



Appeal Decision

Site visit made on 7 July 2023

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 SEPTEMBER 2023

Appeal Ref: APP/Z5060/C/22/3298250

Land at Unit 6b, Midas Business Centre, Wantz Road, Dagenham, Barking and Dagenham RM10 8PS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Hustine Omoyeni of H7 Avenue Limited against an enforcement notice issued by the Council of the London Borough of Barking and Dagenham.
- The notice, numbered 22/00030/ENF, was issued on 7 April 2022.
- The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised change of use to a nightclub (Sui Generis).
- The requirements of the notice are to: Cease the use of the premises as a nightclub; remove all fixtures and fittings relating to the unauthorised use; and remove all subsequent waste material from the premises.
- The period for compliance with the requirements is 6 months after the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary Decision: the appeal is dismissed

Preliminary Matters

1. Since the appeal was submitted, a revised version of the National Planning Policy Framework (the Framework) has been published and this is a material consideration which should be taken into account from the date of its publication. I have therefore determined the appeal in light of the revised Framework. The revision to the Framework has had little effect on the sections of the previous Framework that have been brought to my attention. I have not, therefore, sought the parties view on the implications of this revision to their case.

The Notice

2. Part 1 of the notice states that there has been a breach of planning control falling within section 171A(1)(a) of The Town and Country Planning Act 1990 as amended (the 1990 Act), which is the carrying out of development without the required planning permission. Development is defined in section 55(1) of the 1990 Act as including 'the making of any material change in the use of any building or other land'. Whilst the notice alleges a change of use, it does not state that this is a **material** change of the use. It therefore follows that the allegation in the notice would not constitute development for the purposes of section 55(1) of the 1990 Act.

3. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land. Because the breach of planning control as alleged in the notice does not constitute the development of land, it follows that planning permission would not be required for it. The notice is defective in that respect.
4. Notwithstanding the above, having regard to the appellants' case, they have clearly understood that the allegation was intended to refer to a material change of use. As such, I am satisfied that a correction of the notice to include reference to a material change of use would not cause injustice in this case. The word 'material' will replace the word 'unauthorised' in the allegation as this word is unnecessary.

Ground (a) and the deemed application for planning permission

Main Issues

5. The appeal on ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The matters stated in the notice, as I intend to correct it, relate to a material change of use of the land to a use as a nightclub.
6. Whilst the Council has provided an appeal statement, this does little to amplify the two substantive reasons for issuing the enforcement notice. In particular, the second main reason states that 'the development will generate increased levels of comings and goings and general disturbance to the area which is considered unneighbourly'. It is not, however, clear whether the Council's concerns are with regard to the effect of the development on the occupiers of nearby residential properties or on the occupiers and uses of other units on the Midas Business Centre. I will, therefore, consider both matters, and have identified the following main issues in this case:
 - Whether or not the location of the development is acceptable, having regard to local and national planning policy; and
 - The effect of the development on neighbouring occupiers and uses on the Midas Business Centre estate, and on the living conditions of nearby residents.

Reasons

Location

7. As well as the Framework, the enforcement notice refers to a number of policies of the development plan. Policies CM1 (General principles for development) of the London Borough of Barking and Dagenham Core Strategy adopted July 2010 (CS) is an umbrella policy for the plan's development strategy. Under this policy sits CM5 (Town centre hierarchy), which encourages development and services within its centres. Policy BE2 (Development in town centres) of the London Borough of Barking and Dagenham Borough Wide Development Policies Development Plan Document adopted March 2011 (DPD), together with Policies SD8 (Town centre network) and SD7 (Town centres: development principles and Development Plan Documents) of the London Plan March 2021 (LP) have a similar purpose. These Policies set out where in the hierarchy of centres certain types of

development are best located and inform that a sequential approach should be taken to the location of town centre uses.

8. The enforcement notice also refers to policies that relate to the promotion and enhancement of the vitality and viability of town centres. These include LP Policy SD6 (Town centres and high streets) and CS Policy CE1 (Vibrant and prosperous town centres).
9. Whilst there is little expansion on the reasons for the issue of the notice, there is no dispute that the development comprises a town centre use that is the subject of the above-mentioned policies. The appellant acknowledges that the appeal site is not in a town centre location. Accordingly, on its face, the development is in a location that does not accord with the development plan's strategy and is not supported by the above-mentioned Policies. Indeed, I have little evidence to demonstrate that a town location is not available or is unsuitable for the use.
10. Notwithstanding this, the appellant says that the permitted use of the site as a café¹ is unsustainable and that the site is under-utilised. He suggests that the current night club use is a more effective use. In addition to the support for a strong and competitive economy in the Framework, the appellant points to LP Policies E7 (Industrial intensification, co-location and substitution), E8 (Sector growth opportunities and clusters) and GG5 (Growing a good economy) for support, suggesting that these encourage economic competitiveness and the intensification and diversification of existing business sites.
11. I acknowledge the support in both the development plan and the Framework for diversity and flexibility in business in order to encourage a prosperous economy. The permitted use of the site as a café is an example of such diversity, where such a use might support the surrounding businesses. Whilst I note the appellant's claims with regard to the unsustainable nature of the permitted use of the site, I have little evidence to substantiate this.
12. Policy E7 encourages the intensification of all business uses; i.e. those falling within Classes B1c, B2 and B8 of The Town and Country Planning (Use Classes) Order 1987 as amended (the 1987 Order). This is supported by LP Policies E2 (Providing suitable business space) and E4 (Land for industry, logistics and services to support London's economic function), which are referred to by the appellant in his evidence. Both inform of the need to supply land and premises for industrial and related functions, whilst Policy E2 in particular encourages the provision of a sufficient supply of business space of different types, uses and sizes for micro, small and medium-sized enterprises and businesses wishing to start-up or expand. In this regard, there is a lack of evidence to demonstrate that the site is not needed or suitable for one of the business uses encouraged by these Policies.
13. The support for business in the development plan and the Framework should not cause detriment to the wider economy, and should be in a controlled manner. In this regard, I note that there is no dispute that the appeal site is within a locally significant industrial site (LSIS), identified in accordance with the LP and referred to in Policy E7. These are sites that have particular local importance for industrial and related functions. In the case of any proposed non-business uses, such as the current night club use, Policy E7 imposes a

¹ Council reference 93/00120/TP.

greater degree of control in any LSIS. It informs that in LSIS the scope for co-locating industrial uses with residential and other uses may be considered, but that this should also be part of a plan-led or masterplanning process.

14. In view of the above, I am not persuaded that there is support in either the development plan or the Framework for the development subject of this appeal, such that this would outweigh the conflict I have identified with other policies of the development plan and the harm caused to the Council's development strategy.
15. I note the appellant's reference to recent changes to the 1987 Order, although he does not specify the particular class in question. Nevertheless, recent changes have included a new class (Class E of Part A, Article 3, Schedule 2 of the 1987 Order) for commercial, business and service uses. Whilst this allows for more flexibility in the case of the uses specified in the Class, this does not include the use that is the subject of this appeal. Accordingly, this provides little support for the grant of permission for the development in this case.
16. All things considered, I conclude that the location of the development is not acceptable and that the development causes harm to the Council's development strategy. Accordingly, the development neither accords nor is supported by Policies CM1, CM5, CE1 of the CS; Policy BE2 of the DPD; and Policies GG5, E2, E4, E7, E8, SD6, SD7 and SD8 of the LP. Furthermore, I cannot find support for the development in the Framework, when read as a whole.
17. The appellant has listed other policies in his evidence, including Policies D1 (London's form, character and capacity for growth) and D13 (Agents of Change). He has also referred to LP Policy E9 (Retail, markets and hot food takeaways), the subject of which is the retail sector. The appellant has not explained the relevance of these policies to this first main issue and their relevance is not obvious to me. Accordingly, I have no reason to alter my conclusions above.
18. The appellant has also referred to Policies 4.1a1 and 4.3, but these are not policies of the LP, nor any other plan that has been drawn to my attention.
19. Finally, there is reference to Policies DMD1, DME3 and DME5 of The London Borough of Barking and Dagenham Draft Local Plan. This is not an adopted plan and does not form part of the development plan that is relevant to this appeal. Notwithstanding that the relevance of these policies has not been drawn to my attention, any conflict with or support for the development provided by these policies carries limited weight in this case.

Effect on neighbouring occupiers

20. The appellant suggests that the appeal site is in an area where there is a mix of uses, including residential. I observed the residential properties around the periphery of the Midas estate. Otherwise, the estate appears to be mainly occupied by a variety of business uses.
21. With regard to the effect of the development on the living conditions of nearby residents, the Council does not point to the local residents that might be affected. I observed residential properties at either end of the estate along Waltz Road and then to the rear of the appeal site, along Hunters Hall Road and Alibon Road. The appellant refers to the distance separating the site from

- the closest residential properties, and I can agree that the separation is such that activity at the site, including any comings and goings close to the site, is unlikely to be experienced by, or affect, residents of these properties.
22. Whilst visitors to the site are likely to travel past the properties at either end of Waltz Road, I do not have any details of visitor numbers, such that I could conclude that this activity would cause an unacceptable degree of disturbance.
23. Turning to the effect on neighbouring occupiers and uses, I note that Midas estate has the character of a typical industrial estate, with a mix of building types and sizes occupied by a variety of businesses. I note the third party evidence, which indicates that there is activity associated with businesses on the estate around the clock. It is suggested that articulated delivery lorries arrive at the estate at night, ready to collect deliveries early in the morning. I note the concerns of the interested party for the safety of late night visitors to the appeal site when such vehicles arrive at the estate.
24. Having regard to the above, it appears that there is potential for a degree of incompatibility between the use of the appeal site and the activity on the wider estate. However, the appellant points to the lack of any instances of conflict arising from the use, which he says has operated since July 2020. This is not disputed by the Council. He also refers to the conditions of his licence.
25. Based on the evidence before me, I conclude, on balance, that the development does not have an unacceptable effect on neighbouring occupiers and the use of neighbouring units on the estate.
26. On a final matter, the notice refers to Policy D13 of the LP, which relates to developments that generate noise and other nuisance. The Council only refer to 'general disturbance', which I have considered above. It does not, however, refer to harm caused by reason of noise generated by the use. Neither does it provide any technical evidence with regard to noise. Without such evidence I am unable to find harm on the matter of noise, or conflict with this Policy.
27. For the reasons given above, I have insufficient evidence to conclude that the development has an unacceptable effect on neighbouring occupiers and uses on the Midas Business Centre estate, and on the living conditions of nearby residents. I have found no conflict with the Framework, or with Policies BE4 (Managing the evening economy) and BP8 (Protecting residential amenity) of the DPD. These Policies permit development provided, amongst other matters, that there would be no significant individual or cumulative adverse effect on the surrounding residential amenity due to noise, traffic, parking or general disturbance, and where existing and proposed occupiers are not exposed to unacceptable levels of general disturbance arising from development.
28. Notwithstanding the policies referred to above, the second main reason given for the issue of the enforcement notice also refers to Policy D1 of the LP and Policy CE1 of the CS. The Council does not, however, point to any particular part of these Policies to explain how there is conflict. Having regard to the Council's briefly stated case, the relevance of these Policies to this second main issue is not obvious to me. Similarly, whilst the notice also refers to Policy BP10 (Housing density) of the DPD, the relevance of such a policy is wholly unclear.

29. There is reference to Policies DMD1 and DME3 of the draft local plan. Again, the relevance of these policies to this second main issue has not been specified. Nevertheless, for the reasons already given, any conflict with or support for the development provided by these Policies carries limited weight in this case.

Other Matters

30. The employment opportunities provided by the use are noted, and carry weight in favour of the development. I also note the appellant's reference to paragraph 92 of the Framework. Whilst the development provides a place for people to meet and socialise, this benefit is limited due to the likely demographic of those visiting the premises.
31. The appellant points to the benefits of a diverse evening economy. However, I have not been advised of other evening economy uses in the vicinity of the appeal site, such that the development could be regarded as providing diversity in this location.
32. On other matters, I note the concerns of an interested party with regard to the nature of the night club use and the matter of fire safety. Such matters are, however, outside of the remit of this appeal.

Planning Balance and Conclusion

33. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that the determination of this ground (a) appeal and the deemed planning application must be in accordance with the development plan unless material considerations indicate otherwise. Whilst I have not found harm with regard to the effect of the development on neighbouring occupiers and nearby residents, I have found conflict with the development plan and identified harm to the Council's development strategy.
34. I have considered whether conditions could be imposed to mitigate this harm, but conclude that they would not. I have had regard to the suggested benefits of the development, but do not find these of sufficient weight to indicate that my determination of the appeal should be made otherwise than in accordance with the development plan. Accordingly, I conclude that planning permission ought not to be granted and that the ground (a) appeal should fail.

Ground (f)

35. For the appeal to succeed on this ground, I must be satisfied that the steps required to comply with the notice exceed what is necessary to remedy the breach of planning control or, as the case may be, to remedy any injury to amenity which has been caused by the breach. Having regard to the requirements of the notice, its purpose must be to remedy the breach of planning control that has occurred.
36. The thrust of the appellant's case made under ground (f) is that the steps required by the notice are excessive because the development is acceptable. This reflects the case made under ground (a), which I have considered above. The appellant has not suggested any alternative steps that would achieve the purpose of remedying the breach of planning control in this case. No other steps that would achieve this purpose are obvious to me. On this basis I can

only conclude that the steps required in the notice are necessary and proportionate. For these reasons, the appeal under ground (f) should fail.

Ground (g)

37. An appeal on ground (g) is that the period specified in the notice falls short of what should reasonably be allowed. The notice specifies a period of 6 months from the date it takes effect. The appellant suggests that a period of 9 to 12 months is needed to relocate the night club and to find alternative premises.
38. It is clear that the appellant wishes to continue his business elsewhere. However, I have no substantiated evidence to demonstrate that there is a shortage of suitable premises elsewhere, or that an extended period of time is required for a relocation. In my judgement, a six month period would be sufficient to move the business and then to comply with the remaining requirements of the notice. Should the appellant encounter problems, I am mindful of the powers under section 173A of the 1990 Act that can be exercised by the Council to vary an enforcement notice, including the period for compliance.
39. For the reasons given above, I have no reason to conclude that the period specified in the notice falls short of what should reasonably be allowed. For this reason, the ground (g) appeal should fail.

Overall Conclusions

40. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act.

Formal Decision

41. It is directed that the enforcement notice is corrected by the deletion in part 3 of the word 'unauthorised' and its substitution with the word 'material'.
42. Subject to the correction, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act.

J Moss

INSPECTOR