



Appeal Decision

Hearing Held on 31 October 2023

Site visit made on 31 October 2023

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 27 November 2023

Appeal Ref: APP/U5360/C/22/3307637

63-65 Broadway Market, Hackney, London E8 4PH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Rupert Selby of Off Broadway Limited against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice was issued on 24 August 2022.
- The breach of planning control as alleged in the notice is the material change of use of the lower ground floor to a live music event space and operational development consisting of the hardstanding of the rear garden to create an outdoor area and installation of new door at ground floor level.
- The requirements of the notice are:
 1. Cease the use of the Property as a live music event space;
 2. Remove from the garden the hardstanding created and remove the doorway at ground floor level;
 3. Reinstate the rear garden to its previous lower ground floor level prior to the breach of planning control taking place;
 4. Make good all damage to the Property resulting from the removal of the unauthorised works as listed above; and
 5. Upon completion of the above steps, remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (d) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a correction and variations.

Preliminary matters

1. Before the Hearing, the Council suggested that requirement 5.1 should be amended to reflect the alleged breach of planning control more accurately. Therefore, it is suggested that rather than reading "Cease the use of the Property as a live music space" it should read "Cease the use of the lower ground floor of the property as a live music space". After a short explanation and discussion, the appellant agreed that the change could be made without causing injustice.
2. In addition, the Council suggested that requirement 5.3 should be deleted because it essentially duplicates part of requirement 5.2. The appellant agreed that this is the case and that 5.3 can be deleted without causing injustice.

3. The appeal on ground (b) was made in relation to the use of the outdoor beer garden which does not form part of the alleged breach of planning control in the Notice. Since this is the case, the appellant agreed that his ground (b) falls away and does not need to be considered.
4. It is agreed that the appeal on ground (c) is made in relation to the operational development consisting of the hardstanding of the rear garden only. It is also agreed that the appeal on ground (d) is made in relation to the material change of use of the lower ground floor to a live music event space and the operational development consisting of the hardstanding of the rear garden to create an outdoor area.
5. It was agreed at the Hearing that the appeal on ground (a) the deemed planning application is made in relation to the new door at ground floor level. At the Hearing site visit the appellant stated that he wished to widen the scope of his evidence under ground (a) to the other alleged breaches of planning control, but after some consideration, I have has rejected this request on the basis that there are no clear reasons why the appellant did not take an earlier opportunity to widen the scope of his appeal on ground (a) and the Inspector cannot see any exceptional reasons why new evidence should be allowed at such a late stage.

The appeal on ground (c)

6. The appellant's case is restricted to the hardstanding of the rear garden and at the Hearing he clarified that his main argument is that the roof which now forms a hardstanding area replaced a previous faulty roof. The Council contends that it is not a like-for-like replacement and therefore requires permission.
7. The drawings and photographs submitted in evidence show that the building and its associated flat roof which forms the hardstanding is very different from the one that previously existed at that location. The previous building was a relatively light weight pitched roof structure with what appears to be a plastic sheeting roof whereas the replacement structure now in place is far more substantial, being built with a concrete roof. Its form and overall scale is also different and, consequently, it is a new building. The erection of a building or extension to a building such as this comprises operational development within the meaning of s55 of the Act for which, s57 of the Act indicates, planning permission is required. There is no evidence before me that the development constitutes permitted development for which planning permission was granted by way of Article 3 of the Town and Country Planning (General Permitted Development Order) 1995 and no other planning permission has been granted.
8. Therefore, the appeal on ground (c) fails.

The appeal on ground (d)

9. The ground of appeal is that at the time when the Notice was issued, no enforcement action could be taken. In order to succeed on ground (d) it would be necessary to demonstrate that on the balance of probabilities the operational development consisting of the hardstanding of the rear garden and the material change of use of the lower ground floor to a live music event space commenced and continued for a period of ten years without interruption up to the date the enforcement notice was issued on 24 August 2022.

10. Firstly, the appellant's only argument is that the roof has been in place for a period in excess of ten years. He stated at the Hearing that the outside cellar was built to reduce noise levels to benefit local residents. However, the evidence before me is that the new rear cellar building and associated concrete roof which forms the hardstanding was constructed some time during 2021. The appellant contends that the works constituted "repairs", but as discussed above under ground (c) the works constitute operational development for which planning permission had not been granted.
11. Consequently, because the hardstanding has not been in place for a period of ten years, the appeal on ground (d) must fail in this respect.
12. In support of his appeal on ground (d) regarding the material change of use of the lower ground floor the appellant has submitted a range of evidence, including documentation named or entitled:
 - Accounts from 2009, 2011 and 2012;
 - Kansas Smitty's;
 - The Brink;
 - TJ Johnson Jazz at Off Broadway
13. The Council has also submitted their version of a timeline of use of the appeal property for the period January 2013 to the present time.
14. The first set of the appellant's accounts from 2009 (labelled 03 Accounts 2009) appear to show transactions that may be associated with the operation of a bar or music venue and highlight "Basement Soundproofing" paid on 26 November 2009. It is not possible to identify whether or not the evidence relates to the lower ground floor of the appeal property or, in fact, any part of the appeal property. The appellant stated that soundproofing was added to the basement and all windows were boxed in to create soundproofing for the space. The payment for basement soundproofing does appear to support this contention, but is not evidence of any actual use of the lower ground floor as a live music venue.
15. The account entitled 06 Accounts 2009 show a range of payments having been made for laundry, marketing, staff, equipment, building work and food, among others. There is reference to "Music for basement" on 2 October 2009 and 7 November 2009 which does appear to confirm that on those specific dates the basement area was being used for some kind of music and/or performance.
16. Accounts from 2011 relate to September to November of that year and show payments for various equipment, staff, marketing and food items. Open mic is specified for some payments, but there is no clear evidence that they relate to the use of the lower ground floor of the property as a live music venue. The appellant states that an open mic event in the upstairs bar commenced in November 2011 and continued until August 2015. However, this is evidence of use of the upper bar and not the lower ground floor area the subject of the current appeal on ground (d).
17. The 2012 accounts specify Jazz Band and music for dates in December 2011, January 2012 and February 2012. There is also reference to entertainment payments as well as those for equipment, staff, alcohol and other items.

Again, there is no evidence that these relate specifically to the alleged use of the lower ground floor of the property.

18. The document entitled "Kansas Smitty's" states that the Kansas Smitty's Bar was launched in 2015. The appellant has stated that the business operated very successfully with live music every night until the onset of Covid in 2020. There is no evidence of the use of the lower ground floor between 2012 and 2015 and the supporting evidence does not specify use of the lower ground floor of the appeal property.
19. The appellant states that the basement has been renamed The Brink and since 1 July 2021 live music events have been held there. Documentary evidence in the form of a booking diary shows a number of bookings for musicians for July 2021. However, there is no evidence of booking since then.
20. Correspondence from a professional musician dated 22 September 2022 states that he has been performing regularly at Off Broadway, both on the ground floor and in the basement, since January 2012. He goes on to confirm that his last gig there was on 1 April 2022. The musician confirms that the venue has been an important for jazz music for over ten years, especially during the five years it was occupied by Kansas Smitty's. The evidence supports the claim that the appeal site has been used for the material period, but there is no indication of the frequency of his performances, nor how frequently he performed in the lower ground floor level, specifically.
21. There is certainly a body of evidence that shows that 63-65 Broadway Market has been used for live music events for a long period of time, since around 2009. However, there is insufficient clear evidence that demonstrates on the balance of probabilities that the *lower ground floor* of the appeal property has been continually used without gaps. There are significant gaps in the evidence submitted by the appellant and, furthermore, the timeline submitted as evidence by the Council also shows periods where there is insufficient evidence of the property being used as a live music venue.
22. Therefore, the appeal on ground (d) does not succeed.

The appeal on ground (a)

23. The ground of appeal is that planning permission should be granted. The appellant's case is restricted to the installation of new door at ground floor level. The main issues are:
 - i. the extent to which the development preserves or enhances the character or appearance of the Broadway Market Conservation Area; and
 - ii. the effect on the living conditions of the occupants of nearby residential properties with particular reference to noise and disturbance.

Conservation Area

24. The site is situated in the Broadway Market Conservation Area which was originally designated in 1995. Broadway Market itself is a commercial area which comprises of mainly two or three storey terraced properties, most of which contain ground floor shops or other commercial uses. The buildings are situated tight against the adjacent pavement, and it has a vibrant character with high levels of pedestrian activity, particularly when the market is open.

Most buildings date back to the Victorian era, but there are also examples of fine Edwardian architecture and some modern replacement buildings, of which the appeal site is one, having been built in 1982 according to the evidence before me. As well as retail outlets and the market, there are public houses, bars, restaurants and cafes which add to the range of uses available and the area's overall lively ambience.

25. The appeal site is situated at the corner of Broadway Market and Dericote Street and from the front and side appears to be a two-storey brick built building with a cocktail bar at ground floor with residential above. However, it accommodates a lower ground floor, ground floor which is lawfully a wine bar and a first floor residential apartment.
26. The door the subject of the appeal on ground (a) is situated to the rear of the building adjacent to Dericote Street. It is built of timber with a concrete header. As a consequence of its position to the rear of the building it is not visually prominent or intrusive, although it can be partly seen when passing by along Dericote Street. However, it is unobtrusive and does not detract from the character of the host property or the surrounding Conservation Area, in general.
27. Having such a neutral effect, I conclude that the door in question preserves the character and appearance of the Conservation Area. As such the development does not conflict with Policies HC1 of the London Plan 2021, Policies LP1 and LP3 of the Hackney Local Plan 2020 (the LP), Broadway Market Conservation Area Appraisal 1995 (Reviewed 2006) and the National Planning Policy Framework (the Framework). Among other objectives these seek to ensure that new developments affecting heritage assets should conserve their significance by being sympathetic to the asset's significance and appreciation within their surroundings.

Living Conditions

28. The appellant contends that the door in question was created to provide access for the occupant of the first floor flat, for staff to collect ice from the ice machine and change beer barrels. The evidence from local residents is that the creation of the door has resulted in unacceptable levels of noise and disturbance in relation to the arrangement that was previously in place. In particular, additional noise and activity has been generated through comings and goings associated with collecting ice and carrying out other tasks associated with the authorised ground floor use and noise from the bar, including amplified music, when the door is open.
29. The door is situated to the rear of the property and is relatively close to a number of neighbouring residential properties, including No 2 Dericote Street to the rear which has its principal elevation facing directly towards the rear elevation of the appeal site. Evidence from residents is that their living conditions have been harmfully affected since the arrangements to the rear of the appeal property changed, including the insertion of the door in question. It appears that the new arrangements have given rise to noise late into the evening when the property is open for trade. I understand that the main concerns relate to noise and disturbance associated with late night anti-social behaviour, people congregating outside the venue around closing time, additional traffic movements and extension of the commercial use into the rear garden area. I do not dispute that these may be sources of noise, but in this

case my determination of the appeal on ground (a) relates solely to the rear door and any noise and disturbance that may be associated with it.

30. The appellant argues that any effect on living conditions is very limited and he has undertaken measures such as moving bins in order to mitigate any harm caused by the business. He also argues that the activity levels generated by the door are no greater than before the door was created. However, given the evidence before me, the arrangements to the rear of the property and specifically the new door opening have resulted in there being increased levels of commercial relates activities to the rear of the appeal property. Given the close proximity to nearby residential properties which may be particularly sensitive to late night or evening noise, I consequently find that the development is harmful to the living conditions of the occupants of nearby residential properties with particular reference to noise and disturbance.
31. As such it is in conflict with Policies LP2 and LP33 of the LP, Policy D14 of the London Plan and the Framework. Among other objectives these seek to ensure that all development is appropriate for its location and should be designed to ensure that there are no significant adverse impacts on amenity. Development should avoid significant adverse impacts on health and quality of life.
32. Therefore since the development conflicts with the development plan as a whole I conclude that the appeal on ground (a) should not succeed and planning application will be refused on the application deemed to have been made under s177(5) of the Act.

Formal Decision

33. It is directed that the notice be corrected by:

- a) The deletion from requirement 5.1 of the words "Cease the use of the Property as a live music space" and the substitution therefor of the words "Cease the use of the lower ground floor of the Property as a live music space";

and varied by

- b) the deletion of requirement 5.3; and
- c) renumbering paragraph 5.4 as 5.3 and paragraph 5.5 as 5.4.

34. Subject to this correction and these variations 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 as amended.

A A Phillips

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Rupert Selby

Off Broadway Limited

FOR THE LOCAL PLANNING AUTHORITY:

Lorraine Murphy

Senior Planning Enforcement Officer

Nick Kirk

Deputy Enforcement Team Leader

INTERESTED PERSONS:

Paul Reynolds

Local Resident

Heather Roberts

Local Resident

Jenny Field

Local resident

Rachel Bowditch

Local Resident

Clara Byrne

Local Resident

Louise Brewood

Local Resident and Community Representative

Documents Exchanged at the Hearing

Statement of Common Ground

Suggested Conditions

Broadway Market Conservation Area Appraisal March 2006

Policy HC5 of The London Plan 2021

Timeline of Use: Appellant's and LPA evidence