



Appeal Decision

Site visit made on 24 January 2024

by M. P. Howell BA (Hons) Dip TP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22ND MARCH 2024

Appeal Ref: APP/A5840/C/22/3310614

The ground floor and rear garden, 20-22 Camberwell Church Street, London SE5 8QU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Shiraz Kamawal against an enforcement notice issued by the Council of the London Borough of Southwark.
- The notice, numbered 20/EN/0079, was issued on 4 October 2022.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the Land from a restaurant (class E) to a mixed use as a restaurant, drinking establishment and shisha bar/lounge (sui generis), and the erection of a building to the rear of the Land in the approximate location shown edged and hatched green on the attached plan ("the Unauthorised Development").
- The requirements of the notice are to:
 - (i) Cease the use of the Land as a mixed use as a restaurant, drinking establishment and shisha bar/lounge.
 - (ii) Remove from the Land, all shisha pipes, tobacco, charcoal burners, and any other shisha smoking equipment.
 - (iii) Remove from the rear of the Land (edged and hatched in green, on the attached plan) all amplified speakers and other musical equipment.
 - (iv) Demolish the building to the rear of the Land (edged and hatched in green, on the attached plan) and remove all materials arising from these works from the Land.
- The period for compliance with the requirement is: Four (4) months.
- The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal is dismissed, and the enforcement notice is upheld with variations.

Matters Concerning the Enforcement Notice

1. The mixed use alleged is set out clearly in paragraph 3 of the Enforcement Notice (Notice). It is not therefore necessary to repeat the mix of uses in the requirements. The words 'as a restaurant, drinking establishment and shisha bar/lounge' shall be deleted from step (i) in paragraph 5.
2. The variation above does not alter the nature of the breach or its requirements and would not cause prejudice to either party.

Preliminary Matters

3. During the course of the appeal the revised National Planning Policy Framework December 2023 (the Framework) was published. In respect of relevant paragraphs set out in evidence, there are no substantive changes relevant to the appeal, and no prejudice would be caused by me having regard to it.
4. As no ground (a) has been plead, issues such as noise, fire risk and the impact on the character of the area are not matters before me for consideration. Since

the Notice has been served the appellant may have made changes on site, as well as curtailed or changed their activity. However, S174(2)(b) of the Town and Country Planning Act (1990 Act) is worded in the past tense, and the question is whether the breach had occurred by the date of issue of the Notice. I will consider the appeal on this basis.

The Appeal on Ground (b) and Ground (c)

5. By suggesting that the Land is two separate planning units, the appellant's case is that the breach alleged has not occurred as a matter of fact. This amounts to a ground (b) appeal. However, the appellant also contends that the shisha lounge/bar activities are ancillary and do not constitute a breach of planning control. This ground of appeal would normally be assessed as part of a ground (c) appeal. However, to avoid the complexity of detangling the differences, I have considered them together.
6. When making an appeal on these grounds, the onus rests with the appellant to make their case. The evidence alone should be sufficiently precise and unambiguous to demonstrate that on the balance of probability, the development has not occurred as a matter of fact, or if it has, it does not amount to a breach of planning control.
7. In cases where there is a dispute as to whether a material change of use has occurred, it is first necessary to ascertain the correct planning unit, and the primary (as opposed to incidental) uses of that unit. The planning unit is a concept which has evolved as a means of determining the most appropriate physical area against which to assess the materiality of change, to ensure consistency in applying the formula of a material change of use.
8. In respect of the determination of a planning unit, *Burdle*¹ is the lead case. *Burdle* held that the planning unit is normally the unit of occupation, unless a smaller area can be identified, which as a matter of fact and degree, is physically separate and distinct and occupied for different and unrelated purposes. Three separate broad categories are identified for planning units, those include: -
 - a) single unit of occupation with a single primary use with ancillary and incidental activities;
 - b) a single unit of occupation with two or more separate primary uses that are not incidental to one another (mixed use);
 - c) a unit of occupation where two or more physically separate areas which are occupied for different and unrelated purposes. Each area in scenario c) forms a separate planning unit.
9. The appellant claims 'the restaurant and bar uses operate separately within their lawful use, with the restaurant at No 22 and the bar at No 20.' The appellant's claim would suggest that the Land is two separate planning units being occupied for different and unrelated purposes. This would fit broadly into category (c) set out above.
10. From what I saw on site, from Camberwell Church Street the Land does appear as two separate shop fronts, with separate numbered addresses and pedestrian accesses. The Council also suggests that No 20 and No 22 were historically

¹ *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207

separate planning units, in use as differently occupied and unrelated restaurants. This would go some way towards supporting the appellant's claim that there are two separate planning units being occupied for different and unrelated purposes.

11. However, a Planning Contravention Notice (PCN) was completed and returned on behalf of the appellant on 22 December 2020. The information in the PCN sets out that he is the occupier and leaseholder of 20 and 22 Camberwell Church Street (the Land). The PCN also states the Land is used as a Lebanese and Moroccan restaurant, with no indication of No 20 being used as a separate drinking establishment. The planning history shows the existing lawful use at No 20 as a café and restaurant in 2017². A change of use from a café and restaurant to a drinking establishment would be material and is not a permitted change. No evidence of any planning permission for a drinking establishment has been provided to supervene the lawful café and restaurant use granted in 2017.
12. I also saw on site, that there are areas within the Land that are put to different purposes, but that are not physically separate. An opening within the dividing wall provides unrestricted access between the two addresses. The bar and kitchen are situated in the area that would have historically been No 20, and there were no similar separate facilities in No 22. The rear building spans the width of both addresses, it is open plan and includes significantly more tables and seating than contained within the main building. The rear building can be accessed from either side of the main building via bi-fold doors. The signage, décor and furniture are largely consistent throughout.
13. Despite the planning history and the external appearance, the PCN confirms that the Land is leased and occupied by the appellant. No 20 is not occupied separately and there is no evidence of any planning permission granted as a drinking establishment. Furthermore, the internal layout and consistent decoration throughout would suggest that customers can move freely between the two addresses and would be able to use the bar, restaurant and rear building without having to leave one address to enter the other. Collectively these factors, together with the single bar and kitchen, indicate the Land functions as a single unit of occupation with a mix of uses, rather than a unit of occupation where two or more physically separate areas are occupied for different and unrelated purposes.
14. Although a bar can be an ancillary activity associated with a restaurant use, based on the evidence before me, the appellant considers it to be an activity that is separate and independent of the restaurant. The representations submitted with the appeal also confirm that the scale and nature of the drinking establishment use has increased the frequency of the comings and goings of patrons, which has led to noise and disturbance at unsociable times from loud music being played and the free flow of patrons. Consequently, the drinking establishment and restaurant uses are a mix of primary uses on a single planning unit, with no evidence to suggest that they are incidental to one another.
15. The appellant also claims that the shisha lounge/bar use is an ancillary activity to the restaurant. The appellant indicates that the shisha smoking has now ceased, but at the time the Notice was served, the menu offered shisha and the advertisements submitted with the appeal indicate that the Land was being used specifically for this activity. The completed PCN states that the seating in the rear of the building was sometimes used for smoking. Also, the breakdown in sales

² Council ref 17/AP/4273- Section 191 of the Town and Country Planning Act 1990

between front and rear in terms of food, drink and shisha are '70% sales in the main building and 30% of sales at the rear for the various items.'

16. The split in sales would suggest that uses within the main building were the primary uses compared to those activities in the rear. However, sales are not always conclusive in these matters, and this is an imprecise and vague statement that does not allow me to conclude one way or another.
17. I acknowledge that there are instances when shisha smoking could be ancillary to the main activity, but the appellant has provided little information to substantiate this claim. The building to the rear provides shelter from the elements and a comfortable area within which to smoke shisha. Seating available in the rear building significantly exceeds the seating available in the main building, and while patrons could dine in the rear building, it would be unusual for diners and smokers to be using the same covered space. The Police camera footage confirms the rear building was being used as a shisha bar/lounge and as a drinking establishment, but it does not show anyone dining.
18. While I appreciate the Police camera images represent a snapshot in time, it demonstrates that the scale and nature of the use of the rear building has increased the number of patrons at the site late into the evening, resulting in an increase in noise and disturbance by virtue of the free flow of patrons to and from the site and the use of loud music. This harm is substantiated by the representations submitted as part of the appeal. Even if shisha smoking is typical of this type of restaurant, the scale of the rear building and the increased activity results in a material change in its character. In my judgement, based on the available evidence, I conclude that the shisha lounge/bar use is also a primary use, rather than an ancillary activity to the restaurant use.
19. As indicated, when making an appeal on these grounds the onus of proof rests with the appellant. The information in the Statement of Case is limited, imprecise and ambiguous. It fails to discharge the required burden of proof, and does not demonstrate that the use alleged has not occurred as a matter of fact, or it does not amount to a breach of planning control. Despite the appellant's claims, for the reasons set out above, 20 and 22 Camberwell Church Street is a single planning unit, rather than two separate units, and its use is a mixed use comprising a restaurant, drinking establishment and shisha bar/lounge.
20. For the reasons given above, the appeal on grounds (b) and (c) fail.

The Appeal on Ground (d)

21. An appeal on this ground is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters. My consideration of this ground (d) appeal is confined to the matter of the material change of use.
22. In order to succeed on this ground, the appellant must show that the use had been continuous for a period of ten years beginning with the date of the breach. The relevant date for the ground (d) appeal is, therefore, 4 October 2012. The test in this regard is the balance of probability and the burden of proof is on the appellant.
23. Despite the appellant appealing on this ground, no information has been provided in the Statement of Case to support his position. In this respect, I cannot be satisfied that the appellant has discharged the burden of proof in this case. I am,

therefore, unable to conclude, on the balance of probability, that on the date the Notice was issued, no enforcement action could be taken in respect of the breach of planning control alleged. Furthermore, the completed PCN and the planning history cast significant doubt on any claim that the material change of use to the mixed use alleged occurred on or before the material date.

24. For this reason the ground (d) appeal fails.

The Appeal on Ground (f)

25. The appeal on ground (f) is that the varied requirements of the notice exceed what is necessary to achieve the purpose of the notice. In pleading ground (f), the onus is on the appellant to state the precise details of any lesser steps, otherwise it is not possible to judge whether the Council's requirements are excessive or not. If I were to allow the appeal on ground (f) then I would also need to vary the requirements of the Notice in a way that unambiguously sets out what needs to be done to remedy the breach, or the injury to amenity, as the case may be.
26. In this case the Notice requires that the mixed use is ceased and the rear building is removed together with all the smoking paraphernalia and any music equipment contained therein. I therefore consider that the purpose of the notice is to remedy the breach of planning control under s173(4)(a) of the Town and Country Planning 1990 Act.
27. I acknowledge that the scale and design of the building to the rear was considered acceptable in principle in previous applications to the Council. Nevertheless, the previous applications were refused, and the building does not, therefore, benefit from planning permission. Consequently, to retain the building would not remedy the breach of planning control, which is the purpose of the Notice in this case.
28. I appreciate that a pending application has been submitted to the Council, and the appellant is seeking to address matters pertaining to noise and disturbance and fire safety. However, I have not been provided with any evidence to suggest the pending application has been approved and is an extant permission. As such, I am not able to vary the Notice to require the appellant to comply with an extant permission.
29. Amplified music is not development and there are no conditions limiting the use of amplified music on the Land. However, a Notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development. As the music within the rear building facilitates the unauthorised mixed use alleged, the removal of music equipment that facilitates the use is not considered excessive to remedy the breach. This ensures the Land is restored to its condition before the change of use took place.
30. Accordingly, the steps required by the Notice do not exceed what is necessary to remedy the breach of planning control, and based on the information provided, I am unable to consider whether lesser steps would be sufficient to remedy the breach.
31. The appeal on ground (f) fails.

Conclusion

32. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation.

Formal Decision

33. It is directed that the notice is varied by:

In paragraph 5, step (i), delete the words 'as a restaurant, drinking establishment and shisha bar/lounge.'

34. Subject to the variation, the appeal is dismissed, and the enforcement notice is upheld.

M. P. Howell

INSPECTOR