



Appeal Decisions

Site visit made on 23 January 2024

by G Robbie BA(Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 May 2024

Appeal A Ref: APP/W4705/C/23/3334508

Appeal B Ref: APP/W4705/C/23/3334509

Land at rear of 4 Cowpasture Road, Ilkley, West Yorkshire LS29 8SR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
- Appeal A is made by Mrs Rachel Fitton (The Gin Lounge) and Appeal B is made by Mrs Lindsay Fitton against an enforcement notice issued by City of Bradford Metropolitan District Council.
- The notice was issued on 2 November 2023.
- The breach of planning control as alleged in the notice is Without planning permission, the material change of use of the land to an area for customers to congregate including as a drinking and seating area (*Sui Generis*) in connection with the adjacent drinking establishment (at 4 Cowpasture Road) and associated operational development comprising the siting of timber boundary fencing, timber and plastic canopy and fixed seating.
- The requirements of the notice are to:
 - i. Cease all unauthorised use of the land as indicated on the attached plan as a drinking and seating area in connection with the adjacent drinking establishment;
 - ii. Demolish the unauthorised fixed seating from the rear of the building;
 - iii. Demolish the unauthorised timber boundary enclosure from the rear boundary;
 - iv. Demolish the unauthorised timber and plastic canopy attached to the rear of the building; and
 - v. Remove all resulting materials from the land.
- The period for compliance with the requirements is:
One calendar month.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (e) and (f) of the Town and Country Planning Act 1990 (as amended).

Summary Decisions: The appeals are dismissed and the enforcement notice is upheld with corrections in the terms set out below in the Formal Decisions.

Formal Decisions

1. It is directed that the enforcement notice is corrected by:

the deletion at section "3. *THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL*" of the words "*the material change of use of the land to an area for customers to congregate including as a drinking and seating area (Sui Generis) in connection with the adjacent drinking establishment (at 4 Cowpasture Road) and associated*"

and by:

the deletion of section "5. *WHAT YOU ARE REQUIRED TO DO*" in its entirety and the substitution with the words:

"5. *WHAT YOU ARE REQUIRED TO DO*

- i. *Demolish the unauthorised fixed seating from the rear of the building;*
- ii. *Demolish the unauthorised timber boundary enclosure from the rear boundary;*

- iii. *Demolish the unauthorised timber and plastic canopy attached to the rear of the building; and*
 - iv. *Remove all resulting materials from the land”.*
2. Subject to these corrections the appeals are dismissed and the enforcement notice is upheld.

Preliminary Matters

3. The notice alleges the material change of use of an area of land to the rear of the building at 4 Cowpasture Road for the congregation of customers of that premises as a drinking and seating area. Elements of operational development are also included with regard to timber fencing, plastic canopy and fixed outdoor seating within this area. The specific area of land to which the Council refer is shaded in blue within a wider red-edged line on the plan which accompanies the notice.
4. Planning permission was granted in 2022¹ (the 2022 scheme) for the change of use of the ground floor of the appeal premises to a drinking establishment, along with the conversion of upper floors to a hotel use. That scheme also included the demolition of a rear infill extension to create a stepped access from the rear land and rear yard of the appeal property to the basement and ground floor areas of the property.
5. The initial iteration of the 2022 scheme included, in a submitted plan² of floor plans, elevations, section and other details, an inset extract of a site location plan at a scale of 1:1250. This identified the extent of the planning application and its site within a red-edged line. The building’s footprint area was shaded grey on this extract.
6. During the course of the planning application a revised plan³ setting out elevations, floor plans and sections was submitted, and subsequently became one of the approved plans upon the granting of planning permission. That plan also included an inset extract of the site location plan, albeit in this iteration it only showed the building’s footprint shaded grey and not the red-edged application site boundary line of the original version.
7. The views of both parties have been sought regarding the circumstances surrounding the revised plans and the omission, from the revised plan, of the red line around the planning application site. The Council responded to reiterate its position that the grey shaded building footprint on the amended (approved) drawing’s site location plan is the definitive expression of the extent of the planning permission granted by the 2022 scheme. The appellants have not commented further and in determining the appeal accordingly I return to this matter below in relation to the appeals under ground (c).
8. The appellants have also referred to a canopy structure at the rear of the property having been present for 58 years. However, a lack of supporting evidence regarding the age and status of this structure means that a hidden ground (d) appeal – that it was too late to take enforcement action against this particular matter – fails in this regard.

¹ LPA Ref No: 22/00681/FUL – approved 11 April 2022

² Drwg No: 3011.2 Rev A

³ Drwg No: 3011.2 Rev C

The appeals on ground (e)

9. An appeal on ground (e) may be made if it is felt that copies of the enforcement notice have not been served as required by section 172 of the Town and Country Planning Act 1990 (as amended (the Act)). Section 172(2) requires that a copy of an enforcement notice be served on (a) the owner and on the occupiers of the land to which it relates; and (b) on any other person having an interest in the land which, in the opinion of the local planning authority, is materially affected by the notice.
10. The appellants say that they had received no information from the Council regarding the outcome of a planning application for fencing, or regarding the notice prior to it being 'issued'. It is not clear however whether this related to the means of enclosure elements of the 2022 scheme, or a separate scheme for which I have not been provided with the details. Nevertheless, as there is not a letterbox at the appeal premises, the appellants have stated that they had previously requested that documents be sent by e-mail, albeit that the e-mail address that the Council had used turned out to be incorrect.
11. The Council's evidence demonstrates that copies of the notice were sent to the company secretaries of Burley Developments Group Limited and The Gin Lounge Limited, and to the two named appellants in relation to the appeals before me. The appellants and the company secretary for The Gin Lounge Limited all appear to share the appeal site address which, if there was no letterbox present as has been stated, then this may make delivery problematic.
12. However, the Council's evidence also includes a 'Certificate of Service' in relation to the service of the notice. This confirms that a copy of the notice was hand delivered by a representative of the Council to the appeal premises, together with photographic evidence of the notice affixed to the appeal property in a prominent and accessible location.
13. Section 329 of the Town and Country Planning Act 1990 (as amended) (the Act) prescribes a number of methods by which an enforcement notice may be served. The Council has not said that it has served a planning contravention notice or used its powers under section 330 of the 1990 Act to obtain information about the address of the owner, but nevertheless it appears to have served the notice at the property by affixing it conspicuously to some object on the land, as provided for in section 329(2). I am satisfied therefore that the steps indicated by the Council amount to the satisfactory service of the notice under sections 172 and 329 of the Act.
14. However, even if the notice had not been correctly served, section 176(5) of the Act provides that failure to serve may be disregarded if the appellants have not been substantially prejudiced by the failure to correctly serve. In this instance, I am satisfied that this has not been the case as the appellants have been able to submit appeals against the notice, within the statutory time periods and to argue their case in the course of these appeal proceedings. It cannot, therefore, be said that the appellants have suffered any prejudice as a result of any failure to comply with the rules concerning service. There is no suggestion that any other person may have been prejudiced. I conclude, therefore, that in the circumstances of this case any failure by the Council in terms of service of the enforcement notice may be disregarded. Consequently, the appeals on ground (e) therefore fail.

The appeals on ground (c)

15. An appeal may be brought on ground (c) if it is felt that those matters being enforced against do not constitute a breach of planning control. This may be because what has been alleged does not constitute development; for example, a change of use was not material, or that it complies with the terms and conditions of a planning permission.
16. Planning permission was granted in 2022⁴ (the 2022 scheme) for the change of use of the ground floor retail unit to a drinking establishment and the upper floors to a hotel use. The description given to the planning permission also included reference to the demolition of a rear infill extension to create access.
17. As described above, the submitted plans for the 2022 scheme included an inset extract location plan showing the appeal site edged with a red line. The purpose of the red line on a planning application site location plan is to define the extent of the planning application site. The red line shown on the initial plan included the area of land (now shaded blue on the plan that accompanies the notice) within the scope of the planning application.
18. However, during the course of the Council's consideration of the application, an amended plan was submitted which, according to the revision schedule on the drawing, set out revised fenestration and paint colour details. The amended plan also omitted the red line boundary for the application site but retained the grey shading of the building's footprint. I have not been provided with any commentary or explanation as to the purpose or intent of the submission of the revised plan, nor of the significance of the grey shading of the building footprint or the omission of the red line.
19. Nevertheless, this, the Council argue, clearly demonstrates that the extent of the planning permission granted by the 2022 scheme excludes the area of land to which the notice relates. As such, the 2022 scheme permission does not confer permission for the change of use of alleged in the notice.
20. To succeed on ground (c), the appellants must prove on the balance of probabilities that the matters stated in the notice which give rise to the alleged breach of planning control did not constitute a breach of planning control.
21. Thus, it is necessary to determine whether what is alleged in the enforcement notice constitutes development, as defined in section 55 of the Act. Section 55(1) of the Act defines development as the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change in the use of any buildings or other land. In this instance the notice alleges the material change of use of the land to an area for customers to congregate including as a drinking and seating area in connection with the adjacent drinking establishment at 4 Cowpasture Road. It also alleges operational development in the form of timber boundary fencing, a timber and plastic canopy and fixed seating.
22. The Council has reiterated its belief that in the absence of an approved plan showing a red-edged application site boundary, the planning application site boundary is limited to just the grey shaded area on the location plan. However, whilst I accept that the submission of the revised plan³ superseded the original plan² and that the revised plan is listed on the planning permission certificate

⁴ LPA Ref No: 22/00681/FUL

as one of the approved plans, the schedule of revisions set out therein describes clearly the relatively minor nature of the changes, those being minor points of fenestration detail and paint colour.

23. It is clear as to the appellants' intent with regard to the extent of the planning permission sought by the 2022 scheme. It is also clear that the appellants remain of the view that it is (and was) their intent that the application includes the external areas at the side and rear of the building itself. I have not been directed by either party to any authority given, or explanation for, changes to the extent of the planning application site boundary, nor has any explanation been given as to the significance of the building footprint being shaded in grey on the submitted plans or on what basis the Council conclude that this should become the application site boundary.
24. Planning Practice Guidance (the Guidance) explains what the 'national information requirements' are in respect of applications for planning permission. It states that an application for planning permission must be accompanied by plans and drawings⁵ and that, as a minimum, a 'location plan' showing the application site in relation to the surrounding area will need to be submitted⁶. It goes on to state that on the location plan the application site should be edged clearly with a red line and should include all land necessary to carry out the proposed development.
25. The area of land omitted, in the Council's submission, from the extent of the planning application, included works specifically set out on the approved plans. Thus, the removal of a pre-existing lean-to extension to the appeal property, the installation of steel stairs from basement to ground level, and on to ground floor level and above, a steel deck for access to the ground floor, the creation of a fenced enclosure for refuse bin storage and a car space were all shown as part of that planning application⁷ but on land which the Council now claims does not form part of the planning application site.
26. From the evidence before me I find it difficult to reconcile the Council's approach to this matter with a straightforward assessment of the entirety of the ground floor part of the site as a single planning unit. From the evidence, I am satisfied that that was the case prior to the 2022 scheme permission and, from the submitted and approved plans for the 2022 scheme, I am also satisfied that that remains the case.
27. That being so, as a single planning unit with a drinking establishment the primary use, the use of the area of land to the side and rear of No. 4 does not amount to a material change of use of the land. Rather, I am satisfied that the use of this land for congregation in connection with the planning permission granted for a drinking establishment use of the building's ground floor would be incidental to that of the ground floor use, permitted by the approval of the 2022 scheme.
28. I acknowledge concerns were raised during the course of the 2022 scheme's planning application process, and has been in relation to the appeal now before me, with regard to noise disturbance arising from the use of the land to rear of the premises. However, it is not within my remit to consider the planning

⁵ Paragraph: 022 Reference ID: 14-022-20140306 – revision date 23/06/2021

⁶ Paragraph: 023 Reference ID: 14-023-20140306 – revision date 06/03/2014

⁷ Drwg No: 3011.2 Rev C

merits of the alleged breach of planning control as part of an appeal on ground (c). Had the Council sought to control, in principle, drinking related activity within the external parts of the property, a restrictive planning condition should have been used. This does not, however, overcome the need for the appellant to comply with any planning conditions imposed, but the Council does not allege in the notice that planning conditions have been breached in this case. The appeals on ground (c) succeed in part in relation to the alleged material change of use of the land, and I shall correct the notice accordingly.

29. However, the notice's allegations include certain other elements of operational development that were not shown on the 2022 scheme's approved floor plans. Thus, the timber boundary fencing (being different to that shown as part of the refuse storage area), canopies and fixed seating are all features that were absent from the approved floor plans. The appellant has not advanced a case with regard to the elements of operational development described in the notice, whether in the terms set out in the legal grounds (b), (c) or (d), or with respect to the planning merits under ground (a). As such, in these respects the appeals on ground (c) fail.

The appeals on ground (f)

30. An appeal under ground (f) may be brought if it is felt that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. In this instance, it is clear that the purpose of the notice is to remedy the breach of planning control, not just merely to remedy any injury to amenity.
31. For reasons set out above, I have concluded that the appeal on ground (c) succeeds in part with regard to the use of the area of land in question and I shall correct the notice's requirements as a consequence. However, that still leave the notice's requirements regarding the elements of operational development stated therein.
32. The appellants have offered to submit a fresh application for planning permission for the fence at the rear of the property or, alternatively, to remove it. No further reference is made to the canopies or fixed seating. Thus, the appellants have not made a case that the removal of the canopies or fixed seating are felt to be excessive, and as the removal of the fence is required by the notice, the offer to remove it is clearly not considered by the appellants to be excessive to remedy the breach of planning control.
33. Thus, the offer of a planning application and the details therein are, at best, vague. In any event, the question of a future planning application does not support an appeal under ground (f). In this case, the notice requires the removal of the elements described and as such these are consistent with the purpose of remedying the breach of planning control in accordance with (s173(4)(a)) of the Act. As such, the appeals on ground (f) fail for the reasons set out.

Conclusion

34. For the reasons I have set out, I conclude that the appeals on grounds (e) and (f) should not succeed. The appeals on ground (c) however succeed in part in

relation to the alleged material change of use but not in relation to the operational development. There has not, therefore, been a material change of use of the land at the rear of the appeal property. Subject therefore to the corrections set out, I shall uphold the enforcement notice with corrections.

G Robbie

INSPECTOR