

Appeal Decision

Site visit made on 27 November 2024

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 January 2025

Appeal Ref: APP/G5750/C/22/3298889

Land at 151-153 Barking Road, East Ham, London E6 1LD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Sidi Cisse against an enforcement notice issued by the Council of the London Borough of Newham.
 - The notice was issued on 13 April 2022.
 - The breach of planning control as alleged in the notice is without planning permission the material change of use to a restaurant.
 - The requirements of the notice are to:
 1. Cease the use of the premises as a [sic] restaurant.
 2. Remove from the premises all fixtures and fittings that solely facilitate the use as a restaurant.
 - The period for compliance with the requirements is: three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended.
-

Decision

1. It is directed that the enforcement notice is corrected at section 5 of the notice, requirement 1, by the insertion of the word 'as' after the word 'premises', so that the requirement says '1. Cease the use of the premises as a restaurant.'
2. Subject to the correction above, the appeal is dismissed, and the enforcement notice is upheld.

Preliminary Matters

3. The enforcement notice requires the recipient of the notice to 'Cease the use of the premises as a restaurant'. Within its Statement of Case, the Council identifies the requirement as 'Cease the use of the premises [as] a restaurant'. It is clear the omission of the word 'as' is a typographical error and so I shall correct the notice accordingly. Since such a correction would not change the scope of the notice or make the requirement more onerous, I consider a correction to insert the word 'as' can be made without causing injustice to either party.
4. The appellant has ticked grounds (b) and (c) on their appeal form. However, the arguments put forward by the appellant for ground (c) duplicate the arguments put forward for ground (b). Since the Council has had the opportunity to consider and respond to the appellant's arguments, I shall consider them accordingly.
5. For the avoidance of doubt, since there is no ground (a) appeal, I cannot consider the planning merits of the alleged breach.

Ground (b)

6. An appeal under ground (b) is made on the basis that the matters stated in the notice have not occurred as a matter of fact. In a legal ground of appeal, such as (b) or (c), the burden of proof is firmly on the appellant to make their case, to the civil standard, which is the 'balance of probabilities'. To succeed in this ground of appeal, the appellant would need to show, on the balance of probabilities, that by the date of issue of the enforcement notice, the material change of use of the premises to a restaurant had not occurred as a matter of fact.
7. Although the enforcement notice does not state what the Council considers the use of the building was prior to the material change of use, it is the Council's case that planning permission was granted in 2011 for the change of use of the premises to a drinking establishment (formerly Class A4, now *sui generis*), reference 11/00714/FUL, and that this planning permission was lawfully implemented.
8. Prior to 2020, a restaurant or café was defined by the Town and Country Planning (Use Classes) Order 1987 (as amended)(the UCO) as use for the sale of food and drink on the premises (Class A3), whereas Class A4 was defined as use as a public house, wine bar or drinking establishment. Following changes to the UCO in 2020, restaurants and cafés have been brought within Class E and drinking establishments are now *sui generis*, which is a Latin term, meaning 'of its own kind'.
9. The site address has been listed as 'Sisko Fish Café', which the Council suggests supports its belief that the site is being used akin to a restaurant, rather than a drinking establishment with ancillary food options. The Council has also provided Google reviews, one of which comments 'Great fish spot after a nigjt [sic] out'. Both of these matters point towards the premises having been used as a restaurant by the date the notice was issued.
10. Reference is made by the Council to visits made by the Metropolitan Police's Licensing Duty Team to the property on 29 January 2022 and 12 March 2022. On the second visit, the Council suggests that the gentleman working at the establishment confirmed that he mostly serves large fried croaker fish and that they do not serve alcohol but that they usually have African Palm wine in stock (though not that night). A photograph of the food purchased by the officers has been provided, comprising fried Croaker fish, fried plantain and hot sauce. This, in my view, would be consistent with a restaurant use rather than a drinking establishment.
11. The Council has provided me with details of complaints made between 2020 and 2022, which raise concern regarding noise and disturbance, amongst other things. A number of complainants referred to the venue as a club, however, the Council states at no time during the investigation when Police Officers have visited the premises has it been in use as a nightclub. Indeed, the appellant does not suggest it is used as such and, during my visit, I saw that the property is laid out with tables and seating, which would be consistent with a restaurant use (or drinking establishment) rather than a nightclub.
12. The appellant states that the primary use of the premises is for the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises. This appears broadly

consistent with the evidence provided by the Council. From the evidence, it appears that it is simply a restaurant serving fish, which has played loud music.

13. Under their ground (b) appeal, the appellant asserts that the premises has historically been used as a restaurant/café and that, despite planning permission being granted in 2011 for a drinking establishment (A4), the premises continued to offer the sale of food and drink. I shall consider this matter under ground (c).
14. From the evidence provided by the Council, and the appellant's own admissions, it seems likely that, by the date of the issue of the enforcement notice, the material change of use of the premises to use as a restaurant had occurred. Thus, the appeal under ground (b) must fail.

Ground (c)

15. An appeal under ground (c) is made on the basis that the matters stated in the notice (if they occurred) do not constitute a breach of planning control. The appellant does not suggest that the use of the premises as a restaurant would be lawful by virtue of the passage of time (which is a matter which would be considered under ground (d), rather than ground (c)). Rather, the appellant's suggestion is that the premises continued to offer the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises. This appears to be a suggestion that the 2011 permission was not implemented.
16. Planning permission 11/00714/FUL was granted for the change of use of the premises from Restaurant (A3 use) to drinking establishment (A4 use) and continue the use as Drinking Establishment (A4 use) at 153 Barking Road, alterations to front elevation and existing rear sheltered smoking area and erection of a proposed seating area at front of property.
17. The Council advise that it considers the 2011 consent was implemented by a previous operator at the site and that no planning permission for the change of use to a restaurant has been granted, since the implementation of application 11/00714/FUL.
18. The Council refers to a 'Breach of Conditions Notice' which was issued in September 2014 for the drinking establishment use failing to operate in accordance with a condition relating to opening hours. I also note an application, reference 14/01990/VAR was submitted for variation of condition 3 (opening hours) attached to planning permission 11/00714/FUL. This refusal was also appealed, and the appeal dismissed.
19. While I have not been provided with a copy of the appeal decision or the application documents, in my view, this supports the Council's suggestion that the 2011 had been implemented. The appellant has provided no substantive evidence to dispute the Council's suggestion that the 2011 permission was implemented.
20. Notwithstanding the above, I am mindful that the Town and Country Planning (General Permitted Development)(England) Order (2015)(as amended)(the GPDO) grants planning permission for certain types of development. The Council suggests that there is no permitted change of use from a drinking establishment without planning permission and the appellant does not dispute this.

21. While I would agree that the alleged breach does not benefit from planning permission granted by the GPDO in this case, this is not a straightforward matter and so I think it is worth setting out why I agree.
22. Class B, Part 3 of the 2015 GPDO permitted development consisting of a change of use of a building from a use falling within Class A4 (drinking establishments) to a use falling within Class A3 (restaurants and cafes), subject to certain requirements. This part of the GPDO was changed in 2017 to permit change of use within Class A4 (drinking establishments) to a use falling within Class A4 (drinking establishments) with a use falling within Class A3 (restaurants and cafes)(drinking establishments with expanded food provision). This would be a mixed use.
23. On 1 September 2020, the Town and Country Planning (Use Classes)(Amendment)(England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987 (the UCO). The changes removed the former A4 'Drinking establishments' use classes which no longer fall within any use class. The changes to the UCO include transitional provisions which retain the effect of the permitted development rights based on the classes that were in place prior to these regulations coming into force. A building or use will continue to be subject to any permitted development rights that it was entitled to on or before August 2020.
24. In 2021, the GPDO was amended. Class AA of Part 3 of Schedule 2 of the GPDO permits development consisting of a change of use of a building and any land within its curtilage (a) from a use falling within article 3(6)(p) (public house, wine bar, or drinking establishment) of the Use Classes Order to a use falling within article 3(6)(q)(drinking establishment with expanded food provision) of that Order; or (b) from a use falling within article 3(6)(q) to a use falling within article 3(6)(p).
25. However, the enforcement notice alleges the material change of use to a restaurant, not a drinking establishment with expanded food provision or some other mixed use. The Council suggests the restaurant use commenced after the adoption of the UCO in 2020. The complaints provided, range in date from 17 July 2020, which is well after the changes to the GPDO were made in 2017. It is therefore unlikely, on the balance of probabilities, that the material change of use to a restaurant would have been granted by the GPDO at the time.
26. Thus, I find the material change of use to a restaurant is development which required planning permission and the appeal under ground (c) must fail.

Conclusion

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

M Savage

INSPECTOR