



Appeal Decision

Site visit made on 20 May 2025

by **S A Hanson BA(Hons) BTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date 07 July 2025

Appeal Ref: APP/P4605/C/24/3341484

17-19 Barr Street, Birmingham B19 3EH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Habtom Ghebremichael against an enforcement notice issued by Birmingham City Council.
 - The notice was issued on 26 February 2024.
 - The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised change of use from warehouse (Use Class 88) to mixed use restaurant/café (Use Class E) and Bar/Nightclub (Use Class Sui Generis) in the approximate position marked in green on the attached plan.
 - The requirements of the notice are to:
 - (i) Cease the unauthorised mixed use as a restaurant/café and bar/nightclub; and
 - (ii) remove all fixtures and fittings associated with the mixed unauthorised use; and
 - (iii) remove all demolished building materials and rubble from the premises arising from compliance with requirements (i & ii) above.
 - The period for compliance with the requirements is 3 (three) months.
 - The appeal is proceeding on the ground[s] 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.
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Decision

1. It is directed that the enforcement notice is corrected:
2. In part 3 by deleting the wording in its entirety and substituting it with “Without planning permission, the material change of use from warehouse (Use Class 88) to mixed use restaurant/café and Bar/Nightclub (Sui Generis) in the approximate position marked in green on the attached plan.”

and

In part 4 by deleting the wording “within the last 4 years” and substituting it with “within the last 10 years”.
3. Subject to the corrections, 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 as amended.

Preliminary Matters

4. The allegation refers to the mixed use as a restaurant/café (Use Class E) and Bar/Nightclub (Use Class Sui Generis). Where it is alleged that land is in a mixed use, there is a single mixed use with all its component activities, and it is classified as sui generis even if individual components might on their own fall within a

described use. Considering the submissions from both parties, I consider that there would be no injustice caused if I correct that part of the notice¹.

5. Further to this, the Council incorrectly refers to the breach of planning control having occurred within 'the last four years' within its reason for issuing the notice. Section 171B of the Town and Country Planning Act 1990 (as amended) sets out the time limits for taking enforcement action. For the material change of use as alleged, s171B(3) is relevant and therefore the time limit for bringing enforcement action is 10 years.
6. The appeal is proceeding on the grounds (a), (f) and (g). As no appeal and no case has been made for the use being immune from enforcement action, I consider that there would be no injustice caused to either party if I correct that part of the notice too.

The appeal of ground (a) and the deemed planning application

Main Issues

7. The main issues are the effect of the development on i. the living conditions of the occupiers of premises within proximity in terms of noise and general disturbance and ii. the loss of an industrial unit/employment land.

Reasons

8. The appeal relates to the change of use of the ground floor of a three storey mid-terrace commercial building formerly used as a retail and wholesale warehouse premises. The ground floor is said to have formerly been used as a showroom and warehouse and the upper floors used as offices. The previous use ceased in 2018, and the existing use commenced in 2020, with the appellant taking over the business in 2022. The street is predominantly comprised of three-storey Victorian and inter-war buildings which are mostly in industrial, warehouse or retail warehouse uses. There are elements of residential uses, including a former commercial building converted to residential prior to the change of use of the appeal premises. This four-storey block of accommodation, Gilder's Yard, is located opposite the appeal site and comprises 156 residential units and is also said to have commercial floorspace. There are habitable rooms on the ground floor and several bedrooms on the first floor in the building that have windows looking out onto Barr Street.

Effect on living conditions of occupiers of nearby premises

9. Internally, the appeal site comprises a large seating area, a dance floor, a DJ's booth and a bar. There are also toilets and a fully operating kitchen. The main door to access the club is on Barr Street and there is a side door which leads to a narrow outdoor area. Access from this space leads on to Barr Street. The business describes itself as a nightclub on its own social media platforms and website, going by the name of Diamond Sparklez. Aside from planning and licencing being different regimes, the premises is licenced to open between the hours of 10.00 and 02.00 Monday to Wednesday, and between the hours of 10.00 and 05.30 on Thursdays to Sundays. The licence contains, among other matters: a condition to require CCTV coverage; a requirement to employ door staff from 22.00; a requirement for a noise management and dispersal policy; a no re-entry policy

¹ Section 176(1) of the Town and Country Planning Act 1990

after 02.30; a stipulation that the volume of music must not cause a disturbance; all windows are to be kept closed, except for access and egress, while regulated entertainment is taking place after 20.00; and site observations in the vicinity of the premises are to be carried out to check whether there is any noise breakout from the premises.

10. The Council's submissions refer to 24 complaints from nearby residential occupiers which relate to loud music and noise, and activity from people congregating on the street when arriving at or leaving the appeal site. The complaints cover a period between 10 October 2022 and 31 March 2024. They relate to noise being generated between 00.00 and 05.30 hours, and mostly in the early hours of a Friday, Saturday, Sunday or Monday. There is also reference to 18 complaints made following the granting of the variation to the Premises Licence on 10 May 2023.
11. A noise assessment has been provided by the appellant in accordance with Policy DM6 of the submitted Development Management in Birmingham DPD (the 'DPD'). Monitoring of the appeal site occurred between 20.25 and 01.00 on Friday 26 April 2024. The report states that it was not possible to hear music or voices inside, except for some 'bass thud'. When doors were opened there were spikes of noise break-out from the music and conversations between door staff on the street and patrons were recorded as causing some periods of higher speech frequencies sound levels. While ambient levels remained consistent before and after 23.00 hours, bass levels are reported to increase on average by 3dB at post 23.00 to the end of the survey.
12. There is, however, no account of noise levels between 01.00 and 05.00 during the unsocial hours and, perhaps more importantly, when the premises closes. Disturbance at these times has been reported. With noise from patrons through movements and conversations, and noise from cars idling waiting to pick up passengers and car engines being started and car doors slamming. This disturbance would likely be significant against the generally quiet environment of the immediate surroundings, particularly in the early hours of the morning.
13. The noise assessment considers that there is still work to be done to mitigate and minimise the impacts as far as possible. It provides that external noise causing the maximums (attributed to people talking outside the venue) and the measured bass frequency content of emissions are reduced, a refinement of the mitigation package imposed by the licence with complimentary measures to add a sound limiting device, and refined noise management controls for people would achieve the level of protection required for residents.
14. I note the contents of the Diamond Lounge Noise Management and Dispersal Policy dated April 2023 that is said to have been put in place to comply with licencing requirements and thus to reduce disturbance. However, with complaints recorded as being received up to 2 April 2024, and the noise assessment undertaken in April 2024, I am not persuaded that such measures have or would genuinely lead to a situation where noise emanating from the use of the premises would not unreasonably disturb nearby residents, particularly during unsocial hours, thus having an adverse impact on their living conditions.
15. While the residential building opposite the premises may well have been built to a high standard with acoustic provision to protect from external noise, there have

clearly been instances where noise from the use of the premises have caused disturbance. This indicates to me that the level of noise is problematic.

Furthermore, although the appellant claims the residential building has a ventilation system which does not rely on opening windows, the nuisance is reported by occupiers as being exacerbated during the warmer months when they wish to open their windows.

16. Further to the reported noise disturbance, the company who own and operate Gilder's Yard state that the operation of Diamond Lounge late into the night and until the early hours of the morning, not only disrupts the peace of the tenants' living environment but also engenders feelings of insecurity within their own homes. Such disturbances are said to not only jeopardize the well-being of current residents but also undermine the potential for future residential developments in an area undergoing regeneration.
17. To mitigate the risks posed by ongoing disturbances, they say that it has been necessary to employ security at the residential apartments during peak operating hours, namely: Thursdays: 20:00 to 08:00; Fridays: 20:00 to 09:00; and Saturdays: 18:00 to Monday morning.
18. The appellant has suggested that the night club element could cease and the imposition of necessary conditions regarding the control of noise could render the use of the appeal site acceptable. While I do accept that ceasing the nightclub use would go some way to lessen the impact in terms of the degree of music, or more particularly the sound of bass coming from the venue, I am not persuaded that the remaining uses in a premises which operate daily into the early hours would necessarily function in a manner where the other issues raised would not remain problematic. Furthermore, it would be inappropriate to grant permission for the use by seeking to impose conditions to address the harm when I cannot be satisfied if any mitigation measures would be effective to protect against noise and disturbance that has been highlighted. Accordingly, I do not consider that this suggestion would be an acceptable outcome.
19. Overall, I find that due to its siting within proximity of a large number of residential units, the use of the premises would have an unacceptable adverse impact on the living conditions of those occupiers in terms of noise and disturbance. On the information before me, I cannot be satisfied that noise and disturbance caused by the mixed use of the premises can be controlled to acceptable levels, including through the use of conditions.
20. As such, the use is contrary to Policy DM2 of the DPD which provides that all development will need to be appropriate to its location and not result in unacceptable adverse impacts on the amenity of occupiers and neighbours. There is also conflict with Policy DM6 of the DPD which, among other things, states that development should be designed, managed and operated to reduce exposure to noise and vibration.
21. While the re-use of an existing building would support the overall development strategy, the unauthorised use is a noise-generating development, and it is in an area where there are noise-sensitive uses. Therefore, it is not considered to be the best use of an existing building in this context and therefore there is conflict with Policy PG3 of the Birmingham Development Plan 2031 (adopted 2017) (the 'BDP') in that respect.

Loss of an industrial unit

22. The appellant argues that the established previous use of the premises occupied by Hampton Hosiery was considered a sui generis use as a retail warehouse. This was described as such by the officer reports included within the appellant's submissions². The Council's appeal statement considers the lawful use of the site to be within Class B8 wholesalers. The Loss of Industrial Land to Alternative Uses Supplementary Planning Document (SPD) defines industrial uses as those within E(g)ii and E(g)iii, B2 and B8 of the Town and Country Planning (Use Classes) Order 1987, as amended. The SPD also notes that 'a number of sui generis uses can also be located on industrial land'.
23. Notwithstanding this, there is a variance between Policy TP20 of the BDP and the SPD. Where the SPD provides guidance for the protection of *industrial development for employment*, Policy TP20 aims to protect *employment land* within the city which is considered a valuable resource to the Birmingham economy. Policy TP17 of the BDP provides that there will be a portfolio of 'readily available' employment land consisting of a hierarchy of sites. The appeal site is considered by the Council to be a site of 'other quality' being less than 0.4ha of average or poor quality likely to be of interest to local companies. While I have had regard to the SPD, I consider that its direct relevance to Policies TP17 and TP20 is limited in this instance, and I afford the policies substantial weight. Accordingly, I consider that it is more appropriate to assess the use of the appeal premises on the loss of employment land rather than the loss of an industrial unit.
24. There is no evidence that details the nature of the workforce, or the numbers employed by the previous use and, although it is claimed that the current use provides jobs for 15 people, there is no information to substantiate that claim. Nevertheless, it is apparent that the current use will provide employment for things such as catering, security, DJ-ing, and bar staff. Consequently, I am not persuaded that there has been a loss of employment land and thus I find no conflict with Policies TP17 and TP20 of the BDP.

Conclusion on ground (a) and the deemed planning application

25. While I consider there would be no impact relating to a loss of employment land, adverse harm would be caused to the living conditions of nearby residents. This is a matter of overriding concern. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal on ground (a) and the application for deemed planning permission must fail.

The appeal on ground (f)

26. The appeal on ground (f) is that the steps required by the notice to be taken exceed what is necessary to remedy any breach.
27. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These are either to remedy the breach of planning control which has occurred (section 173(4)(a)), or to remedy any injury to amenity that has been caused by the breach (section 173(4)(b)). It is firstly necessary to establish the purpose of the notice.

² Appendix 4 – the 2008 Planning Application, Appendix 5 – the 2015 Application for Prior Approval

28. The requirements to cease the unauthorised use in its entirety is consistent with an intention to remedy the breach. The notice itself also identifies significant noise and disturbance impacts on existing residential occupiers within the vicinity indicating injury to amenity. The notice is therefore directed at both purposes.
29. Under their ground (f) appeal, the appellant suggests that the nightclub element of the mixed use could cease, and conditions imposed to control noise. I have dealt with this matter under ground (a) and considered it on its planning merits, concluding that the appellant's suggestion would not be acceptable in planning terms, as proposed.
30. Consequently, there is no obvious alternative scheme that would overcome the planning difficulties and remedy the breach and injury to amenity. Given that the notice does no more than seek to achieve the purposes of section 173(4)(a) and (b), it is not excessive.
31. The appeal on ground (f) therefore fails.

The appeal on Ground (g)

32. The appeal on ground (g) is that any period specified in the notice in accordance with s173(9) of the Act falls short of what should be reasonably allowed. I am mindful of the importance of striking a balance between enforcement that is intended to be remedial rather than punitive, while maintaining public confidence in the planning system. The appellant has requested that the compliance period be extended from 3 to 6 months to enable those employed to find alternative jobs and for the physical works to be carried out. They say that they have many staff but have not provided any more details to support or justify this request.
33. The three-month compliance period does not stand out as being patently unreasonable within which to cease the unauthorised use and undertake the various requisite physical works. I therefore have no reason to doubt that this would be a proportionate measure.
34. The appeal on ground (g) appeal therefore fails.

SA Hanson

INSPECTOR