



Appeal Decision

Site visit made on 18 January 2022

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11th February 2022

Appeal Ref: APP/C5690/C/21/3270217

Land at Shop Unit 1, 257 New Cross Road, London, SE14 5UL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Kim Pham against an enforcement notice issued by London Borough of Lewisham.
- The notice was issued on 22 January 2021.
- The breach of planning control as alleged in the notice is: Change of use to sui generis nail Bar (fumes rising into upper flat), without the benefit of planning permission.
- The requirements of the notice are to:
 - (1) Cease the use of the Unit as a nail bar/ beauty salon.
 - (2) Remove fixtures and fittings from the Unit in their entirety that facilitate the unauthorised use of a nail bar/ beauty salon.
 - (3) Make good all damage resulting from the compliance with the requirements of this notice.
 - (4) Remove all materials, debris, waste and equipment resulting from compliance with the above requirements of this notice from the land.
- The time for compliance with the requirements is 6 months after the notice takes effect.
- The appeal is proceeding on the ground set out in section 174(2)(a) 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.

Summary Decision: The appeal is dismissed.

Preliminary Matters

1. I advised the parties of my concerns with regard to certain errors I have identified in the enforcement notice subject of this appeal. I sought their views on these matters; any possible corrections to the notice; and whether injustice would be caused if I were to correct the notice. I received no response to this request.

The Notice

2. Prior to consideration of the grounds of appeal, I have a duty to ensure that the notice does not contain any errors. If errors are found, the powers transferred to Inspectors under section 176(1)(a) of The Town and Country Planning Act 1990 as amended (the 1990 Act) include to correct any defect, error or misdescription in the enforcement notice or, under section 176(1)(b), to vary the terms of the enforcement notice. In each case, the only test is whether the correction or variation would not cause any injustice to the appellant or the local planning authority.
3. Part 1 of the enforcement notice states that there has been a breach of planning control falling within section 171A(1)(a) of the 1990 Act, which is the

carrying out of development without the required planning permission. Development is defined in section 55(1) of the 1990 Act as including 'the making of any material change in the use of any building or other land'.

4. Whilst the notice refers to 'a change of use' it does not allege that a material change of use has occurred. It therefore follows that the allegation in the notice would not constitute development for the purposes of section 55(1) of the 1990 Act. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land. Because the breach of planning control as alleged in the notice does not constitute the development of land, it follows that planning permission would not be required for it. The notice is defective in that respect.
5. However, having regard to the appellant's case under ground (a), he has clearly understood that the allegation was intended to refer to a material change of use. As such, I am satisfied that a correction of the notice to include reference to a material change of use would not cause injustice in this case.
6. In addition to this, the reference in the allegation to '(fumes rising into upper flat)' is not necessary; this relates to the reasons for the issue of the notice, rather than adding to the description of the allegation. I will correct the notice to remove this in the interests of clarity and precision.
7. Turning to the requirements of the notice, 5.(1) requires the use of the Unit as a nail bar / beauty salon to cease (my emphasis). There is also reference to use as a beauty salon in requirement 5.(2). The allegation does not, however, include reference to a beauty salon. In these circumstances the requirements of the notice go beyond remedying the breach of planning control alleged as they require the cessation of a use not included in the allegation. As the requirements of the notice are not consistent with the description of the breach alleged, I find the notice defective in this regard.
8. Having viewed the unit in question I observed manicure stations and reclining chairs with foot baths; these are consistent with a nail bar use. I did not observe any facilities that are obviously used for a beauty salon use and none have been drawn to my attention. Accordingly, it is more likely than not that the use of the unit is as a nail bar alone, rather than as a nail bar and beauty salon.
9. Varying the requirements of the notice to remove reference to a beauty salon use would not cause injustice to the appellant, particularly as it would make the requirements of the notice less onerous. Should the unit be used as a beauty salon in the future in breach of planning control, it is open to the Council to issue a further notice, should it be considered expedient to do so. Accordingly, varying the notice as proposed would not cause injustice to the Council.

Ground (a) and the deemed application for planning permission

Main Issues

10. The appeal on ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. I note the substantive reasons for issuing the enforcement notice and from these I have identified the main issue as being

the effect of the development on the living conditions of neighbouring residents, with regard to odours.

Reasons

11. The appeal relates to a commercial unit within a row of other commercial properties, most with residential flats above. The residential flats above the appeal unit have been drawn to my attention. The Council's evidence is, in short, that the nail bar use of the unit emits particularly strong odours that travel to the flats above the ground floor unit. The odours come from the use of certain chemicals within the nail bar. Indeed, during my site visit I was able to see inside the unit that was in use at the time and could appreciate the strong odour from the chemicals used.
12. The owner of the building and an occupier above the unit suggest that the smell from the nail bar experienced in the residential properties above is unbearable. Within the unit I observed what appeared to be a wall mounted air conditioning unit. However, no form of extraction equipment within the unit or associated flue on an external wall has been brought to my attention that would extract from the unit (and the building altogether) the odour from the chemicals used in the nail bar. Accordingly, I have no reason to doubt the representations of those who live above the unit.
13. The appellant does not dispute any of the above, but has suggested that additional information could have been provided prior to the issue of the notice. He also suggests that permission could have been granted with conditions imposed¹. Indeed, the reason for the refusal of the recent planning application refers to a 'suitable ventilation/flue extraction system', indicating that the Council is mindful that there may be a means to mitigate the harmful effects of the use. I have, therefore, considered whether the deemed planning application could be granted with a condition requiring the submission of odour extraction equipment within a set time period.
14. No conditions have been suggested for me to consider. Furthermore, I have limited information before me to indicate what type of ventilation or extraction equipment might be appropriate, and where this would be located within the unit and on the building. If it is necessary to provide an external flue for the extraction equipment, this may have an effect on the character and appearance of the building and the surrounding area, which ought to be considered.
15. Having regard to the above, I have insufficient evidence to conclude it is likely that the harmful effects of the development could be acceptably mitigated and that there is an appropriate condition that would achieve this. For this reason, I conclude that the development has an unacceptable effect on the living conditions of neighbouring residents, with regard to odours generated by the use.
16. Core Strategy Policy 9 (Improving air quality) of the Lewisham local development framework Core Strategy adopted June 2011 is referred to in the reasons for issuing the notice. The Policy informs that the Council will seek to improve local air quality and minimise any negative air quality impacts. The supporting text of the policy concentrates on CO₂ emissions, particularly in the context of climate change. I have not, however, been provided with evidence

¹ Planning application reference DC/20/115715

sufficient for me to conclude that the matter of odour and its effect on the living conditions of local residents is relevant to the matter of air quality as it has been set out in the policy. The link between the two has not been demonstrated. I cannot, therefore, conclude that the Policy is relevant in this case.

17. Furthermore, whilst I note reference to DM Policy 23 (Air quality) and DM Policy 31 (Alterations and extensions to existing buildings including residential extensions) of the Lewisham local development framework Development Management Local Plan adopted 26 November 2014 have also been referred to, I do not have sufficient evidence to indicate that either of these policies are relevant to the development in this case. With regard to DM Policy 23, again there is a lack of evidence of the link between air quality and the matter of odour. Furthermore, this appeal does not relate to major development, and it does not include a biomass boiler. As for DM Policy 31, the development in this case comprises a material change of use, not an alteration or extension.
18. As no other policies have been brought to my attention, I must conclude that there are no relevant development plan policies. In these circumstances, the provisions of paragraph 11d) of the National Planning Policy Framework (the Framework) are engaged. In this regard, whilst the appellant has not pointed to any benefits of the scheme, I cannot ignore that the use provides employment opportunities for a number of people, and that it contributes towards an active and vibrant row of commercial premises.
19. Weighing against these benefits, is evidence of the harm caused to the living conditions of residents who live above the unit, to which I attribute significant weight. In this regard, I note both the social and environmental objectives of achieving sustainable development² in the Framework include to support healthy communities by fostering well-designed and safe places that support communities' health; and to protect and enhance the natural and built environment. Furthermore, paragraph 185 of the Framework informs that decisions should also ensure that new development is appropriate for its location, taking into account the likely effects of pollution on health and living conditions. The development does not accord with these objectives or advice within the Framework.

Planning Balance and Conclusion

20. Having regard to all of the above, whilst I acknowledge the benefits of the development, these are significantly and demonstrably outweighed by the adverse impacts of the use. For this reason, I conclude that the ground (a) appeal should fail. I shall uphold the enforcement notice with corrections and variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act.

Formal Decision

21. It is directed that the enforcement notice is corrected by:
 - The addition of the word 'Material' at the start of the paragraph in part three, before the word 'Change'; and
 - The deletion of the words '(fumes rising into upper flat)' from part 3.

² Paragraph 8 of the Framework.

22. It is directed that the enforcement notice is varied by the deletion of the words ‘/beauty salon’ from 5.(1) and 5.(2).
23. Subject to the corrections and variations 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.

J Moss

INSPECTOR