
Appeal Decision

Hearing held on 30 July 2014

Site visit made on 30 July 2014

by D H Brier BA MA MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 22 August 2014

Appeal Ref: APP/J2373/C/13/2210586
97-107 Egerton Road, Blackpool FY1 2NN

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr P C Maher against an enforcement notice issued by Blackpool Borough Council.
 - The notice was issued on 6 November 2013.
 - The breach of planning control alleged in the notice is failure to comply with conditions Nos 1 and 2 of a planning permission Ref 12/0799 granted on 6 December 2012 for a variation of condition 1 attached to planning permission 04/0673¹ to allow the premises to operate between the hours of 11.00AM until 11.00PM Sundays to Thursdays and between 11.00AM until 00:00AM on Fridays and Saturdays.
 - The conditions in question state that:
 1. The use of the premises shall not operate other than between 08:00 hours and 23:00 hours Sundays to Thursdays and between 08:00 hours and 00:00 hours on Fridays and Saturdays.
 2. The premises shall be used for use as a spa and sauna with steamroom and sunbed facilities and for no other purpose including any other purpose within Class D2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987.
 - The notice alleges that the conditions have not been complied with in that the premises have been operating outside the permitted hours and; the premises have been operating as a swinger's club (a sui generis use).
 - The requirements of the notice are: Cease using the premises other than between 08:00 and 23:00 Sundays to Thursdays and between 08:00 and 00:00 on Fridays and Saturdays. And; cease the use of the premises as a swinger's club.
 - The period for compliance with the requirements is 14 days.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
- **Summary of Decision: The appeal is dismissed and the notice is upheld with a variation.**
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Background

1. As the notice indicates, the conditions referred to were attached to a planning permission granted on 12 December 2012. Condition 1 is a variation of a condition attached to a previous planning permission granted on 6 September 2004 for the "continued use of premises as a spa and sauna including steam room and sunbed facilities", whereas condition 2 repeats condition 2 of the 2004 permission.

¹ This permission, granted on 6 September 2004, was for the "continued use of premises as a spa and sauna including steamroom and sunbed facilities".

Appeal on Ground (c)

2. As regards condition 1, it is not disputed that the use operates until 03.00 hours on Saturday nights/Sunday mornings. I heard that the premises are locked at midnight so that no one can gain entry – I saw a notice to this effect in the entrance area - and customers are told that the premises close at 03.00 hours. Regardless of whether the activity that takes place constitutes or is akin to a private party, as I was told, and even though I heard that the sauna is switched off at midnight, it seems to me that the fact that customers are using the premises after the permitted time is a clear indicator that the condition has not been complied with. Accordingly, therefore, I find that a breach of planning control has occurred in this respect. I see no reason to question the validity of the condition.
3. Turning to condition 2, the nub of the Council's concern is that the premises are being used for another purpose that lies outside the ambit of those specified in the condition, namely what is termed as a 'swingers' club'.
4. My attention has been drawn to the manner in which the 2004 planning application was processed and determined in that the description of the use that appears on the notice of approval differs from that on the application form which states "private members club with spa, sauna and steam room facilities". The appellant also points out that while the application file includes annotated drawings that identify a steam room, sauna and jacuzzi on the ground floor together with a solarium on the first floor, the majority of the rooms are labelled "TV room" or "TV and mat [mattress]".
5. It was claimed that given the disproportionate amount of rooms not assigned to spa, sauna or sunbed use, the manner in which the planning permission was framed was a euphemism to cover activities taking place between consenting adults, at that time males. It was further submitted that the permission represented a tacit understanding of this, because Blackpool had such uses traditionally. Moreover, referring to the website of 'Wet Wet Wet Sauna' in Charles Street as an example, it was contended that by regarding the use as no more than a spa, the Council were being "astonishingly naïve".
6. Mindful of the proportion of the property not expressly assigned to spa, sauna with steamroom and sunbed facilities on the plans that accompanied the 2004 planning application, it is somewhat strange that this matter was not clarified at the time, perhaps all the more so given the amended description of the development seemingly made by the Council. At the hearing it was apparent that the appellant and those supporting him clearly regarded the term "sauna" as synonymous with a facility that offers opportunities for sexual encounters. Whether this is a general perception or one peculiar to Blackpool is hard to say, but I note that the dictionary definition of sauna is "a building or room equipped for a Finnish form of steam bath" and those for spa include "an establishment offering steam baths and other health treatments" and "a heated bath or pool of aerated water"². In the light of this, my view is that it is reasonable to interpret both the description of the approved use and condition 2 in this manner. As I see it, neither of these terms necessarily encompasses the provision of facilities for accommodating activity of a sexual nature as part and parcel of the permitted use.

² The Chambers Dictionary.

7. Notwithstanding the 'unaccounted for' nature of a good deal of the accommodation within the premises, I consider the Council were reasonably entitled to restrict the scope of the permitted use in the manner they did and the condition is both valid and clear in its intent. Although there was some post decision correspondence in 2004 and 2005, and the possibility of an appeal against the conditions attached to the 2004 planning permission was mooted, no such appeal was made.
8. According to the appellant, the term the 'swingers club' was a marketing ploy intended to make the premises sound more exciting, whereas the Council saw this as a means of bringing people together for sexual activity. A customer who said he had been visiting the premises for 9 years indicated that the facility was mainly social. In this respect I saw that there are several lounge areas within the premises, as well as a food and drink server. However, my impression was that a good deal of the accommodation is given over to facilitating sexual encounters. For instance there are a number of 'play' rooms, each equipped with mattresses, as well as 2 larger similarly equipped rooms, one called the 'gang bang room', and the other named the 'orgy room' [actually spelt 'orgie']. In addition, part of the basement is referred to as 'the dungeon' and is equipped with various items including stocks, a swing contraption and a cross. Another part of the premises contains a series of cubicles with holes cut in the sides described to me as 'glory holes'.
9. The sauna, jacuzzi and sunbed facilities remain, but I am unable to concur with the view that the other facilities are ancillary to this. Their scale and nature is such that I regard them as part and parcel of a wider use that amounts to significantly more than that permitted. My view is that, as a matter of fact and degree, the character and nature of the overall use of the premises is such that a significant part of it falls outside the ambit of, and does not accord with, condition 2. I find therefore that there has been a breach of this condition and so a breach of planning control has occurred. In the light of my findings regarding the 2 conditions therefore, the appeal on ground (c) fails.

Appeal on Ground (d)

10. In order for the appeal to succeed on this ground, it has to be shown that the breach of condition occurred more than 10 years before the notice was issued, that is 18 December 2003, and has been continuous since then. In this case, as the conditions being enforced against had been in place less than 12 months before the notice was issued, I do not consider it is possible to demonstrate that this is the case. Even if the base date of 6 September 2004 is used for condition 2 as it is a repeat of that attached to the 2004 planning permission, the same applies as this condition was also less than 10 years old when the notice was issued.
11. Even if I am wrong on this point, as I acknowledge that the 2004 permission referred to a continued use, mindful that this is legal ground of appeal in which case the onus on proving it lies with the appellant, I find the evidence somewhat thin and inconclusive, albeit the relevant test is the balance of probability. Even if the activities carried out at the premises have remained the same as is claimed, the only tangible evidence before me is the planning application submitted in 2004, what was observed at the time, and the related correspondence, but all that is within the 10 year period. As the appellant said he had only lived in Blackpool for 8 years, and the customer said he had been

going for a period of 9 years, the position prior to the submission of the 2004 application is far from clear. I am not satisfied that what evidence there is is sufficient to demonstrate that at the time the notice was issued, it was too late for enforcement action to be taken; the burden of proof that lies with the appellant has not been discharged. The appeal on ground (d) therefore fails.

Appeal on Ground (a), the Deemed Application

12. I consider the main issue is whether the living conditions of local residents would be adversely affected. At this stage I should reiterate the point I made at the hearing, namely that my decision focuses upon land use considerations and is not concerned with any matters regarding morals.
13. The development plan for the area is the Blackpool Local Plan 2001-2006, various policies of which have been 'saved'. The appeal site lies in the Claremont inner area neighbourhood where Policy BH1 indicates that development proposals will be assessed in terms of their impact upon the local neighbourhood and identifies a need to promote development and investment that, amongst other things, provides new or improves existing facilities. Policy BH3, entitled 'Residential and Visitor Amenity', indicates that developments which would adversely affect residential and visitor accommodation by, amongst other things, associated use and activity, will not be permitted. In a similar vein, outside defined centres, Policy BH15 allows for the change of use from shops to commercial or other appropriate uses provided that they are compatible with nearby uses and would have no adverse impact on residential amenities. My attention has also been drawn to the emerging Core Strategy, but having heard that it has only recently reached submission stage, I only attach limited weight to it.
14. The appeal premises comprise a row of former shops now amalgamated into one. Although there is a small local centre across the road to the south east which also includes a public house, the Empress public house³, the surrounding area is largely residential, characterised in the main by a fairly tight-knit pattern of terrace housing.
15. Viewed from the street, the use to which the property is put is not readily apparent and my impression was that the presence of the use has been kept intentionally discreet. There are no external signs and the entrance, on the corner of Egerton Road and Richmond Road, is relatively unobtrusive. Moreover, in my view, the activities that take place within the premises are not in themselves likely to be unduly disturbing to local residents albeit the Council's evidence points to some concern in this respect. And, the provision of accommodation for a sexual health clinic within the premises is indicative of a commendable degree of social responsibility on the part of the appellant.
16. While none of the above gives me cause for serious concern, I am distinctly less sanguine about the appellant's desire to seek a relaxation of condition 2 to permit the premises to remain open until 03.00 at weekends (Friday and Saturday nights). In my experience, a use operating until this time in a largely residential area such as this is likely to give rise to problems, mainly due to activity associated with comings and goings. I accept that the appellant has instituted measures to counter this, for instance by not permitting admissions after midnight, and I saw that a 'polite notice' advising customers to respect

³ At the time of my site inspection these premises were closed and boarded up.

neighbours and keep noise to a minimum was displayed prominently in the entrance lobby of the premises.

17. However, although I was told that the number of people that attend the premises is around 80, as I indicated at the hearing, the 'Connections' website indicates that there is room for 300. It may be that the latter total is an optimistic aspiration, but whether the figure is 80 or somewhat higher than that, it seems to me that in this location a large number of people exiting the premises in the early hours, whether by foot or by car or taxi, is a potential source of disturbance.
18. I acknowledge that no evidence regarding noise levels has been produced by the Council. Nevertheless, I consider residents are likely to find general conversation, even if it is good natured rather than boisterous, and things such as car doors slamming shut and vehicles arriving and departing, disturbing when such activity occurs during a period when people ought reasonably to be able to enjoy a period of relative peace and quiet. My attention has been drawn to an undated letter signed by 4 occupants of the neighbouring property, No.95 Egerton Road, which indicates that they have no complaint about the sauna. I find this somewhat strange as it is rather at odds with the dated witness statements by 2 of the same individuals produced by the Council in which they both express concern about noise associated with the use.
19. It may be that late night revellers returning from the town centre pass through the area as I was told, I understand that late licences have been granted for the nearby Empress public house on occasions, and I saw that there are dwellings close to 'Infusion', another swingers' club said to remain open until late. I can well understand why these matters have been drawn to my attention, but I do not find they offer good reasons for permitting another activity that is likely to be problematic in its own right. In my opinion extending the permitted operating hours of the premises would have an unacceptably adverse effect upon the living conditions of nearby residents and, as such, would be contrary to the relevant provisions of the development plan, in particular Local Plan Policy BH3.
20. In view of my comments regarding the activity inside the premises (paragraph 15), I have given some thought as to whether the scope of condition 1 should be extended, irrespective of my concern about the hours of operation. However, as the latter appear to be integral to the use, I am not satisfied that such a measure, or the imposition of any other conditions to control the operation as postulated by the appellant, albeit under the heading of ground (f), would be reasonable or appropriate or that this would be sufficient to overcome or allay my concern overall.
21. In the light of the foregoing, the appeal on ground (a) fails.

Appeal on Ground (f)

22. The premise underlying this ground of appeal is that planning permission should be granted – a matter that I have considered in the appeal on ground (a). As I see it, the requirements of the notice represent a reasonable response to the breach of planning control alleged therein. I do not find them excessive. Accordingly, therefore, the appeal on ground (f) fails.

Appeal on Ground (g)

23. Given that a business is involved, with attendant implications for jobs and the local economy, I consider the 14 day compliance period is too short. Even though there is nothing that shows that there are any contractual obligations, the appellant ought to be given a reasonable opportunity to assess the consequences for his business, including, if necessary, the possibility of having to make arrangements to secure alternative premises. All of this is likely to take some time, perhaps all the more so as I heard that the Council had not endeavoured to enter into any dialogue with the appellant on this point. In the light of this, even 2 months, an alternative aired at the hearing by the Council would not be reasonable. That said, given my misgivings about the non-compliance with condition 1 in particular, the 12 month period sought by the appellant would be too long.
24. Taking all the relevant circumstances into account I consider 4 months would be a more reasonable period to assist the appellant address the consequences of the enforcement action. I shall vary the notice accordingly. To this extent therefore, the appeal on ground (g) succeeds. In so saying, I am mindful that section 173A(1)(b) of the 1990 Act as amended gives the Council the discretion to further extend the period for compliance if need be.

Other Matters

25. I have taken into account all the other matters raised including the Council's stance pursuant to the appellant's complaint about 'Infusion'. None, however, are sufficient to outweigh the considerations that have led me to my conclusions.

Formal Decision

26. I direct that the enforcement notice be varied in section 6 by the deletion of "14 days" as the period for compliance and its substitution by "4 months". Subject to this variation, I dismiss the appeal and uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act.

D H Brier

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr A Cassidy MSc Cert.Ecol MRTPI MIEMA C.Env.	Planning Consultant, Cassidy & Ashton, Preston.
Mr P C Maher	Appellant.
Mr D Woods	Representing 'Connections'.
Mr D Trayford	Representing 'Connections'.
Mr P Howarth	Client.

FOR THE LOCAL PLANNING AUTHORITY:

Mr G Johnston	Head of Development Management, Blackpool Borough Council.
Mrs C White	Assistant Head of Legal Services, Blackpool Borough Council.
Mrs N Rigby LLB	Planning Enforcement Manager, Blackpool Borough Council.

INTERESTED PERSONS:

Councillor I Taylor	Member, Claremont Ward.
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DOCUMENTS

- 1 List of persons present at the hearing.
- 2 Email dated 18 November 2004 with written annotation.
- 3 Undated letter from D Hunter.
- 4 Undated letter signed by residents of 95 Egerton Road.
- 5 Plan showing location of Infusion Swingers Club.