

and further written representations made by the parties. The Council's challenge to the Inspector's decision had been made under section 288 of the 1990 Act only. As such, by virtue of the terms of section 284(3)(e), as applied by section 288(4) of the 1990 Act, the only part of the Inspector's decision challenged and quashed by the Court was her decision to grant planning permission under paragraph (a) of section 177(1). Her decision to quash the enforcement notice could not be challenged under section 288, and in these circumstances the enforcement notice dated 14 January 1997 remains quashed and of no effect.

5. No further representations were made with regard to the Inspector's decision to allow the appeal on ground (a) and to grant planning permission, subject to conditions, on the deemed application, and I see no reason to disagree with her conclusions, in paragraphs 6 to 18 of her decision letter dated 25 September 1997. Further representations were made concerning the wording of each of the three conditions imposed by the Inspector, not just the condition which formed the basis of the parties' consent to judgment. As the whole of the decision to grant planning permission is open to redetermination, I shall therefore consider how each of the conditions should be worded, in the light of the further representations which have been received.

6. As to Condition 1, relating to hours of use of the outdoor terrace, I note that the Inspector's intention was that the terrace should not be used by clients after 2000 hours on Mondays to Thursdays, or 2300 hours on Fridays, Saturdays, Sundays, Bank and Public Holidays. As noted by the Inspector, the Council expressed concern that the extension to the restaurant (described by the Inspector as a "café bar") would result in undue noise and disturbance in the evenings and at weekends, and the condition she imposed did not restrict the hours of use in the mornings. The Council suggest 0900 hours to 2000 hours on Mondays to Thursdays, 0900 hours to 2300 hours on Fridays and Saturdays, and 1000 hours to 2300 hours on Sundays, Bank and Public Holidays, with a rider preventing anyone, whether or not a patron of the premises, from using the terrace for any purpose outside those times. Your client, who had originally suggested a daily starting time of 1100 hours, subsequently preferred the earlier starting time of 0900 hours suggested by the Council, as it would allow staff time to put tables and chairs out on the patio before they began trading. Concerns about noise and disturbance to nearby residents were the main reasons why the development was originally considered unacceptable, and, while there has been little if any evidence of noise and disturbance occurring during the mornings, in my view it is desirable to restrict hours of use of the terrace in the mornings, particularly at weekends, as well as in the evenings. Both parties appear to agree to the starting time of 0900 hours on weekdays and Saturdays and 1000 hours on Sundays, Bank and Public Holidays, and to the finishing times of 2000 hours on Mondays to Thursdays and 2300 hours on Fridays, Saturdays, Sundays, Bank and Public Holidays, as originally intended by the Inspector. I agree and propose to restrict the hours of use of the terrace accordingly. As to the Council's concern that the hours restriction should not just apply to customers, while the model "hours condition" in paragraph 66 of DOE Circular 11/95 refers to use by customers, I propose that the condition should simply refer to use of the terrace for any purpose, outside the hours specified.

7. Turning to Conditions 2 and 3 imposed by the Inspector, relating to the control of music and lighting, I note that the form of wording of both these conditions, suggested in the Council's letter of 29 April 1998, was acceptable to your client. The "music" condition refers to both live and recorded music, and prevents the singing, playing or otherwise performing of live or recorded music on the terrace, or the use of equipment for the reproduction or amplification of live or recorded music either on the terrace or within the structure of the wall, door or window openings forming the eastern boundary of the terrace. The "lighting" condition is intended to prevent the setting up or use on the terrace of lighting of any kind, or the positioning of lighting within or on the building which has the effect of illuminating the roof terrace without the Council's prior written approval. I consider that these agreed conditions are now sufficiently precise and capable of enforcement to meet any objections on public amenity grounds.

8. Accordingly, the appeal succeeds on ground (a) and planning permission will be granted, subject to the revised conditions referred to above. The Inspector's decision dated 25 September 1997 to grant conditional planning permission is endorsed for the reasons given. Alternative Conditions 1 to 3 inclusive are being substituted for those imposed by the Inspector. The enforcement notice is already quashed for the reason explained in paragraph 4 above; and there is no need for me to make any further direction in that respect. Even if I were wrong in this, however, the effect of the planning permission now being granted is that, by virtue of section 180(1) of the 1990 Act, the requirements of the enforcement notice would be rendered ineffective in any event. As before, grounds (f) and (g) of the appeal do not fall to be considered.

FORMAL DECISION

9. For the above reasons, and in exercise of the powers in section 177 of the 1990 Act which have been transferred to me, I allow your client's appeal against the enforcement notice on ground (a) in section 174(2) of the Act and hereby grant planning permission, on the application deemed to have been made under section 177(5) of the Act, for the development already carried out, namely the enclosure by 1.6 metre trellis fencing of an area of roof and the laying of scaffold poles to form an outdoor sitting area as an extension to "Indy Jaks" on land at first floor level at 168 Marlowes, Hemel Hempstead, subject to the following conditions:-

1. The outdoor roof terrace shall not be used for any purpose outside the following hours:

0900 hours to 2000 hours on Mondays to Thursdays,
0900 hours to 2300 hours on Fridays and Saturdays, and
1000 hours to 2300 hours on Sundays, Bank and Public
Holidays.

2. No live or recorded music shall be sung, played or otherwise performed on the outdoor roof terrace, and no equipment used for the reproduction or amplification of music (whether live or recorded) shall be placed either on

the outdoor roof terrace or within the structure of the wall or the door and window openings which form the eastern boundary of such terrace.

3. No lighting of any kind shall be set up or used on the outdoor roof terrace situated at first floor level, nor shall any kind of lighting be positioned within or on the building such that it has the effect (whether intended or not) of illuminating the outdoor roof terrace without, in either case, the prior approval in writing of the local planning authority. Any lighting permitted pursuant to this condition shall only be illuminated during the times specified in Condition 1 above.

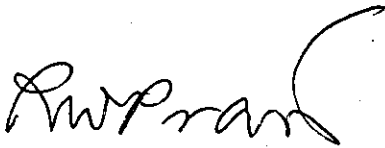
10. This letter does not convey any approval or consent which may be required under any enactment, byelaw, order or regulation other than section 57 of the Town and Country Planning Act 1990.

11. Attention is drawn to the fact that an applicant for any consent, agreement or approval required by a condition of this permission has a statutory right of appeal to the Secretary of State if consent, agreement or approval is refused or granted conditionally, or if the authority fail to give notice of their decision within the prescribed period.

RIGHTS OF APPEAL AGAINST THE DECISION

12. This letter is issued as my redetermination of the appeal in pursuance of the Order of the Court. The enclosed leaflet sets out the rights of appeal to the High Court against the decision.

Yours faithfully,



R W PRATT



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Council Reference: 4/0307/97

Our Reference:

T/APP/C/97/A1910/646265

Date:

25 SEP 1997

26 SEP 1997

Dear Sirs

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 174 AND SCHEDULE 6
PLANNING AND COMPENSATION ACT 1991
APPEAL BY MR N. SULLIVAN
LAND AND BUILDINGS AT 168 MARLOWES, HEMEL HEMPSTEAD

Comments

1. As you know I have been appointed by the Secretary of State for the Environment to determine your client's appeal against an enforcement notice issued by the Dacorum Borough Council concerning the above mentioned land and buildings. I have considered the written representations made by you and the Council and I inspected the site on 26 August 1997. An application for an award of costs has been made by Mr N Sullivan against the Council. This is the subject of a separate letter.

THE NOTICE

2. (1) The notice was issued on 14 January 1997.
- (2) The breach of planning control as alleged in the notice is the enclosure by 1.6 m high trellis fencing of an area of roof and laying of scaffold boards to form an outdoor sitting area as an extension to "Indy Jaks", 168 Marlowes and shown edged red on the plan attached to the notice.
- (3) The requirements of the notice are:
- [i] Remove all materials, fixtures and fittings used in formation of the patio area.
- [ii] cease the use of the flat roof for any purpose ancillary or incidental to "Indy Jaks" restaurant with the exception of use as a fire exit.
- (4) The period for compliance with these requirements is one month.

GROUNDS OF APPEAL

3. Your client's appeal is proceeding on grounds [a], [f] and [g] as set out in section 174(2) of the 1990 Act as amended by the Planning and Compensation Act 1991.

SITE DESCRIPTION & PLANNING HISTORY

4. The site lies on the west side of Marlowes in Hemel Hempstead town centre. It comprises mid terrace, first floor accommodation, situated above two street level shop units. It is occupied by a cafe bar, Indy Jaks which is accessed by a staircase from the street. The notice relates to the enclosure of roof space at the rear of the premises. The fire escape crosses this space and descends to a service yard behind which provides rear access to the site and surrounding properties.

GROUND [b]

5. Although you did not formally appeal under ground [b] you contend that the patio area is not considered to be operational development as the fitments are not of a fixed or permanent nature. In my view the enclosure of an area of roof by the physical attachment of scaffolding poles to two sides of the roof with trellising to a height of some 1.6 m and the erection of trellising to the wall on the third side together with the laying of scaffolding boards on the roof of the ground floor extension has resulted in a physical alteration to the land which has some degree of permanence. I conclude, as a matter of fact and degree, that these works constitute development under section 55 of the Act for which planning permission is required.

APPEAL UNDER GROUND [a] & THE DEEMED APPLICATION

6. I consider the main issue is whether the development would result in undue noise and disturbance to nearby residents.

7. The development plan comprises the approved Hertfordshire structure plan and the adopted Dacorum Borough local plan. The shopping frontage is designated as a mixed frontage in the local plan. Policies aim to encourage the vitality and viability of town centres.

8. Indy Jaks advertises itself as a cafe bar. A sign in the street says "open all day". It serves drinks and light meals and it advertises that it caters for office parties and birthdays. Tables and chairs are spread around the accommodation and there is a free standing bar area. I understand it is open until 2000 hours on Mondays to Wednesdays and to 2300 hours from Thursdays to Sundays. The roof is accessed by double doors from the rear of the cafe. Some tables and chairs were stacked on the roof and there were a few planting boxes placed around the space. White lines have been painted on the boards to indicate the route of the fire escape.

9. Marlowes is the main retail street in the town centre comprising mixed retail, restaurant and building society use at street level. Many of the premises have residential use on upper floors. This section of the street is restricted to buses and taxis with the main pedestrianised section situated south of Bridge Street. The nearest residential properties to the roof terrace are located on the second floor of the

corner property, 2-6 Bridge Street, and the maisonettes above the Bridge Street terrace, Nos 8 - 42.

10. The restaurant use has been established on the site for over twenty years. Your client wishes to use the roof as an extension to the restaurant in reasonable weather and claims that the ability to accommodate extra customers contributes to the viability of the business. You say that music is not relayed externally.

11. The Council argues that the roof represents an extension to the restaurant which would result in undue noise and disturbance to nearby residents in the evenings and at weekends when the noise environment is quieter. I saw that the main access to the maisonettes is from the service yard and the majority have small rear gardens and outdoor drying areas at deck level. The rear service yard is restricted to authorised users which includes the businesses in the Marlowes and Bridge Street facades.

12. The roof terrace is barely visible from the service yard as it is located in its extreme north eastern corner and is positioned between the first floor kitchen extension to the premises and behind a two storey building which is occupied by a building society. From my viewpoints, it appeared that the terrace would not be visible from the maisonettes or their rear gardens but could be visible from two windows in the second floor residential accommodation at 2-6 Bridge Street which appeared to be high level bathroom windows.

13. I note that no residents have written in response to the Council's letter of notification and the Council do not refer specifically to any complaints being received. I understand that a notice in respect of statutory nuisance issued in October 1996 under section 80 of the Environmental Protection Act in respect of noise emitted from the whole premises was not upheld in the courts.

14. I acknowledge that use of the roof terrace by patrons would extend the floor area of the cafe and would bring people closer to the nearest residential flats and at first floor level. I also believe it would be difficult to prevent customers taking alcohol onto the terrace. Nevertheless, its use would be intermittent limited to periods of fine, warm weather. Furthermore, the surrounding buildings would largely muffle any sound emanating from the terrace or screen any lighting after dark.

15. Local policies aim to encourage a diversity of uses in town centre and in my view an extension of an existing restaurant use is compatible with this policy aim. The site is located in the main shopping street and Sunday trading has increased activity. In my view residents living in a town centre location should reasonably expect some noise and disturbance. Bridge Street takes buses and taxis and the Bridge Street flats are situated above another restaurant and a cafe and two more restaurants are situated on the south side of the street. The service yard is busy during the day and the many air conditioning units on rear walls will contribute to the noise environment during the day and in the evenings and weekends.

16. I accept that the service yard would be less used in evenings and at weekends and that evening use of the terrace could create the potential for some disturbance. However, the cafe is only open to 2300 hours from Thursdays through to Sundays and even at present, there may be some noise

spillage from within the premises at times the double doors are opened. In the context of a busy, town centre environment, it seems to me that occasional use of the terrace on fine days would be unlikely to result in undue noise and disturbance to the nearest residential occupants, providing adequate safeguards are taken to control music and light pollution.

17. In my view any such potential problems could be satisfactorily controlled by appropriate conditions. In the context of Circular 11/95, I consider the condition you suggest concerning restriction on the hours of use of the terrace is necessary and appropriate. However, I am not persuaded that a differential time is necessary on Sunday evenings in the context of Sunday trading and the existing closing hours. I also consider it desirable to control any external emission of music and the illumination of the terrace after dark in order to protect residential amenities.

18. The government remains committed to fostering business activity and my overall conclusion is that the extension of the use conforms with the aims of PPG6. Accordingly the appeal succeeds on ground (a) and planning permission will be granted. The appeals on grounds (f) and (g) do not therefore need to be considered. I have considered all other matters raised in the representations, but none are of sufficient weight to override those considerations that have led me to my conclusion.

FORMAL DECISION

19. For the above reasons, and in exercise of the powers transferred to me, I allow your client's appeal and direct that the enforcement notice be quashed. I hereby grant planning permission on the application deemed to have been made under S177(5) of the amended Act for the development already carried out, namely the enclosure by 1.6 m trellis fencing of an area of roof and laying of scaffold boards to form an outdoor sitting area as an extension to "Indy Jaks" on land at first floor level at 168 Marlowes, Hemel Hempstead referred to in the notice, subject to the following conditions:-

"1. The outdoor roof terrace shall not be used by patrons of the cafe outside the following hours:

after 2000 hours Mondays to Thursdays

after 2300 hours on Fridays to Sundays, Bank or Public holidays

2. No external emission of music at any time.

3. No high intensity, strobe or flashing lights to be used on the terrace at any time."

RIGHTS OF APPEAL AGAINST DECISION

20. This letter is issued as the determination of the appeal before me. Particulars of the rights of appeal against my decision to the High Court are enclosed for those concerned.

Yours faithfully



MAUREEN C TAYLOR BSc DipTP MRTPI FRGS Inspector