

PLANNING APPEAL DECISION

Lead Officer: Tony Pomfret – Development Control Manager

To inform Members of two recent appeal decisions at Captain Senny's, 2 Senhouse Street, Whitehaven

Recommendation: That the decisions be noted in the context of the Councils local plan policies and in relation to performance monitoring.

Resource Implications: The Inspector has awarded costs against the Council in this case

1.0 SUPPORTING INFORMATION

1.1 Planning permission was refused for the variation in the opening hours of this licensed premises to allow opening until 02.00 a.m. on Thursdays, Fridays and Saturday on 06th January 2011 on the following grounds:-

"The proposed extended opening hours would result in an increase in late night noise and disturbance which would be harmful to the character and amenity of the general area and to the amenity of nearby residential properties, in particular the adjoining Waverley Hotel, contrary to Policies TCN 7 and ENV 21 of the adopted Copeland Local Plan 2001 – 2016".

1.2 An Enforcement Notice was issued on 20 May 2011 which required the premises to close at 01.00 a.m. on Thursdays, Fridays and Saturdays, and 11.30 p.m. on every other day. This Notice was due to take effect on 17 June 2011. The owners of the premises lodged an appeal against both the Enforcement Notice and the refusal of planning permission before the Notice came into effect.

1.3 Both appeals have recently been allowed and the Enforcement Notice has been quashed.

The Inspector agreed with the Appellants claims that the outline permission granted in 1988 was unlawful as it related to a change of use. On this basis he considers the time restrictions imposed on the 1988 outline permission to be unenforceable. He also considers the permission granted in 2002 to vary the opening hours to be invalid as it sought to alter the time restrictions relating to the 1988 permission which is unlawful.

He concluded that as the use of the premises has been in operation for more than 10 years this use has become lawful in planning terms and therefore is exempt from any enforcement action. It also invalidates any conditions controlling the use.

As there are no planning conditions controlling the opening hours the Inspector confirmed that he was unable to consider the effects of late night noise and disturbance on residential amenity at the neighbouring properties in his decision.

1.4 In coming to this conclusion the Inspector also considered that the Council had acted unreasonably in this case and this has resulted in the Appellants incurring unnecessary expenses. Consequently he allowed an application for costs on both appeals.

1.5 Members are asked to note that irrespective of these appeal decisions the premises are still constrained by licensing law. Currently this means that the premises can trade until 02.00 a.m. and must close by 02.20 a.m. The licence imposes a number of conditions in terms of noise, door supervisors, CCTV and other operational issues. The licence can be reviewed if crime and disorder, nuisance or safety issues arise.

1.6 A copy of both Inspectors appeal decisions is attached.

Contact Officer: Nick Hayhurst – Senior Planning Officer

Background Papers: Planning application file ref 4/10/2544/0B1



Appeal Decisions

Site visit made on 13 December 2011

by **John Braithwaite BSc(Arch) BArch(Hons) RIBA**

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

Decision date: 23 December 2011

Appeal Ref: APP/Z0923/C/11/2155147

Captain Sennys, 2 Senhouse Street, Whitehaven CA28 7ES

- 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 Captain Sennys Limited against an enforcement notice issued by Copeland Borough Council.
 - The Council's reference is P/11/11/10/0123.
 - The notice was issued on 20 May 2011.
 - The breach of planning control as alleged in the notice is :- On the 1st July 1988 planning permission was granted for the change of use to billiard room, restaurant and licensed premises. Condition 4 stated:- The premises shall close by 11:30pm every day. Condition 4 was altered on 18th July 2002 when planning permission was granted to extend the opening times on the premises until 1am on Thursday, Friday, Saturday nights and other special occasions as granted by the Magistrates. The Council has evidence that the premises have been open for business outside these hours.
 - The requirements of the notice are (1) To close the premises at 1am on Thursdays to Sundays; and (2) To close the premises at 11:30pm every other day.
 - The period for compliance with the requirements is 28 days.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (c) of the Town and Country Planning Act 1990 as amended.
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Appeal Ref: APP/Z0923/A/11/2156240

Captain Sennys, 2 Senhouse Street, Whitehaven CA28 7ES

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Captain Sennys Limited against the decision of Copeland Borough Council.
 - The application Ref 4/10/2544/0B1, dated 16 November 2010, was refused by notice dated 6 January 2011.
 - The application sought planning permission for change of use to billiard room, restaurant and licensed premises without complying with a condition attached to planning permission Ref 4/88/0586/0, dated 1 July 1988.
 - The condition in dispute is No. 4 which states that: The premises shall close by 11:30 pm every day. Condition 4 was amended by planning permission 4/02/0643/0 which is 'to extend opening times on the premises until 1am on Thursday, Friday, Saturday nights and other special occasions as granted by the Magistrates Court'.
 - The reason given for condition 4 is: To safeguard the amenities of the locality.
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Decision

Appeal Ref: APP/Z0923/C/11/2155147

1. The appeal is allowed and the enforcement notice is quashed.

Appeal Ref; APP/Z0923/A/11/2156240

2. There is no Decision in this appeal.

Procedural matter

3. An application for costs has been made by Captain Sennys Limited against Copeland Borough Council. This application is the subject of a separate Decision.

Reasons

The enforcement appeal under ground (c)

4. It is not disputed that Captain Sennys, a nightclub, remains open until 0200 hours after opening on the evening of Thursday, Friday and Saturday. It is disputed, however, that this is a breach of planning control because the condition that the Council is seeking to enforce is not part of a valid planning permission.

5. The condition, no.4, is imposed on outline planning permission 4/88/0586/0, dated 1 July 1988, for 'change of use to billiard room, restaurant and licensed premises' (the 1988 permission). The Appellant believes that "...under the terms of the Town and Country Planning General Development Order 1977 (the 1977 Order) which was in force at the time of the decision, it was procedurally incorrect to permit an outline planning permission for a change of use application". It is indeed long established in planning legislation that outline planning permission cannot be granted for a change of use. However, even if the Appellant's belief is incorrect, regarding the 1977 Order, there are other factors to take into account.

6. Condition 1 of the 1988 permission requires the approval of reserved matters and condition 2 sets out a three year time limit for submission of an application for approval of reserved matters. The Council has not contested the Appellant's assertion that no such application was ever submitted. The 1988 permission therefore expired on 1 July 1991. In addition, the Council has not contested the assertion that the building has never been a restaurant or a billiard room and they "...accept that the premises has been in use as a licensed premises for more than 10 years and therefore this use is lawful".

7. The Council also states that "...before the use became lawful a condition was imposed which allowed the use of the premises up to 01.00 am on Thursdays, Fridays and Saturdays. The enforcement notice clearly refers to the 2002 permission". The 2002 permission is planning permission 4/02/0643/0 for 'to extend opening times on the premises until 1am on Thursday, Friday, Saturday nights and other special occasions as granted by the Magistrates Court'. The Council maintains that "The 2002 permission does not refer to the 1988 permission and...this permission stands alone" and "...is the relevant permission to use as the starting point for the enforcement period rather than the 1988 permission".

8. The last quote in the previous paragraph is puzzling. If the Council accepts that the use of the building as a licensed premises is lawful then the reference to the 2002 permission being the starting point for the enforcement period is not relevant, and the grant of permission in 1988 did not initiate any enforcement period. More importantly, the breach of planning control set out in the notice refers to amended condition 4 of the 1988 permission. The 2002 permission is not valid because it purports to vary the terms of a condition of a permission that had expired and it cannot stand alone because it does not describe development as defined in section 55 of the Town and Country Planning Act 1990.

9. The breach of planning control set out in the notice refers to the 1988 permission which does not exist in law and to the 2002 permission which is not valid. There is no planning permission for, and therefore no conditions restricting the use of, the appeal building. The matters alleged in the notice do not constitute a breach of planning control and the ground (c) appeal thus succeeds.

The planning appeal

10. The appeal is against the refusal by the Council to vary amended condition 4 of the 1988 planning permission. This permission does not exist in law. Amended condition 4 also does not exist and cannot therefore be varied. No decision can thus be made in this planning appeal.

Other matters

11. The Appellant has requested that consideration be given to granting a Certificate of Lawful Use or Development (LDC) for the nightclub given that this use has subsisted for in excess of ten years. An LDC can only be granted for the breach of planning control alleged in the notice and as this is non-compliance with a planning condition an LDC cannot be granted for the nightclub use.

12. There are no planning conditions controlling the opening hours of Captain Sennys so the effect of late night noise and disturbance on residential amenity at neighbouring properties cannot be considered in this decision.

John Braithwaite

Inspector