
Appeal Decision

Site visit made on 30 August 2016

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 23 September 2016

Appeal Ref: APP/X5990/C/16/3144746

The buildings and associated land at 275 Regent Street, London, W1B 2HB

- 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 The Company Secretary Leon against an enforcement notice issued by the City of Westminster Council.
- The enforcement notice, numbered 08/39134/I, was issued on 15 January 2016.
- The breach of planning control as alleged in the notice is :
Without the requisite planning permission and within the last 10 years the material change of use of the basement and ground floor of the property from use for Class A1 (Retail) purposes to use for mixed use purposes (Sui Generis) comprising use as a retail shop, restaurant/café and hot food takeaway (the unauthorised use) and;
Without the requisite planning permission and within the last 10 years the material change of use of the public highway to the front to the property to use for the placing of table and chairs in association with the unauthorised use.
- The requirements of the notice are:
 - (a) The use of the basement and ground floor of the property for mixed use purposes (Sui Generis) comprising use as a retail shop, restaurant/cafe and hot food takeaway (the unauthorised use) shall cease;
 - (b) All equipment, fixtures, fittings and furniture brought onto the premises for the purpose of carrying on the unauthorised use cited in Part a) above, shall be removed from the property; and
 - (c) The use of the public highway to the front of the property on Regent Street for the placing of tables and chairs shall cease, and all tables and chairs and any other equipment, fixtures and fittings and furniture shall be removed from the public highway.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Decision.

Application for costs

1. An application for costs was made by the Council against the Appellant. This application is the subject of a separate Decision.

Preliminary Matters

2. The Appellant has questioned the expediency of the Council's decision to issue the notice given, among other things, that the business has been in operation since March 2007. However, a challenge on the grounds of expediency can
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only be made by way of judicial review and I have no jurisdiction to determine such an issue¹.

3. Although the premises are in Roxburghe House which is a Grade II listed building and also within the Regent Street Conservation Area the Council does not raise in its reasons for issuing the notice any matters that relate to either the listed building or the Conservation Area and I will determine the appeal on this basis.

The appeal on ground (c)

4. In an appeal on ground (c) the Appellant has to prove, on the balance of probability, that the matters alleged in the notice do not constitute a breach of planning control. The Appellant has confined his case in this ground of appeal to the alleged material change of use of the basement and ground floor to a mixed use and has not addressed the allegation relating to the material change of use of the public highway. In the circumstances I will likewise confine my determination of this ground of appeal to the allegation of the change of use to the mixed use.
5. S.55 of the 1990 Act says that development means, among other things, the making of any material change of use of any buildings or other land. The Town and Country Planning (General Permitted Development) Order 2015² grants permission for two categories of change of use which are changes between classes of use defined in the Town and Country Planning (Use Classes) Order 1987 and changes of use between alternative uses as specified.
6. The Town and Country Planning (Use Classes) Order 1987 as amended categorises various uses of land into different Use Classes and it allows switches between uses within the same class without attracting planning control even if the character of the new use is different from the previous one. Not all uses are within a use class and uses such as a mixed use, as alleged in the notice, are sui generis. It is a matter of fact and degree whether a change of use from one use class to a sui generis use is a material change of use.
7. The authorised use of the premises is Class A1 (shops) and the definition of Class A1 includes the retail sale of goods other than hot food and the sale of sandwiches or other cold food for consumption off the premises. In essence, it is the Appellant's case that the current operation, taking into account what he considers to be the primary and ancillary uses, has no material impact in land use planning terms and does not constitute development.
8. In responses to a planning contravention notice (PCN) dated 30 October 2015 the Appellant said that hot food such as paninis, hot boxes, soups and potato wedges/shaped fries were sold on the premises both for consumption on the premises and takeaway; none of the food was cooked from raw but was reheated and that there were a rationale oven, a rice steamer and panini heater/grill for the purpose of providing hot food.
9. Class A5 refers to the sale of hot food for consumption off the premises and there is no restriction or requirement that food has to be cooked from fresh, the reference is to 'hot food'. I noted on my visit that that the food for sale included 'grilled wraps', 'big hot boxes', 'little hot boxes' and 'sides'. Some of

¹ *Britannia Assets v SSCLG & Medway Council* [2011] EWHC 1908 (Admin)

² Schedule 2, Part 3

the food being sold was undoubtedly 'hot' and the kitchen on the ground floor had the facilities to provide hot food in that there were ovens to heat food, containers in which the food was kept hot for serving, a griller and microwave ovens. My visit was during the lunchtime and hot food was being consumed by customers on the premises and was also being taken away.

10. Class A3 relates to the sale of food or drink for consumption on the premises. There were 6 tables on the ground floor with 6 individual chairs with banquette seating along the wall that appeared to be able to take up to 6 people and there were also 3 stools at a high counter along the front window. Outside there were 5 tables and 10 chairs. At the time of my visit, and for some time before when I observed the premises, the outside tables were full and the interior tables were mostly occupied. There was no waiter service and no facilities for customers other than the tables and chairs. The prices of the food and drink did not differentiate between that eaten on or off the premises which in my view could encourage customers to stay and eat their food on the premises.
11. The Appellant said in the PCN that the total sales were as follows : hot food consumed on the premises was 14.3%; 11% of cold food was consumed on the premises; 22% of hot food was taken away; 22.5 % of cold food was taken away; hot and cold drinks consumed on the premises totalled 14.1%; and hot and cold drinks taken away totalled 16.1%.
12. The percentage of hot food taken away accounts for 35.5% of the gross turnover and the consumption of food and drink on the premises amounts to 39.4% of total sales which equates to 33% of the gross turnover. These are significant numbers in terms of sales and gross turnover of the operation of the business and I find as a matter of fact and degree that the premises are not primarily retail as meant by a Class A1 use but comprise a mixed use of a retail shop, restaurant/café and hot food takeaway as alleged in the notice because none of the uses are ancillary to each other but each comprise a primary use.
13. As the change of use from Class A1 to a mixed use is not one within the same use class nor is it one between specified alternative uses it is one that requires a grant of planning permission unless there are no differences between the character of the new use from the previous one. The character of the mixed use is different from that of a shop in that it has such things as a seating area where customers partake of food and drink and thus it has the appearance of a café/restaurant; the numbers of customers that could be seated at any one time together with the large area for customers waiting to be served caters for greater numbers of customers than would be the case with a shop; the comings and goings of customers, particularly those taking food away, is likely to be greater than that for a shop; and the attendant noise and food smells are different from a shop. I therefore find as a matter of fact and degree that there has been a material change of use as alleged.
14. The material change of use alleged constitutes a breach of planning control and it therefore requires planning permission. No such permission has been granted and none has been applied for. The Appellant has raised a large number of other matters which I have taken into account but which do not affect my findings or alter my conclusion that the appeal on ground (c) fails.

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

15. In an appeal on ground (a) and the deemed planning application the Appellant is in effect seeking a grant of planning permission for what its alleged in the notice, that is, the material change of use of the basement and ground floor of the property from use for Class A1 (Retail) purposes to use for mixed use purposes (*Sui Generis*) comprising use as a retail shop, restaurant/café and hot food takeaway and the material change of use of the public highway to the front to the property to use for the placing of tables and chairs in association with the unauthorised use.
16. From the reasons for issuing the notice I consider that the main issue in this appeal and the deemed planning application is the effect of the loss of the Class A1 (Retail) unit on the Core Central Activities Zone (CAZ) including whether the placing of tables and chairs outside the premises has any impact on amenity.
17. The appeal premises comprise the ground floor and basement of a mixed use, multi-storey building on Regent Street, not far from Oxford Circus. The basement of the premises largely comprises storage and staff facilities and the ground floor has a kitchen/food preparation area, a counter for selling food/drinks, an area for customers to order their food/drinks and seating facilities. There are also tables and chairs outside for customers' use.

Loss of Class A1(Retail) use

18. The London Plan, in Policies 2.10 and 2.11, seeks to support, improve, enhance and expand Class A1 (Retail) uses in the CAZ and the thrust of Strategic Policies S6 and S21 in the Westminster City Plan is to encourage retail floor space in the CAZ and to protect existing retail use in the Borough as a whole. The aim of Saved Unitary Development Plan Policy SS5 is to protect Class A1 uses at ground, basement or first floor level in the CAZ and CAZ frontages.
19. The appeal premises are in a row of six units that includes three units which appeared to me to have the same, or extremely similar, use to that of the appeal premises, one Class A1 unit and one unit that looked as if it would be Class A1 when it opened. I have no knowledge of the planning status of these units, or indeed any of the other many different uses of premises along this part of Regent Street. At the time of my visit, and on a previous occasion recently when I happened to be in the vicinity, the area in which the appeal site is located was extremely busy with large numbers of people coming and going and all of the units, whatever their use, including the appeal premises, appeared to have plenty of customers. There was no question in my mind that the area was active and well patronised.
20. Whilst there has been the loss of a Class A1 (Retail) unit there is evidence of a retail use of the appeal premises, albeit as part of the mixed use, in that a notable amount of cold food is taken away for consumption off the premises; the public are clearly attracted to the appeal premises; and its character and function are part and parcel of the surrounding area. The mixed use has been in operation since March 2007 and the Council has not referred me to any complaints or objections from any interested persons or other Council departments with regard to matters such as noise, disturbance or offensive smells. I have not been referred by the Council to any residential uses in the vicinity.

Tables and chairs

21. The pavement is wide and the tables and chairs outside take up a narrow stretch adjacent to the unit frontage. I did not notice any obstruction caused by the tables and chairs and large numbers of pedestrians moved freely along the pavement. From what I saw I have no reason to believe that what I witnessed was unusual.
22. Saved Unitary Development Plan Policy TACE 11 sets out criteria that have to be satisfied for permission to be granted for the placing of tables and chairs on the public highway and for the reasons given above I do not consider that the placement of the tables and chairs offended any of the specified criteria to any significant extent so as to amount to a reason to refuse permission. Similarly, with regard to Strategic Plan Policy S41 and Saved Unitary Development Plan Policy TRANS 3 which, among other things, aim to prioritise pedestrian movement and secure an improved environment for pedestrians, with particular regard to their safety, ease, convenience and directness of movement, I do not consider that the placing of the tables and chairs on the public highway has such a significant adverse effect on pedestrian movement so as to be in breach of these Policies.

Conditions

23. The Council has suggested 3 conditions to protect amenity and local environment quality. The first restricts the opening hours of the premises and the Appellant offers no comment on this condition. I note that the times stated in the condition are slightly longer for Monday – Friday than the times stated by the Appellant which would allow for flexibility and it seems to me reasonable that such a condition should be imposed to protect the area from any potential harm from noise and disturbance. From the layout of the ground floor I consider it would be difficult to expand the seating area to provide more than the current 15 inside seats, but the imposition of a condition to that effect would prevent any increase in numbers which could further change the use of the premises.
24. The final condition requires the submission of details within one month of a) a scheme for the ventilation for the extraction and the dispersal of cooking smells; b) a scheme for waste storage; and c) details of the external tables and chairs. I accept that there have not been any complaints about cooking smells or waste storage in the years that the Appellant has been operating and that the appeal site is currently properly managed. But the permission would not be a personal one to the current operation but would run with the land and it could apply to any mixed use of retail shop, restaurant/café and hot food takeaway which may have a different method of operation. I note that the current system for ventilation and waste apparently works satisfactorily and the imposition of the conditions would not be unreasonable in this respect. In the circumstances I do not consider it unreasonable to impose the conditions. The Appellant has no objection to the condition in respect of the outside tables and chairs and I consider it reasonable to impose it to, among other things, prevent any further encroachment onto the public highway.
25. As the planning permission is granted pursuant to a ground (a) appeal as well as the deemed planning application, it is reasonable to impose a requirement that, unless the requirements to provide details are complied with, the

requirements of the notice should come into effect. I will, however, vary the terms of the suggested condition to accord with guidance.

26. I appreciate that I have reached a different view on conditions from that of an Inspector in an appeal by the same Appellant in connection with another location³ but I have determined this appeal on its own merits taking into account what I saw and the cases made by both Parties.

Conclusions on the ground (a) appeal and the deemed planning application

27. For the reasons given above, and taking all other matters into account, I conclude that the loss of the Class A1 (Retail) unit does not have any adverse impact on the CAZ; that the placing of tables and chairs outside the premises does not have any harmful impact on amenity; and that the changes of use are not in breach of the Development Plan Policies to which I have been referred.

Conclusions

28. For the reasons given above I conclude that the appeal should succeed on ground (a) and planning permission will be granted. The appeals on grounds (f) and (g) do not therefore need to be considered.

Decision

29. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely the use of the land and buildings at 275 Regent Street, London, W1B 2HB as shown on the plan attached to the notice, for the material change of use of the basement and ground floor of the property from use for Class A1 (Retail) purposes to use for mixed use purposes (Sui Generis) comprising use as a retail shop, restaurant/café and hot food takeaway (the permitted use) and the material change of use of the public highway to the front to the property to use for the placing of tables and chairs in association with the permitted use subject to the following conditions:

- 1) The use hereby permitted shall only take place between the following hours: 0700 – 2130 Mondays – Fridays; 0930 – 2000 Saturdays; and 0930 – 1900 Sundays and Bank Holiday.
- 2) There shall be no more than 15 covers or chairs/stools provided inside the property for customers at any one time.
- 3) Unless within one month of the date of this decision a) a scheme for the means of ventilation for the extraction and dispersal of cooking smells; b) a scheme for waste storage; and c) details, including drawings, showing the area of public highway to be used for the placing of tables and chairs and the style number and layout of tables and chairs to be placed, are submitted in writing to the local planning authority for approval, and unless the approved schemes are implemented within two months in the case of a) and one month in the case of b) and c) of the local planning authority's approval, the use of the site for mixed use purposes (Sui Generis) comprising use as a retail shop, restaurant/café and hot food takeaway (the permitted use) and the use of the public highway to the

³ APP/X5990/C/15/3121641

front to the property for the placing of tables and chairs in association with the permitted use shall cease and all equipment and materials brought onto the land for the purposes of such uses shall be removed.

If no schemes and details in accordance with this condition are approved within three months of the date of this decision, the uses of the site shall cease and all equipment and materials brought onto the land for the purposes of such uses shall be removed.

Upon implementation of the approved schemes and details specified in this condition, those schemes and details shall thereafter be maintained and retained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

Gloria McFarlane

Inspector