The Planning Inspectorate

Appeal Decision

Site visit made on 11 October 2016

by Paul Freer BA (Hons) LLM MRTPI

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

Decision date: 24 October 2016

Appeal Ref: APP/X5990/C/16/3149966
Land at 73 Piccadilly, London W1J 8HS

- 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 Caffe Concerto Ltd against an enforcement notice issued by City of Westminster Council.
- The notice was issued on 7 April 2016.
- The breach of planning control as alleged in the notice is, without the necessary express planning permission and within the last ten years, an unauthorised and material change of use of the ground floor of the Property from a travel agency (Class A1 use) to a mixed use comprising a retail shop and a café/restaurant (Sui Generis use).
- The requirements of the notice are:
  a) Cease the use of the ground floor of the Property for mixed use purposes comprising a retail shop and café/restaurant (sui generis use); and
  b) Remove the cooking equipment (including the deep fat fryers, hotplates, food warmers and associated equipment) as shown outlined in red in Photograph A attached to the notice; and furniture (including tables and chairs) which facilitate the unauthorised café/restaurant use.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

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

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

1. The ground of appeal 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. The City Council has stated one substantive reason for issuing the enforcement notice, from which the main issue raised is the effect of the loss of the A1 unit on the character and function of the area.

2. In considering this main issue, the location and precise nature of the use taking place at the appeal premises are in my view of particular relevance. It is therefore helpful to describe these in some detail at the outset.

3. The appeal premises are located on the north side of Piccadilly, between Berkeley Street and Dover Street. The site is directly opposite The Ritz Hotel and close to some major tourist and visitor attractions, including the Royal Academy of Arts and the Fortnum & Mason store. The premises front directly onto Piccadilly, a major thoroughfare linking Piccadilly Circus with Green Park

and other major tourist attractions, and which features a wide variety of retail, leisure and other uses throughout its length.

4. The use of the premises itself is effectively in two parts. On the left hand side, when viewed from Piccadilly, there is window display which, at the time of my site visit, featured a wide variety of cakes but also some other items such as liqueurs and wines. I noted that, throughout the time I was present outside the site, this window display attracted considerable interest from passers-by. Behind this window display and just inside the entrance is a counter and a chilled display unit in which were displayed other items for sale. I understand that the products sold from the counter vary according to season but include cakes, pastries, sandwiches, baguettes, ice creams and chocolates.

5. The remainder of the premises provides a customer seating area, with waiter/waitress service. The appellant explains that there are 25 tables and 56 chairs for this purpose. At the time of my site visit, which was in the early afternoon but outside of the lunchtime period, it appeared from outside the site that a considerable proportion of these tables were occupied.

6. The appellant explains that, in terms of total sales, the split is typically 26.5% dining-in and 73.5% retail sales. The Council has not disputed these figures.

7. The appeal premises are within the Central Activities Zone (CAZ), as designated in the City of Westminster Unitary Development Plan (UDP) and Westminster's City Plan: Strategic Policies (City Plan). Within the CAZ, Policy SS 5 of the UDP seeks to achieve an appropriate balance of town centre uses and indicates that A1 uses at ground floor level will be protected. The policy then goes on to indicate that the introduction of a non-A1 town centre use at ground floor level will only be granted where the proposal would not be detrimental to the character and function of an area or to the vitality or viability of a shopping frontage or locality. Policy SS 5 also requires that non-A1 uses must not lead to a concentration of three or more consecutive non-A1 uses, or cause an intensification of A3 uses in a street or area.

8. It is not disputed that the existing use of the appeal property has resulted in the loss of an A1 retail unit. It is therefore clear that the current use of the property does not comply with this aspect of Policy SS 5. However, although a *sui generis* use, the existing use of the premises combines elements of A1 and A3 uses. Both are regarding as being appropriate uses within a town centre. In the context of the major thoroughfare that is Piccadilly, with its wide range of uses and tourist attractions, I consider that this mixture of A1 and A3 uses contributes to the character and function of the area. The precise nature of the use is an important factor in this, particularly in terms of the prominent window display onto Piccadilly and the split in sales between the A1 and A3 elements.

9. The current use of the appeal premises does not lead to a concentration of three or more consecutive non-A1 uses. Furthermore, having regard to the mixture of uses along this section of Piccadilly, it does not result in a significant intensification of A3 uses in the street. Notwithstanding that Policy SS 5 seeks to protect A1 uses at ground floor level, it is clear from its structure that exceptions may be made where the other elements of the policy are complied with. In my view, and for the reasons that I set out in more detail below, this is one of those situations and, overall, I am satisfied that the existing use of the appeal premises accords with Policy SS 5.

10. However, the structure of Policy S21 of the City Plan is altogether different. This more recently adopted policy indicates that existing A1 retail will be protected throughout Westminster except where the City Council considers that the unit is not viable. There is no test in relation to the effect on character or function: the sole exception is on the grounds of viability. In this context, the City Council explain that the appeal premises was previously occupied as a travel agents and that the premises was not vacant for long before the current use commenced. The appellant has provided no evidence to show that the continued use of the appeal premises for an A1 use was not viable. It follows that the use of the appeal premises for a *sui generis* mixed use comprising a retail shop and a café/restaurant is contrary to Policy S21 of the City Plan.

11. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that applications for planning permission must be determined in accordance with the development plan unless other material considerations indicate otherwise. Having found that the use of the use of the appeal premises does not accord with the development plan, I must now consider whether there are any material considerations to indicate that the deemed planning application for that use should be determined otherwise than in accordance with it.

12. In that respect, the National Planning Policy Framework (Framework) is clearly a material consideration. The Framework confirms that the Government is committed to securing economic growth in order to create jobs and prosperity, and to ensuring that the planning system does everything it can to support economic growth through the planning system. In relation to town centres, the Framework indicates that, in drawing up Local Plans, local planning authorities should promote competitive town centres that promote customer choice and which reflect the individuality of town centres.

13. The existing use of the premises employs a total of 30 staff on site, and indirectly supports other jobs such as cleaning staff and suppliers. This is likely to be at least equivalent to, and quite possibly greater than, the number of staff that might be employed in an A1 use of the premises, both directly and indirectly. I therefore consider that the existing use of the appeal premises accords with the Framework in terms of securing economic growth through the creation of jobs and supporting economic growth. In this respect, the appellant explains that the dine-in element of the trade is critical in order to maintain a viable business and that the economic viability of the business is dependent upon the two elements, in that the dine-in element supports the retail element and vice versa.

14. The particular nature of the existing use, with its significant retail element and diverse retail offer in terms of specialist cakes and other products, promotes customer choice. The prominent window display attracts interest and the counter just inside the entrance provides activity to the frontage. When combined with the seating area, this enhances the retail offer in this section of Piccadilly, is consistent with the diverse range of retail outlets along this major thoroughfare and reflects the individuality of this street. The existing use therefore accords with the Framework in these respects also.

15. In this context, I note the study by the University of Southampton referred to by the appellant in relation to the leisure aspects of shopping trips. This study, the findings of which have not been challenged by the City Council, was published in July 2014 and is entitled "High Street Performance & Evolution".

In summary, the study produced evidence to suggest that the leisure aspect of shopping trips, including places to eat, is a significant driver of footfall in high streets. This study also suggests that the leisure offer increases both dwelling time within the high street as well as the average spend. In a major thoroughfare such as Piccadilly, with numerous retail outlets and tourist attractions nearby, the possibility that the existing use of the appeal premises could potentially generate greater footfall and increase average spend compared with an A1 use weighs in favour of the continuation of that use.

16. In my view, by combining a significant and diverse retail offer with a seating area for customers, the use of the appeal premises for a *sui generis* mixed use comprising a retail shop and a café/restaurant complements the character and function of Piccadilly. In doing so, the use offers the prospect of providing more jobs than an A1 use of the premises and increasing average spend in the area, and is therefore consistent with the objectives in the Framework in terms of supporting economic growth and competitive town centres that promote customer choice. I consider that, on balance, these considerations outweigh the fact that the use does not accord with the development plan in some respects.

Other matters

17. The appeal site is within the Mayfair Conservation Area. The character and appearance of this conservation area is derived in part from the grid pattern of the streets and the quality of the buildings within it. Superimposed on this pattern, the character of the conservation area varies from street to street but, in the vicinity of the appeal site, is derived from the combination of retail outlets, hotels and institutional buildings that front onto Piccadilly. As a major thoroughfare, Piccadilly has a heavy footfall and this bustle of activity contributes to the character of the conservation area.

18. In relation to this character and appearance, the existing use operates behind a shopfront granted planning permission in September 2012. The prominent window display attracts interest and the activity generated by the counter just inside the entrance is consistent with the character of Piccadilly. I am therefore satisfied that the use of the appeal premises for a *sui generis* mixed use comprising a retail shop and a café/restaurant preserves the character and appearance of the Mayfair Conservation Area.

19. The City Council is concerned that, if the existing use was permitted to continue, it would encourage the conversion of other A1 retail units in the area. However, it is a fundamental planning principle that each case is considered on its own merits. My decision to allow this appeal is based purely on the particular facts of this case and, specifically, the benefits in terms of supporting economic growth and promoting customer choice that are derived from the bespoke characteristics of this mixed use. These particular circumstances will rarely, if ever, be repeated and it is most unlikely that allowing this appeal will serve as a precedent for permitting the loss of other A1 units in the area.

20. The reason for issuing the enforcement notice refers to a number of other policies in the development plan, specifically Policy S24 of the City Plan and Policy TACE 8 of the UDP. The latter relates to entertainment uses which will generally be permissible within a CAZ, including restaurant and café uses below 500 sq m gross floorspace, and indicates that permission will generally be granted provided that there is no adverse impact in terms of, for example,

noise, smells and increased late night activity. Policy S24 indicates that new entertainment uses will need to demonstrate that they do not adversely impact on residential amenity or the character and function of the area.

21. I have already found that the use of the appeal premises for a *sui generis* mixed use comprising a retail shop does not itself adversely impact on the character and function of the area. In terms of residential amenity, I understand that the breach of planning control was initially brought to the City Council's attention by complaints from members of the public, although the City Council does not explain whether these complaints related to the living conditions of local residents. However, the appellant explains that the current use of the appeal has taken place since July 2012 without attracting any complaints from local residents. The City Council does not dispute this, although it does point to a number of recent offences in relation to commercial waste associated with the appeal premises being deposited on the public highway. Whilst the latter clearly has an adverse impact on the character of the area, this appears to be a recent and intermittent problem that is already being addressed by the City Council's environmental protection services. I therefore have no evidence to suggest that in overall terms the current use of the premises has any adverse impact in terms of noise, smells and increased late night activity. I am therefore satisfied the use generally accords with Policy S24 of the City Plan and Policy TACE 8 of the UDP.

Conditions

22. The City Council has suggested a number of conditions should I be minded to allow the appeal. I have considered these conditions against the tests set out in the Planning Practice Guidance and, where necessary, have amended them to accord with those tests.

23. The first condition suggested by the City Council is that no raw or fresh food should be cooked on the premises. The reason for this suggested condition is that the City Council does not have sufficient information to show that extraction equipment could be provided to deal properly with cooking smells. However, the current use has been taking place for some four years now without generating any complaints in this regard. Moreover, there are other regulatory powers available to the City Council should cooking smells become a problem in the future. I therefore consider that this condition is not necessary.

24. In order that the use does not become unrestricted, and to secure the A1/A3 split of uses that has formed an important consideration in my decision to the allow this appeal, a condition limiting the number of customers seated inside the premises to the existing maximum of 56 is both necessary and reasonable. In the interests of safeguarding residential amenity in the wider area, I consider that a condition limiting opening hours to those already in operation is both necessary and reasonable.

25. The City Council also suggest that a window display should be retained across the whole frontage. This would negate the use to be permitted and therefore would not be appropriate. However, given that the activity generated by the existing window display is important to the character and function of the area, and also having regard to the appellant's view that the economic viability of the business is dependent upon the two elements working in unison, I consider that a condition requiring the retention of the existing window display is necessary. I shall therefore amend the City Council's condition accordingly.

26. In response to the recent offences in relation to commercial waste associated with the appeal premises being deposited on the public highway, the City Council proposes a condition requiring the submission of details for the storage of waste and materials for recycling. I note that the provision of storage for waste is a requirement set out in Policy TACE 8 of the UDP. However, the City Council has provided evidence of fixed penalty notices being served for this offence on just two occasions in the period of some four years during which the current use has been taking place. Although I do not dismiss lightly the impact on the character of the area that results from the storage of waste on the public highway, I am not convinced that this level of offending amounts to a persistent problem in this respect, such that the condition proposed is necessary or reasonable.

27. Given that the lease of the property is due to expire in 2019 and that there is a possibility that the wider site may thereafter be re-developed, the appellant has indicated that a temporary permission would be acceptable. However, I have found the use to be acceptable on its own merits, such that there would be no planning reasons why the use should not continue should the site not be redeveloped in the short term and the lease extended. Consequently, a temporary permission would not be appropriate or necessary in this case.

Conclusion on the ground (a) appeal

28. Having regard to the above, I conclude that planning permission ought to be granted. The appeal on ground (a) succeeds and planning permission will be granted, subject to the conditions that I set out in the Formal Decision below.

The appeals on grounds (f) and (g)

29. Given that the enforcement notice will be quashed as a consequence of my decision to allow the appeal on ground (a), the appeals on these grounds do not fall to be considered.

Formal Decision

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

31. 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 material change of use of the ground floor of the Property from a travel agency (Class A1 use) to a mixed use comprising a retail shop and a café/restaurant (Sui Generis use) at 73 Piccadilly, London W1J 8HS, as shown on the plan attached to the notice, subject to the following conditions:

    1. There shall be no more than 56 covers or chairs provided inside the premises for customers at any one time.

    2. Customers shall only be permitted on the premises between 07:00 and 23:00 hours on any day.

    3. The window display of goods for sale within the premises shall be retained.

Paul Freer

INSPECTOR