
Appeal Decision

Site visit made on 25 October 2016

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 27 October 2016

Appeal Ref: APP/X5990/C/16/3146239

127 Praed Street, London W2 1RL

- 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 Sergio Faria against an enforcement notice issued by the City of Westminster Council.
 - The enforcement notice was issued on 4 February 2016.
 - The breach of planning control as alleged in the notice is: the change of use from a shop (Class A1) to a café (Class A3) and the installation of an extract duct at the rear to facilitate the use of the premises for Class A3 purposes.
 - The requirements of the notice are as follows:
 - 1) Cease the use of the ground floor premises as a café (Class A3 use) ; and
 - 2) Remove the extract duct shown outlined by red lines in Photographs A and B.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on grounds (a) and (d) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is allowed in part and dismissed in part (see formal decision below).

Background information

2. The appeal premises comprise the ground floor commercial unit of a three storey building located within the Secondary Frontage of the Praed Street District Centre (PSDC) and within the North Westminster Economic Development Area (NWEDA). The building is not a listed building but lies within the Bayswater Conservation Area (BCA). The upper floors are in separate residential use and the adjacent ground floor premises are in retail use (see later). The one at Nos 129-131 was refused planning permission, on appeal, in January 2010 for a change of use to a mixed A1/A3 use.

3. An application for planning permission (14/01410/FUL) for the use of the appeal premises as a café was refused on 11 December 2014. An application for a Certificate of Lawfulness (LDC) of existing works for '*Retention of extract duct at rear of restaurant*' (14/08107/CLEUD) was submitted on 15 August 2014 but was deemed to be refused on 24 June 2015 due to a lack of required information being submitted, including scaled plans. I have now considered, therefore, both the alleged change of use and the operational development directly related to the change of use.

The appeal on ground (d)

4. To be successful on this ground of appeal the onus is upon an appellant to conclusively show that, on the balance of probabilities, the property has been in use as a Café (Class A3) for a continuous ten year period prior to the issue of the enforcement notice and that any directly related operational development was similarly necessary in relation to that use. The relevant starting date is 4 February

2006 and it must be shown that the café (Class A3) use was continuous and that any associated development was in place at least 10 years prior to the date that the enforcement notice was issued.

The appellant's case

5. The appellant contends that the Class A3 use started in the year 2005 and that, up until that time, the premises were in use as a travel agency. It is stated to have been rented to a *Japanese Sushi Restaurant* at that time; to have sold hot food and to have had tables and chairs. This operation is said to have gone out of business and the premises were then rented out to another operator *Madeira Patisserie* in 2008.

6. In 2013 *Madeira Patisserie* rented out the premises to a Mr Victor de Silva. He continued with the same café layout until 2014 when the business was transferred to the appellant. It is stated that no changes to the café layout were made during these changes in tenure. The landlord of the premises wrote to Westminster City Council and set out the above chronological details. Documents submitted to corroborate this history include an invoice to *Madeira Patisserie Ltd* from *J S Madeira Builders Ltd*, (dated 21 -2-08) and several invoices to '*Madeira Group*' and *Madeira Café* from *J A Glover* and from *Kinsman Air Systems* (dated between 17/2/09 and 5/01/11).

The Council's case

7. The Council's evidence clearly contradicts that which is put forward on behalf of the appellant. It is clear that Council officers inspected the site on 2 March 2006. They determined that, at that time, the premises still appeared to be a travel agent (Class A1). This is evidenced by a dated photograph (C) submitted by the Council. This clearly shows the front of the premises and the main signage was entitled '*BTS WORLD TRAVEL*' and '*WE CLAIM TO BE THE CHEAPEST IN TOWN*'. At that time, therefore, it is difficult to conclude that the premises were in use as a café.

8. On 2 May 2006 another dated photograph (D) shows the premises operating as a Sushi Bar. However, this was determined to be in A1 (retail) rather than in A3 (café or restaurant) use and there was no associated extract duct to the rear at that time. There is nothing in the submissions on behalf of the appellant to challenge the Council's evidence.

9. Following a complaint in October 2006 a number of inspections were carried out by the Council. The premises were closed during these inspections but the signage was still that of the Sushi Bar. A photograph (E) dated 27 November 2006 shows the Sushi Bar signage with the security grille lowered.

Assessment

10. Having considered all of the evidence it is my view that, on the balance of probabilities, the premises cannot have been in full use as a café (Class A3) for a continuous 10 year period from 4 February 2006. On 2 March 2006 the photograph clearly shows the travel agency frontage and the evidence relating to the Sushi Bar clearly indicates a retail, rather than Class A3 usage. The submitted invoices only give snapshots of the situation and do assist in defining the use over the required 10 year period. Furthermore, in answer to section 5 of the Planning Contravention Notice, dated 16 May 2006, it was also stated that the Sushi Takeaway and Café use did not commence until 10 April 2006. This reinforces my view that the appellant has not shown that a continuous A3 use could not have taken place from a period of ten years prior to the issue of the notice.

11. Turning to the operational development, the extract fan was clearly installed at a later date to facilitate the use of the premises for the eventual unauthorised Class A3 use. It has been there for more than 4 years but less than 10. Thus, on the basis of *Murfitt v Secretary of State for the Environment (1980) 40P & CR*, it is not immune from enforcement action and the 10 year rule also applies to this installation. The appeal must fail, therefore, on ground (d).

The appeal on ground (a)

12. The main issues are firstly the effect of the use on the local shopping frontage, secondly the effect on the living conditions of nearby residents and, thirdly the effect on the character and appearance of this part of the conservation area.

Effect on the local shopping frontage

13. The main policies relating to the protection of the retail functions in Westminster are policy S21 (Retail) of the Westminster City Plan (WCP) and policy SS6 (The District Centres) of the Council's Saved Unitary Development Plan (UDP). These seek to protect retail areas and to enhance their vitality and viability by maintaining their predominantly retail function. These policies accord with those set out in the National Planning Policy Framework (NPPF) which seek to build a strong competitive economy and ensure the vitality of town centres. In reaching my conclusions I have had regard to the fact that the NPPF has a presumption in favour of sustainable development.

14. In relation to Secondary Frontages such as this one, policy SS6 states that A3 uses will be allowed at ground level where they would:

1. not harm the vitality, viability, character or frontage of a centre;
2. where the total length of secondary frontage in non-A1 use at ground level would not exceed 45%;
3. where the proposal would not lead to or add to a concentration of non-A1 units in any individual frontage;
4. where it would not result in more than 3 non-A1 units located consecutively in a frontage and
- 5 the proposal would not involve the loss of an A1 unit last used as a local convenience shop, or reduce the range of local convenience shops in the centre.

15. The uses adjacent or close to the appeal property are a Class A1 Coffee Shop at No 129; a Class A1 Bakery at No 131; a Class A1 Grocery at No 125 and a Class A1 ironmongers at Nos 121-123. Therefore, No 127 does not contravene criterion 4 above and, if it is taken that the previous use of 127 was as a Class A1 (rather than A3) Sushi Bar, it does not contravene criterion 5.

16. It does however contravene criterion 2. The Council indicates that the most recent Use Class survey in the PSDC frontage carried out in 2012 shows that the non-retail uses amount to over 59%. It is not clear whether the 2012 figure included No 127. However, even if not included the figure was well over the 45% policy target. This figure is considered to be the maximum to retain the balance of uses in order to retain the vitality and viability of the retail uses in this part of Westminster.

17. Having walked the length of the PSDC frontage, it is clear that the non-A1 uses are more concentrated closer to Paddington station. Furthermore, some of these are national or multinational operations which take up more than one unit along the frontage. It is not clear how these double units were counted in relation to the 2012 survey but it is clear that towards the west of the frontage and close to the station, there are Class A3 uses which dominate the street scene and contravene the policy

SS6 criteria. Further to the east and closer to Edgware Road the A3 uses, including the unauthorised one at no 127, are more evenly spaced. To the east there are 5 A1 units (counting one as a double; the ironmongers) before the next A3 restaurant at No 115. To the west there are 3 A1 uses before the next A3 use at 135. Thus, between 115 and 135 the appeal premises is/would be only the only A3 use in a run of nine properties. Towards the east and away from the station, therefore, the character of the frontage is predominantly retail. On balance, as one travels further from the station towards Edgware Road, the character of the frontage changes and the A3 uses are not so obvious.

18. The single unit appeal premises (with five A1 uses immediately to the east of it and three to the west) is not a double unit and only has 22 covers in rather a small area. Although unauthorised it has been in use as a café since well before the last survey was carried out. I acknowledge that its continued use would still result in the 45% figure being well breached. However, because it is well away from the station, a single unit and a unit roughly in the middle of a long run of A1 retail units, I do not consider that its continued use as a café would be harmful to the vitality and viability of this retail part of Paddington. It is the more concentrated and consecutive A3 uses nearest to the station which are harmful to the vitality and viability of the PSDC.

19. Thus on policy grounds, I find this small scale A3 use to be acceptable because of its specific location within the PSDC. Because of the particular positioning and circumstances of this case I do not consider that allowing the change of use would lead to the Council having difficulties with similar applications. Each case must, in any case, be assessed on its merits and in this case and for the reasons set out above, I find that a change of use from Class A1 to Class A3 is acceptable on policy grounds.

Effect on living conditions

20. Clearly in this part (and other parts) of Westminster residents might not necessarily expect a particularly quiet environment. The obvious traffic noise; the noise generated by the already numerous mixed uses and the generally noisy and busy area around the station and the hospital is bound to result in higher levels of noise and disturbance than in some other more quiet residential parts of the City. In addition to this it is not unreasonable to assume that residents will experience odours from the food based establishments.

21. Residents along this part of Praed Street are clearly aware of the aural environment and the comings and goings to both Paddington Station and St Mary's hospital. However, any resident in the area should also be able to have a reasonable expectation that the Council will aim to find a balance of factors (within such a mixed use area), with the aim of ensuring that the living conditions of residents are protected as much as is reasonable or practicable.

22. In line with UDP policy TACE 8, permission will generally be granted where the Council is satisfied that any use or development will not have any adverse effect on residential amenity or the quality of the local environment. In this case there is no acoustic report and the Council is unable to assess whether or not the extract installation complies with their noise policies. In addition it is noted that the duct does not extend beyond the roof height of the building and I agree with the Council that there is clear potential for it to cause odour issues for residents.

23. Even though there have been no formal complaints about the extract system with regards to noise and odour, I do not find the installation to be acceptable. It has not been shown that the extract system accords with the aims of the NPPF; policy

7.15 of the London Plan; policy S32 of the WCP and UDP policy TACE8 which seek to minimise noise and to ensure that changes of use from A1 to A3 do not have any adverse effect through the generation of noise or smells. The proposal in relation to the extract system as installed should, therefore, be resisted.

Effect on character and appearance of this part of the conservation area

24. I do not consider that a café use is harmful to the character and appearance of the conservation area. However, having seen the extract duct and the submitted photographs I share the Council's concerns about its visual impact. In my view the duct is an unsightly and visually dominant fixture which looks completely out of place, even in this back area location. It is also crudely fixed to the brickwork. Whilst acknowledging that there are other extract ducts to the rear of the frontage premises, this one is distinctly noticeable from nearby residential windows. As such it neither preserves nor enhances the character of the conservation area.

25. I consider that the works are contrary to policy DES6 which seeks to avoid unsightly alterations as well as to DES5 which seeks to ensure that such ducting is encased within existing structures where practicable. The installation is also contrary to the NPPF policy which requires good design (section 7) and indicates that permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions.

Overall conclusions and the planning balance

26. For the reasons set out above I have found that the principle of the change of to be acceptable. However, I have also found that the extract duct as installed is harmful. I consider therefore that a split decision is appropriate and will grant planning permission for a change of use subject to a condition relating to the provisions of an acceptable extract system which is visually and aurally acceptable. However, planning permission for the duct as installed will be refused. The notice will be varied accordingly to remove the requirement that the café use should cease but retaining that which relates to the extract duct. The notice will be upheld in relation to the harmful operational development carried out.

Other Matters

27. The Council in reaching its conclusions considered the permitted development rights under the GPDO 2015, even though this is not applicable retrospectively. As indicated by the Council it is a material consideration as to whether enforcement action is reasonable and proportionate. For the reasons set out above I consider that the operational development is unacceptable.

28. In reaching my own conclusions on the grounds of appeal I have taken into account all other matters raised by the Council and on behalf of the appellant. These include the full planning history; the initial appeal documents (invoices etc); details of the application proposals; references to policy; hours of opening; the detailed ground (d) arguments (added 21 April 2016) and all of the photographic evidence. However, none of these carries sufficient weight to alter my conclusions on the grounds pleaded and nor is any other factor of such significance so as to change my decision that the appeal should succeed in part (the change of user) and should fail in part (the operational development).

Formal Decision

29. The appeal is allowed in part on ground (a) and planning permission is granted for the change of use from a shop (Class A1) to a café (Class A3) at 127 Praed Street, London W2 1RL subject to the following condition:

'The change of use hereby permitted shall cease within 7 days of the failure to meet any one of the requirements set out in i) to iv) below:

i) Within 6 months of the date of this decision, details of an extract ducting system, including full design details and a noise report shall be submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.

ii) If within 11 months of the date of this decision the local planning authority refuse to approve the scheme, or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.

iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.

iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition the scheme shall thereafter remain in use.

30. I direct that the enforcement notice be varied by deleting Requirement No 1) – '*Cease the use of the ground floor premises as a café (Class A3 use)*' - in full in section 5 of the notice, WHAT YOU ARE REQUIRED TO DO.

31. Otherwise the appeal is dismissed and the enforcement notice is upheld as varied and planning permission is refused on the application deemed to have been made under section 177(5) of the Act for the extract duct shown outlined by red lines in Photographs A and B (attached to the notice) to the rear of 127 Praed Street, London W2 1RL.

Anthony J Wharton

Inspector