
Appeal Decision

Site visit made on 14 December 2016

by John Whalley

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

Decision date: 21 December 2016

**Appeal A – Enforcement notice A: ref: APP/X5990/C/16/3150618
117a Harley Street, London W1G 6AT**

- The appeal was made by Kool Pharma Ltd under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the City of Westminster Council.
- The notice was issued on 15 April 2016.
- The breach of planning control alleged in the notice was: Without the requisite planning permission, and within the last 10 years the unauthorised and material change of use of part of the basement and front basement vaults of the property, as shown shaded red on 'Plan A' attached to the notice from a medical healthcare clinic (Class D1) to a pharmacy (Class A1).
- The requirement of the notice is to: Cease the use of part of the basement and three front basement vaults of the property as shown in the area shaded red in 'Plan A' attached to the notice as a pharmacy (Class A1).
- The period for compliance with the requirement is 3 months.
- The appeal was made on grounds (b) and (f).

Summary of Decision: The enforcement notice is upheld

**Appeal B: Enforcement notice B: ref: APP/X5990/C/16/3150679
117a Harley Street, London W1G 6AT**

- The appeal was made by Kool Pharma Ltd under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the City of Westminster Council.
- The notice was issued on 15 April 2016.
- The breach of planning control alleged in the notice was: Without the requisite planning permission, and within the last 4 years the installation of an air-conditioning unit, associated brackets, pipework, fixtures and fittings within the front basement lightwell of the property as shown edged in red in 'Photograph A' attached to the notice.
- The requirements of the notice are to:
 - a) Remove the unauthorised air-conditioning unit installed within the front basement lightwell of the property as shown edged in red in 'Photograph A' attached to the notice; and
 - b) Remove all brackets, pipework, fixtures and fittings associated with the air-conditioning unit within the front basement lightwell of the property.
- The period for compliance with the requirements is 3 months.

- The appeal was made on ground (f).

Summary of Decision: The enforcement notice is upheld

Appeal development

1. The appeal premises, No. 117a, Harley Street, is part of the basement to the 5 storey building. The Council said the lawful use of the basement, ground floor and first floor was as a Class D1 medical healthcare clinic, (Town and Country Planning (Use Classes) Order 1987 (as amended)). That was not disputed. The upper floors were said to be in Class C3 flats uses.
2. The Council said the part covered front basement lightwell of the property and 3 front basement vaults had been changed from the Class D1 use to a Class A1 retail pharmacy use with ancillary consulting/beauty treatment rooms and associated works, including the fitting of an air conditioning unit in the basement lightwell. At the time of the appeal site inspection, there were 2 small consulting rooms and a separate small medicine dispensing room set up within the discrete appeal premises part of the basement.

Procedural matter

3. At the appeal site inspection, it was noted that the air conditioning unit, the subject of Appeal B, had been moved to a less prominent position close to the doorway into the basement. Also, the Council's representative said that the internal layout had been changed since the investigation into the alleged breach of planning control that led to the issue of the enforcement notice had been carried out.
4. In dealing with this appeal, considering whether or not there has been a breach of planning control, the relevant date is that of the issue of the notice. However, there can be a significant time between a contravening use being detected and an enforcement notice being issued. There may also be a considerable delay before an appeal is decided. The fact that, for example, residential caravans had been removed from a site a short time before the issue of the notice cannot justify an argument that ground (b) should succeed because the use was not in being at the date of issue or because the use had changed between the issue of the notice and an appeal being decided. The last use of the site was the unauthorised use the subject of the notice and that remains the position. Therefore the situation can arise where an enforcement notice is upheld, because it was not shown that there had not been a breach of planning control, even though the unlawful use had ceased or the operational development removed. In that situation, the enforcement notice would have no directly adverse effect, unless an unlawful use was resumed or further unlawful development was carried out.

Appeal A – APP/X5990/C/16/3150618 - pharmacy use*Ground (b) appeal*

5. The appeal on ground (b) asserts that the breach of planning control alleged in the enforcement notice has not occurred as a matter of fact. What the Appellants said was that the pharmacy activity enforced against was ancillary to the lawful medical healthcare clinic use of the appeal premises. That is a ground (c) matter – that there had not been a breach of planning control.

6. It was not said that a pharmacy activity had not, as a matter of fact, taken place. Therefore, the ground (b) appeal cannot succeed. But particularly as both parties considered whether the pharmacy use at No. 117a required planning permission, I deal with it as an implied ground (c) appeal.
7. The Appellants said the lawful primary use and the actual use of the basement premises was as a health clinic with an ancillary pharmacy. The basement consisted of 2 small treatment/consultation rooms and a pharmacy room from which medicines were prescribed and dispensed to patients attending the clinic. The health clinic was also a travel clinic where medicines were required to be on site. They were housed within the in-house pharmacy for such purposes.
8. The Council's case was that the appeal pharmacy was physically separated from the medical clinic that occupied the remainder of the basement and the 2 floors above. Openings that had existed between the 2 areas in the basement had been closed up. Access to the lawful clinic and the appeal pharmacy were now separate. All pedestrian traffic to and from the appeal premises pharmacy was gained along the single stairway access from the side of the property in Devonshire Street. The medical clinic was accessed from Harley Street. No evidence from the operators of the adjoining medical clinic was produced that might have shown that the appeal pharmacy was any part of their activities.
9. The Appellants had not claimed that their pharmacy activity was connected with any other part of the building. They occupied only that area of the basement shown on the enforcement notice plan. That is the planning unit. However, no evidence was produced to show that planning permission had not been required for the formation of what appears to be a separate planning unit.
10. Section 55(2)(f) of the Act says: The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land — (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class. From that, it could be assumed that s.55(2)(f) covers subdivision of a planning unit, where a new planning unit remains within the same use class. However, the High Court in the case of *Richmond upon Thames LBC v SSETR [2001] JPL 84* said that where the change in the size of the planning unit affected the character of the use, a material change of use amounting to development had occurred, even though there was no change in the use class. It may be concluded that whilst the sub-division of a planning unit may not normally bring about a material change of use, a change in the character of the use may amount to a material change of use. In this instance, the basement stairway access from Devonshire Street is used exclusively by the Appellants and their clients. That has changed the character of the use of this part of the building. In my view, that amounted to a material change of use of the property that required planning permission. I come to that view separately from a consideration as to whether there had been a change of use from a Class D1 use to a Class A1 use.
11. There is also the question whether the Appellants' use of their part of the basement was a Class D1 medical health care clinic with an ancillary pharmacy use, or whether, at the time of the enforcement investigation, the primary use of the appeal premises, (that area of the basement shown on the enforcement notice plan), was as a Class A1 retail pharmacy. A change of use from a Class D1 use to a Class A1 use requires planning permission.

12. A retrospective application for use of part basement floor as a retail pharmacy (Class A1), at No. 117a was refused planning permission in November 2014. That is not determinative of the matter before me. But other than asserting otherwise, the Appellants did not produce any substantive evidence to show that, at the time of the investigation by the Council into the use of No. 117a, it was not being used primarily as a retail pharmacy with consulting advice and possible minor ancillary treatment available. That was the Council's evidence. It may be that the balance of retail and medical clinic uses have changed since the Council's investigation. If so, that does not assist the Appellants. In a legal ground of appeal such as this, the burden of proof lies with the Appellant. The case of *Nelsovil v MHLG* [1962] 1 WLR 404 is authority for that position. The test of evidence is the balance of probabilities, (*Thrassyvoulou v SSE No 1* [1984] JPL a732). It was not shown that a material change of use of No. 117a had not taken place. An appeal on ground (c) would have failed.

The appeal on ground (f)

13. The Appellants produced no statement in respect of the ground (f) appeal. No lesser steps than to cease the Class A1 use were suggested. The requirement of the notice is entirely reasonable and appropriate. If the use of No. 117a can be shown to have changed back to a predominantly medical clinic use and the requirement of the notice thereby being met, the upheld enforcement notice would have no adverse effect on the Appellants' activities. In that circumstance, the Council may wish to consider whether or not, if the division of the basement into 2 planning units required planning permission, compliance with the notice's requirement conferred that permission by virtue of s.173(11) of the Act. The appeal on ground (f) fails.

Appeal B – APP/X5990/C/16/3150679 - air conditioning unit - ground (f)

14. Appeal B deals with the air conditioning unit installed alongside the stairs leading down to the basement No. 117a. The Appellants had, subsequent to the issue of the notice, moved the unit to a less conspicuous position. Whether the new siting required planning permission is not a matter before me. It was not disputed that the original siting of the unit required planning permission.
15. Here the Council sought removal of the air conditioning unit to remedy the perceived harm to the appearance of the building. That comes under s.173(4)(b) of the Act. It is not open to me, in the context of this ground (f) appeal, where there is no ground (a) appeal, to consider the merits of the retention of the air conditioning unit, nor to consider works that might reduce any harm whilst retaining an installation that required planning permission. The requirements of Notice B to remove the unit and its associated fittings are apt, reasonable and not excessive. The appeal on ground (f) fails.

FORMAL DECISIONS

Enforcement notice A: ref: APP/X5990/C/16/3150618

16. The enforcement notice is upheld.

Enforcement notice B: ref: APP/X5990/C/16/3150679

17. The enforcement notice is upheld.

John Whalley

INSPECTOR