
Appeal Decision

Inquiry held on 7 December 2016

Site visit made on 7 December 2016

by Nigel Burrows BA MRTPI

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

Decision date: 12 January 2017

Appeal Ref: APP/X5990/C/16/3147923 26 Strutton Ground, London, SW1P 2HR

- 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 Hossein Ghashtasebi against an enforcement notice issued by City of Westminster Council.
- The enforcement notice, ref: 10/46085/I was issued on 8 March 2016.
- The breach of planning control as alleged in the notice is the unauthorised material change of use of the ground floor of the Property from a Class A1 (retail) use as a sandwich shop to a Class A5 (hot food take-away) use, and associated works which facilitate this material change of use, which include the installation of the large extract duct on the rear of the property, a smaller extract system on the shopfront and the installation of food storage and cooking equipment.
- The requirements of the notice are:-
 - (a) Cease the unauthorised Class A5 (hot food takeaway) use at the premises;
 - (b) Remove any and all items brought onto the site and which facilitate the Class A5 (hot food takeaway) use, which include the following:-
 - i. The extract duct at the rear of the premises (as shown in Photograph A);
 - ii. The extract installed on the shopfront (as shown in Photograph B);
 - iii. The food storage unit (as shown in Photograph C);
 - iv. The deep fat fryer units and grill unit (as shown in Photograph D, marked D1, D2, D3 and D4);
 - v. The deep fat fryer units (as shown in Photograph E, marked E1 and E2).
 - (c) Following the removal of the extract duct at the rear and the extract system on the shopfront, restore the property to its former condition, ensuring all remedial works are carried out in materials and detailing to match the existing fabric of the building.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) and (d) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld

Procedural Matters

1. At the Inquiry an application for a partial award of costs was made by the Council against the appellant. This application is the subject of a separate decision.
2. All evidence to the Inquiry was given on oath.

Background

3. The appeal relates to the ground floor of a three storey building, which forms part of a terrace of properties in mixed use situated on the west side of Strutton Ground in
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Westminster. The ground floor of the building is occupied by the appellant's business, known as 'Strutton Fried Chicken'. The upper floors are occupied as a self-contained flat.

4. According to the Council, the building lies within a parade of properties which form part of the Core Shopping Frontage in the Pimlico sub-region of the Central Activities Zone (CAZ), as designated in the Westminster City Plan.¹ The Council confirms that it also forms part of the Strutton Ground/Artillery Row Local Centre, a designated Local Shopping Centre. In addition, the building lies within the Broadway and Christchurch Gardens Conservation Area, where it is identified as 'an unlisted building of merit'.

The appeal on ground (d)

5. The onus is on the appellant under ground (d) to make out the case that, at the time the enforcement notice was issued, it was too late to take action against the matters stated in the notice. The enforcement notice is directed at a material change of use of the ground floor of the building to a Class A5 (hot food take-away) use. Consequently, the appellant needs to show that the matters alleged in the notice occurred at least 10 years before it was issued (which was on 8 March 2016). As indicated in the heading above, the notice also attacks the works which facilitated the material change of use, including the installation of a large extract duct at the rear of the property, a smaller extract unit upon the shopfront, together with the installation of food storage and cooking equipment.
6. The appellant's stance at the Inquiry was that the premises had operated for 8 years as an A5 use - albeit at the time the enforcement notice was issued the overall period of use of the premises for non-retail purposes was 13 years.² In effect, the appellant alleges the premises were used for purposes within Class A3 for the remaining period.
7. The appellant evidently purchased the premises in March 2008, at which time it was trading as 'Café au Lait'. The appellant says that within a few months the premises were adapted to a hot food takeaway (HFTA) and its signage was changed to 'Strutton Fried Chicken'. A planning application to use the premises for A5 purposes was refused in July 2010.³ A further application for an A5 use was refused in February 2011.⁴ An appeal against the Council's decision was turned away by the Planning Inspectorate.
8. The appellant's case is mainly reliant on a letter accompanying the second application for an A5 use, undated photographs of the shopfront, a lease agreed in 2000, an email enquiry during 2003 regarding a proposed use of the premises as a sushi bar, plus photographs of menus and an exchange of correspondence with the Council between 2010 and 2016. Three witnesses also gave evidence at the Inquiry on the appellant's behalf.
9. In weighing the evidence before me, I have borne in mind that the appellant's evidence does not need to be corroborated by independent evidence in order to be accepted. However, as the Council points out, it is also apparent that the premises were not within the control of the appellant for the entire 10-year period prior to the issue of the notice. This may have given rise to certain assumptions on the part of the appellant.
10. The letter accompanying the second application for an A5 use was from the Agent, Mr Norman White. He stated that since the original application was made, he had received additional information to show the premises were trading as an A3 use at least since 2003. He asked the Council to take this information into account. The additional information was addressed in the Planning Officer's report, but it was concluded this information was insufficient to demonstrate the existence of a lawful A3 use. The information before the Council apparently included a VAT return and a solicitor's letter. However, the appellant has not placed this particular information before the Inquiry.

¹ Westminster City Plan: Strategic Policies, adopted in November 2013 -revised version adopted in July 2016

² Paragraph 1.3 of Mr Fatherazi's Summary of Proof

³ Ref: 09/00341/FULL

⁴ Ref: 10/10184/FULL

11. As noted earlier, the shopfront photographs are undated. Mr Fatherazi (acting as the appellant's advocate and expert witness) accepted under cross examination that they were probably taken in 2008. They do not help to establish the nature of the business during 2006 to 2007, i.e. prior to the appellant's acquisition of the premises. The lease of the ground floor is dated 14 August 2000 and pre-dates the appellant's acquisition. It is for a term of 15 years. The specified use is 'a shop for the retail of clothes within Class A1'. As such, it is difficult to see how this document assists the appellant's case.
12. The enquiry about the use of the premises as a sushi bar is dated 27 March 2003. The correspondent asks the Council whether 'the A1 lease can be used for the proposed business activities'. The Council indicates the use could fall within Class A1 or A3, or it could be a composite use. The Council also states: "*To constitute an A1 use, the overall character of the use would have to remain as a shop. A small amount of hot food and seating can be provided, as long as it is ancillary to the main retail function*". Once again, it is difficult to see how this correspondence assists the appellant's case.
13. The appellant's photographs of various menus are also undated. It is believed they were taken in 2008. In any event, they amount to no more than a snapshot in time. These menus do not provide evidence of the continuity of the use over a 10-year period, nor do they help to establish whether food was mainly consumed within or outside the premises.
14. The correspondence between the Council and the appellant over the period 2010 to 2016 does little to establish the nature of the ground floor use over a 10-year period. The correspondence appears to be concerned, in part, with the application refused in February 2011. At this time permission was evidently sought to retain the A5 use and the full height extract duct on the rear elevation. The Planning Officer's report stated the unit had a lawful A1 retail use, albeit it was occupied by 'Strutton Fried Chicken'. However, the Planning Officer's report⁵ on the 2009 application (which related to a proposed A5 use) stated 'the premises currently trade as a sandwich shop' (i.e. a retail use within Class A1). I attach significant weight to these reports, which appear to provide contemporaneous accounts of the use of the premises at the time of the applications.
15. Turning to the other evidence from the appellant's witnesses, Mr Sidiq (a market trader) indicated he bought hot food from 'Strutton Fried Chicken' and from its predecessor, 'Café au Lait'. However, in answer to the question of whether it was possible to purchase cold food, he was determined to focus only upon hot food sales, which tended to undermine his credibility as a witness. He also appeared vague about the date when 'Strutton Fried Chicken' opened.
16. The evidence from Mr Kaboli was interpreted by Mr Fatherazi - which gave rise to some uncertainty in the answers given. However, Mr Kaboli indicated he had lived in the area since 2004 and knew that occupation of the premises had changed in 2005 and 2008. The latter date appears consistent with the appellant's case, insofar as he acquired the premises in March 2008. Mr Kaboli also said that he first purchased fried food from the premises in 2008.
17. A statement was also presented to the Inquiry from Mr Badiani (originally listed as a witness). Mr Badiani is the main leaseholder. He indicated that, as far as he is aware, hot and cold food was served in 'Café au Lait'. Mr Badiani's statement included undated photographs of the exterior/interior of 'Café au Lait'. Whilst this evidence could not be tested, it is not inconsistent with the Council's stance - namely, in order to determine whether or not a material change of use has occurred, it is necessary to explore the balance of hot and cold food sold from the premises and the balance of food consumed on and off the premises. This is a sound planning principle. It also appears to reflect the Council's stance over the years (for example, the advice given in relation to the sushi bar enquiry).
18. There appears to be no dispute the premises have been used for A5 purposes for about 8 years. However, the evidence before that period is much less conclusive. There is no firm or compelling evidence to demonstrate that, prior to the appellant's acquisition of the

⁵ Dated 9 April 2009

ground floor, the amount of hot food sold from the premises and the manner in which food was consumed tipped the overall balance from an A1 to an A5 use of the premises.

19. I have taken into account the appellant's assertion that the premises were used for A3 purposes during the preceding 5-year period. Nevertheless, here again, there is no firm evidence to demonstrate this was the case, or to show this activity constituted a lawful use of the premises for planning purposes.⁶ Consequently, I see no reason to correct the allegation in the notice by deleting reference to 'A1 use', as offered by the Council.
20. It is well established in planning law that the onus rests with the appellant to make out his or her case. However, on the evidence before me, I find that burden has not been satisfactorily discharged in this particular case. On the balance of probability, I conclude that at the time the notice was issued it was not too late to take enforcement action against the alleged breach of planning control. The ground (d) appeal therefore fails.

The appeal on ground (a)

21. Taking into account all that I have seen and read, I consider there are three main issues in this case. The first is the implications of the development for the vitality, viability, retail function and character of the Strutton Ground/Artillery Row Local Centre. The second is the effect of this development upon the living conditions of residents within the locality, with particular reference to cooking odours, noise and disturbance. The third main issue is the implications of this development for the character or appearance of the Broadway and Christchurch Gardens Conservation Area.

Issue 1: Implications for the Strutton Ground/Artillery Row Local Centre

22. Policy S21 of the Westminster City Plan directs new retail floorspace to the designated shopping centres. The policy states, amongst other things, that existing A1 retail uses will be protected throughout Westminster except where the Council considers the unit is not viable, as demonstrated by long-term vacancy despite reasonable attempts to let. The explanatory text to the policy indicates the concentration of shop uses in designated shopping centres should be maintained to protect their retail attractiveness. It also explains that concentrations of non-retail uses can harm the appearance, character and retail function of a shopping centre. 'Saved' policy SS 7 of the Council's Unitary Development Plan (UDP)⁷ has similar objectives in relation to Local Shopping Centres.
23. The use of the ground floor of the building for a purpose within use Class A5 (or A3) conflicts with these policies. There is no firm evidence before me to show the use of the premises for retail purposes is not viable, or to show that the retail unit was vacant for an extensive period despite attempts to find a suitable occupier. The submissions for the appellant claim there have been a significant rise in the number of non-retail uses within the locality over the last 6 years. It is suggested the change of use of the premises from A1 to A5 use has not resulted in 'any loss to the Borough's shopping profile'. However, on the evidence before me, I find the development has contributed to an unacceptable dilution of the retail offer of the Core Frontage, thereby diminishing the vitality, viability and attractiveness of the Strutton Ground/Artillery Row Local Centre.
24. I conclude the change of use of the premises to Class A5 is contrary to the relevant planning policies that seek to protect existing retail floorspace throughout Westminster.

Issue 2: Living Conditions of Residents

25. There is an extensive mix of uses in the area, including retail and food and drink premises. There is also a significant residential component including a number of flats upon the upper floors of the properties nearby. In this instance, the dwelling most likely to be affected by the A5 use is the flat on the upper floors of 26 Strutton Ground.

⁶ Even allowing for the fact that Use Class A3 was subdivided under the provisions of the 2005 amendment to the Use Classes Order

⁷ City of Westminster Unitary Development Plan, adopted in 2007

26. According to the submissions for the appellant, the only modifications to the building involved the 'enhancement' of the extract duct at the rear of the property. However, this structure appears to have been part and parcel of the works originally carried out to adapt the property to an A5 use (which included the deep fat fryer units cited in the notice). A new extractor was also apparently installed above the shopfront entrance.⁸
27. The appellant claims that recent modifications to the rear extract duct have '*... reduced the amount of odour to almost zero ...*' and '*the Environmental Health Officers have taken care of the issue as well as the noise problem*'.⁹ However, clear and compelling evidence was given to the Inquiry by an occupier of the apartment above the A5 use, who gave a detailed account of the odours caused by the cooking of hot food, the noise associated with the operation of the extract system and its overall visual impact. The submissions from Liberty (the freeholder of the premises, based at 26-30 Strutton Ground) also indicate staff are 'subjected to unpleasant smells emanating from the shop'.
28. In addition, the Council has drawn my attention to numerous complaints received about noise and cooking odours from the extraction units, together with noise associated with customer activity during the evening. The appellant claims the stalls in Strutton Ground Market create some environmental impact within the locality. However, on the evidence before me, it appears the A5 use has a significantly greater impact on the living conditions of the residents above, not least because of the very close proximity of the extract system to their bedroom windows and the more extensive operating hours of the A5 business.
29. There is no firm evidence to show that the nuisance arising from cooking odours, noise and disturbance associated with the operation of the A5 use could be satisfactorily mitigated. I conclude this development conflicts with the relevant development plan policies which seek to protect the amenity of the area from noise and air pollution, including S29 and S32 of the City Plan and 'saved' policies ENV 5 and ENV 6 of the UDP.

Issue 3: Implications for the Conservation Area

30. It is necessary to bear in mind that section 72 (1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 places a general duty upon decision makers with respect to any buildings or other land within a conservation area to pay special attention to the desirability of preserving or enhancing the character or appearance of that area.
31. I have also borne in mind that incremental changes to individual buildings, such as unsuitable alterations, can have a detrimental effect not only on the character and appearance of the building itself, but also upon the conservation area as a whole.
32. The size, bulk and profile of the large extract duct installed on the rear elevation of the building pays little regard to the architectural composition or character of the host building. The structure appears incongruous and is wholly inappropriate to its context. The adverse effect of this large extract duct significantly diminishes the contribution this building makes to its historic surroundings. This extract duct is also readily visible from the upper floors of the surrounding buildings. Overall, it fails to preserve or enhance the character or appearance of the Broadway and Christchurch Gardens Conservation Area.
33. The appellant would be willing to encase the extract duct with brickwork or tiles. However, it is difficult to envisage how this could be done in a way that would enable it to be successfully assimilated into its context. I find the development conflicts with the objectives of policy S25 of the Westminster City Plan and 'saved' UDP policies DES 6 and DES 9.

Overall Conclusions

34. I have taken into account all the other matters raised, however, I find they do not alter or outweigh the main considerations that have led to my decision. For the reasons given above, I shall uphold the notice and refuse to grant permission on the deemed application.

⁸ Albeit at the site visit it transpired that this extractor unit may have been recently replaced

⁹ Paragraph 4.7 of the Proof of Evidence lodged on the appellant's behalf

Formal Decision

35. The appeal is dismissed, the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Nigel Burrows

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Aladdin Fatherazi	Advocate and Expert Witness
Mr Khwaja Noman Sidiq	Market Trader
Mr Faramarz Kaboli	Leaseholder

FOR THE LOCAL PLANNING AUTHORITY:

Ms Stephanie Hall	Of Counsel, instructed by Legal Services Department, Westminster City Council
She called:	
Mr Zia Sarkar	Senior Planning Officer, Westminster City Council

INTERESTED PERSONS:

Mrs Carmen Finescu-Chevalier	Occupier of Upper Floor Flat, 26 Strutton Ground
Ms Rachael Whittaker	Local Resident

DOCUMENTS SUBMITTED AT THE INQUIRY:

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| Document 1 | Letters of notification of the appeal and time, date and venue of the Inquiry, supplied by the Council |
| Document 2 | Appendix D38 to Mr Fatherazi's proof (letter to the appellant from the Council dated 27 October 2010) |
| Document 3 | Letter from Liberty dated 7 December 2016 |
| Document 4 | Witness Statement from Mr Badiani, supplied by Mr Fatherazi |
| Document 5 | Appendices D39 to D42 of Mr Fatherazi's proof |
| Document 6 | Ms Hall's opening submissions for the Council |
| Document 7 | Conservation Audit: Broadway and Christchurch Gardens Conservation Area, supplied by the Council |
| Document 8 | London Plan policies, supplied by the Council |
| Document 9 | Costs application made by the Council |
| Document 10 | List of suggested planning conditions, supplied by the Council |
| Document 11 | Ms Hall's closing submissions for the Council |