The Planning Inspectorate

Appeal Decision

Hearing held on 24 January 2017

Site visit made on 24 January 2017

by B.S.Rogers BA(Hons) DipTP MRTPI

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

Decision date: 3 February 2017

Appeal Ref: APP/X5990/C/16/3149663
45-49 Edgware Road, London, W2 2HZ

- 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 Abouzaki Holdings Ltd against an enforcement notice issued by City of Westminster Council.
- The enforcement notice, numbered MS/30099705, was issued on 30 March 2016.
- The breach of planning control as alleged in the notice is without the requisite planning permission and within the last 10 years the unauthorised and material change of use of the basement and ground floor (as shown edged in red on the attached Plan 2 and Plan 3) and the public highway (as shown shaded green on the attached Plan 4), from a mixed use consisting of a delicatessen and an office (sui generis use) to a new mixed use comprising an office, food/drink storage and distribution space associated with restaurant businesses at separate addresses, a restaurant, and a Shisha smoking place (sui generis use).
- The requirements of the notice are 1) Cease the unauthorised use of the basement and ground floor at the Property (as shown edged in red on the attached Plan 2 and Plan 3) and the public highway (as shown shaded green on the attached Plan 4) as a mixed use comprising an office, food/drink storage and distribution space associated with restaurant businesses at separate addresses, a restaurant, and a Shisha smoking place (sui generis use) and undertake the following steps which facilitate the use: (a) cease the use of the basement area at the Property shown shaded blue in Plan 1 attached, for the storage of food and/or drink other than that sold or stored in association with the use of the Property as a delicatessen/retail shop, and (b) remove all tables and chairs used in association with the consumption of food and/or drink and/or the smoking of shisha at the property from the area shaded blue on the attached Plan 2 and the area shaded green on the attached Plan 4.
- The period for compliance with the requirements is four months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) & (g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.

Summary of Decision: The appeal is allowed and the enforcement notice is quashed.

The enforcement notice

1. The appellants made a number of criticisms about the accuracy of the notice and the accompanying plans. First, it was said that the relevant plans fail to identify the separate basement office area and to show the detailed layout of the ground floor. However, I do not see the need for such detail, given that

the Council's allegation is of a mixed use and that the red line extends around the relevant site area.

2. Second, the appellants object to the description of what they say is private forecourt in their ownership as "public highway". However, whether or not it is, in fact, public highway does not alter the fact that the area in question is clearly identified on the relevant plan. It was agreed at the Hearing that I could, without injustice, correct the description to simply refer to the area shaded green.

3. Third, it was pointed out that the red line did not enclose the former bank vaults which extend beneath Connaught Street. However, the Council made no request for me to correct the notice to include this area and this omission does not appear to cause any injustice to the appellants.

The appeal on ground (b)

4. The ground floor and part of the basement of the appeal property was used as a bank until 2004, with the remainder of the basement in use as a caretaker's flat. Planning permission was granted in March 2005 for *retention of part ground floor and basement for Class A1 (retail)* [Ref: 04/04057/FULL]. In August 2009, a lawful development certificate was granted for *use of ground floor and basement as a delicatessen containing two areas of tables and chairs at ground floor level within the A1 (retail) Use Class* [Ref: 09/04497/CLOPUD]. In December 2013, planning permission was granted for *use of part of basement as offices in connection with the running of the delicatessen and other associated businesses at other addresses* [Ref: 13/01639/FULL].

5. The appellants contend that neither the existing use nor the alleged use is a mixed use. They rely on the 2013 office permission as the basis for creating a separate planning unit. However, whilst it is highly desirable that the former, lawful use is accurately described in the allegation, it is not strictly necessary. It is, of course, necessary for the alleged use to be accurately described. The leading case on the definition of the planning unit relied upon by the parties is that of *Burdle & Williams v SSE & New Forest DC [1972] 1 WLR 1207*.

6. There is clearly a functional link between the office use and the use of the remainder of the appeal premises. Indeed condition no.2 of the 2013 planning permission states *"The offices hereby approved can only be used for administrative functions associated with the ground floor and basement premises at 45-49 Edgware Road and other associated businesses"*. However, the 2013 officer's report acknowledged then that the offices are not purely ancillary to the application premises. Indeed, I was informed that the offices are the headquarters of the appellants' business, comprising 16 restaurants, with 550 employees and a turnover of £22 million. Therefore, the administrative link to the appeal premises can only represent a very small proportion of the entire office business.

7. The offices occupy a physically distinct area of the basement, defined on the plan forming part of the 2013 permission. Although there is a secured access via the delicatessen, there is also a separate access from Connaught Street, via the rear yard. There are 9 full-time and 1 part time office employees with specific administrative functions, with normal working hours of 0900 to 1800, quite different from those of the delicatessen. To my mind, this situation accords most closely with the 3rd category in *Burdle* where there can be two

physically separate and distinct planning units within a single unit of occupation.

8. On this basis, the office use is a distinct planning unit and I believe the appellants are correct to assert that there has been no material change of use to the mixed use as alleged in the notice. This alone could be considered sufficient for the appellants to succeed on ground (b). However, I need to consider other matters before I consider the possibility of correcting the notice.

9. With regard to the alleged food/drink storage and distribution, I can understand the basis for the Council's inclusion of this use in the allegation, particularly as the October 2015 reply to the Planning Contravention Notice (PCN) indicated such a use at that time in connection with 4 nearby premises in the appellants' group. However, that situation appears to have changed soon afterwards. The appellants have pointed to the size of their business operation and to the fact that they have dedicated storage facilities in SW8 and an emerging new factory and distribution facility in Park Royal. As a result, there is no need to use the basement for storage for any other businesses and such a use was not taking place at the time of my site visit. On the balance of probability, I accept that such a use was not taking place at the time the notice was issued.

10. Turning to the alleged A3 use, the use of the ground floor and basement as a delicatessen containing two areas of tables and chairs at ground floor level within the A1 (retail) Use Class was deemed to be lawful in 2009. A ground floor layout plan referred to in the notice indicated 2 sets of tables, 7 in all, with 21 seats. No tables were shown in the basement or on either forecourt. An informative appended to the certificate advised that the proposed use was considered to fall within Class A1 "because the 'eat in' element of the business is ancillary to the retail element." It was agreed at the Hearing that whether a material change of use from A1 to A3 has occurred is not simply a numerical exercise in counting the number of tables and chairs but includes an assessment of the character of the use.

11. The situation observed by my colleague in December 2010 when he concluded that the premises operated as a mixed A1 and A3 use was of 9 tables and 25 chairs (plus padded seating) at ground floor level plus 29 tables and over 80 seats outside on both frontages (Appeal ref: APP/X5990/C/10/2134715). There was no 'primary cooking' but the proportion of eat-in to takeaway trade was not made known to him. He observed that most of the shop front was obscured from view by the large number of external tables and chairs to the extent that, from the outside, the premises looked more like a café than a shop.

12. There still does not appear to be any 'primary cooking' on site. There are facilities for heating food and for the baking of bread, activities that have continued for many years. At my site visit, my initial impression of the character of the use at ground floor level was that of a retail use. There were counters for the sale of ice cream & associated sweets, baklava & cakes, hot & cold drinks, bread and a delicatessen counter. The last of these had both takeaway food containers and plates for eating in. However, despite there being extensive circulation space for retail customers at ground floor level, I observed 11 tables and 19 chairs, plus some padded bench seating; outside, on the Edgware Road frontage were 6 tables and 6 double seats. To my mind,

whilst the presence of tables and chairs outside the premises is not, of itself, determinative, when aggregated with the number inside the premises, this indicates to me a substantial amount of consumption of food and drink takes place on the premises.

13. There was no description of the contents of the basement in the 2010 appeal decision letter. At my site visit, I saw that the relatively small part of it that is open to the public contains a juice counter and both refrigerated and other drink storage. There are also some 5 tables and 14 chairs, which indicates to me a likelihood that a significant proportion of the drinks sold are likely to be consumed here.

14. The appellants' response to the Planning Contravention Notice (PCN) of October 2015 indicated that over 60% of sales at the appeal property were food and drink consumed on the premises. The appellants indicated that this had changed but provided no alternative or updated figures. Taking this into account, together with the mixed retail and café character of the ground floor and the café character of the basement, I come to the view that the present use is a mixed use of A1 and A3 uses.

15. With regard to the alleged shisha smoking, I saw a number of shisha pipes stored in the basement and it is not disputed that such an activity takes place at the appeal premises. This can only legally take place outdoors – in this case the 6 double bench seats and tables along the Edgware Road frontage (the area shaded green referred to in the notice). However, I see little basis for the allegation that, in this case, this is a substantial activity in its own right of such a scale as to trigger a material change of use; the 2015 PCN reply indicated it amounted to just over 1% of sales. Whilst it is more formalised in that it requires purpose-made equipment, it here appears to be appears to me largely akin to cigarette smoking as an incidental activity that might take place whilst consuming food or drink.

16. In conclusion, it appears to me that the office use occupies a separate planning unit in part of the basement. With regard to the remainder of the premises, there appears to have been a material change of use of part of the identified appeal site from A1 to a mixed use of A1 and A3 use. I have considered whether I could fairly correct the notice to reflect this. However, for me to correct the notice so significantly both in terms of the relevant area of the basement and the description of development, excluding 3 of the 4 components of the alleged mixed use would in my view give rise to an injustice on the part of the appellants because neither the allegation nor the accompanying plan would resemble those of the original notice. Accordingly, on the balance of probability, it is my conclusion that the breach of control alleged in the notice has not occurred as a matter of fact. The appeal on ground (b) succeeds and I shall quash the notice.

17. Because of my conclusion on this ground, there is no need for me to go on to consider the remaining grounds of appeal or the deemed application.

Formal Decision

18. The enforcement notice is corrected by replacing "the public highway (as shown shaded green on the attached Plan 4)" in the allegation and in requirement 1) with "the area shown shaded green on the attached Plan 4".

Subject to this correction, the appeal is allowed and the enforcement notice is quashed.

B.S.Rogers

Inspector

Appearances

For the appellants:

Mr K.Hodgson	- Iceni Projects
Mr A Jamali	- Abouzaki Holdings
Ms E.Conwell	- Iceni Projects

For the Council:

Mr N.Inyang	- Senior Planning Officer, L.B.Westminster

Documents

1. Attendance list
2. Letter of notification of Hearing.