

Appeal Decisions

Site visit made on 6 February 2017

by Diane Fleming BA (Hons) MRTPI

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

Decision date: 3 May 2017

Appeal Ref: APP/X5990/C/16/3161343
21-23 Nutford Place, London W1H 5YH

- 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 Ali Heydari against an enforcement notice issued by City of Westminster Council.
 - The enforcement notice was issued on 21 September 2016.
 - The breach of planning control as alleged in the notice is without the requisite planning permission and within the last four years, the installation of a metal-framed screen, as shown outlined in red in Photograph A (appended to the notice) attached at ground floor level to the front elevation of the Property on the pilaster sited at the junction of Nutford Place and Forset Street.
 - The requirements of the notice are a) remove the screen installed at ground floor level to the front elevation of the Property, shown outlined in red in Photograph A (appended to the notice); b) remove all fixtures and fittings installed in association with the screen cited in part (a) above; and c) Repair any damage to the Property caused by the installation and/or removal of the screen.
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

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

Application for costs

2. An application for costs was made by the Council against the appellant. This application is the subject of a separate Decision.

Procedural Matters

3. After the enforcement notice was issued the Council advise that the screen, which is in front of and to one side of the restaurant, was altered. The bracket which held the screen in a fixed position to shield users of the outdoor tables and chairs was replaced with two large hinge brackets and the baton which fixed the screen to the awning above was removed. The screen is now separated into two parts, the upper portion is fixed to the awning above and the lower section can be moved independently of the awning in the manner of a swinging gate. It is now possible to 'fold' the screen across the front of the restaurant when not in use. However, it is the structure of the screen as it was at the time when the notice was issued that is the appeal before me now.
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4. There is another appeal relating to this site which is the subject of a separate decision (Ref: APP/X5990/W/17/3166786).

The appeal on ground (c)

5. Under a ground (c) appeal the onus of proof is on the appellant to show that there has not been a breach of planning control. A breach of planning control comprises the carrying out of development without the required planning permission. The appellant claims that the screen is a temporary structure which is not permanently fixed to the ground. It is only used when the outside seating area is in use and the weather is inclement otherwise it is stored in the restaurant when not in use. As it is a lightweight structure it is anchored to the ground by a hook when in use. Neither the hook nor the screen are considered to be building operations amounting to development requiring planning permission.
6. The Council's case is that the screen was permanently in situ as it had been seen in place by them on many occasions. It was also fixed to the awning and the pilaster on the building. They formed the view that the screen was specifically designed to provide a solid boundary to the side of the outdoor seating area and they refer to established case law¹ to support their case.
7. It is necessary to consider whether the screen is a building. Buildings are defined by section 336 of the Act as including any structure or erection and any part of a building but not plant or machinery within a building. Case law has established three primary factors as decisive of what is a building. These are (a) that it is of a size to be constructed on site as opposed to being brought on site, (b) permanence and (c) physical attachment. No one factor is decisive. The Council rely on two cases and I have had regard to them in determining this appeal.
8. Neither party provide any dimensions of the screen but at the site visit I saw that it was a sizeable structure extending in height from the bottom of a large shop front fascia to ground level, with a depth marginally short² of 3m. The appellant refers in his ground (a) appeal to the depth of the screen projecting less than the depth of the outside seating area. From the Council's photographs I could see that it was firmly attached to the shop front. Due to its size, I consider it would probably have taken more than one person to fix it into position. With regard to physical attachment, I consider the nature of its fixing, including the anchoring hook, meant that it was intended to be permanently in place and permanence has to be construed in terms of significance in the planning context. The Council advise that the screen was in position from at least December 2015 until it was altered sometime between 21 September 2016, when the notice was issued, and when the Council visited the site on 20 December 2016 and noticed the changes.
9. I find the size of the screen, the nature of its previous attachment to the building and its apparent permanent presence on site, as witnessed and documented by the Council, lead me to conclude that it is a building. As set out in section 57(i) of the Act, planning permission is required for this development.

¹ Cardiff Rating Authority v Guest Keens [1949] KB 235 and Skerritts of Nottingham Ltd v SSETR [2000] JPL 789

² The description of development for the grant of planning permission to use the highway for the placing of tables and chairs refers to the area in front of the restaurant as being 10m x 3m.

10. In some circumstances the construction of a building can be 'permitted development' under the provisions of the Town and Country Planning (General Permitted Development)(England) Order 2015 (GPDO). However Schedule 2, Part 7, Class A of the GPDO only relates to shops or financial and professional services and the appeal site is used as a restaurant. Furthermore Class A does not permit extensions or alterations to premises that are within 2m of any boundary of the curtilage of the premises. The screen therefore could not have been considered as permitted development.
11. Having regard to all of the above considerations, I conclude that, as a matter of fact and degree, the development that occurred was the erection of a building structure for which planning permission is required. Class A of Part 7 of Schedule 2 of the GPDO does not permit such development. The appeal on ground (c) therefore fails.

The ground (a) appeal and the deemed planning application

Main Issue

12. The main issue is the effect of the development on the character and appearance of the host property and the surrounding area.

Reasons

13. The appeal relates to a ground floor unit within a large building known as Forset Court which is in mixed use with commercial uses on the ground floor and flats above. It is situated on the corner of the busy Edgware Road and Nutford Place. The appeal site is towards the rear of the building overlooking the pedestrianised part of Nutford Place, where it meets the junction with Forset Street. The surrounding area is mixed in character with predominantly large blocks of commercial uses on or near Edgware Road which gradually reduce in number further away from the main road and a school, a hotel and residential uses then become prevalent.
14. In addition to the appellant's premises there are two other restaurants that overlook the pedestrianised area with one adjacent and one opposite the appeal site. They each have a designated area for outside tables and chairs covered by an awning with side panels. Whilst there are a number of high rise buildings in the area such as the hotel block and Forset Court, there is an intimacy at ground level in the vicinity of the appeal site. This is created by the pedestrianised street which enhances the space and adds to the attractive character and appearance of the area.
15. The appellant's premises have a wide frontage with opening shop front windows either side of a central entrance door. Beneath the fascia, where the name of the establishment is displayed, there is an expansive awning that stretches over the area for outside seating laid out both sides of the central entrance door. This awning appears to be retractable but the Council's photographs show that it seems always to be in an open position. Lights and heaters have been fixed permanently in position underneath its housing.
16. The screen that was attached to the awning and the front of the building had a largely clear-glazed plastic area above the height of the tables with the lower portion filled with a panel of material similar to the awning. A thin baton placed diagonally across the clear-glazed area added to its rigidity. I consider the adjunct of the screen had a harmful effect on the appearance of the host

building as it unacceptably enclosed the shop front and added to the number of fixtures already attached to the ground floor of the building. It also detracted from the design of Forset Court which has a splayed corner at the rear emphasised by a feature window at ground level and a small metal balcony at first floor level. These are separated by a cornice which provides a strong horizontal feature and balances the crisp lines created by the splayed corner. The ad hoc siting of the screen in close proximity to the corner disrupted this balanced composition.

17. The rigidity of the screen also gave the appearance of a side wall to an extension especially at it was attached to the awning which seems always to be in an open position. The screen was particularly prominent in long views from surrounding roads especially given its light colour. The appellant submits that the screen did not have a permanent effect on the building as it was always taken down when not in use. However this submission seems to relate to the screen as altered after the issue of the enforcement notice but if not, as I have concluded already in the ground (c) appeal, it would not have been straightforward to remove it.
18. The appellant also points out that there are other screens in the area. It is my view though, from an inspection of nearby premises and the Council's photographs that they appear to be less rigid and as such are more easily removed when the restaurants are closed. The Council's policies³ seek to improve the pedestrian environment and de-clutter the streetscape to create attractive and clean areas. In particular, the Council are concerned that the screen prevented the pavement from being easily cleansed. The maintenance of the public realm is a high priority for the Council who have produced a supplementary planning document⁴ to set out their approach. This makes it clear that occupation of the street for commercial purposes is a 'privilege and is essentially temporary so the streets can be swept or washed/deep cleansed'.

Conclusion on the ground (a) appeal and the deemed planning application

19. For the reasons given it is concluded that the screen resulted in harm to the character and appearance of the host property and the surrounding area. It therefore did not accord with Policies 6.1 and 6.10 of TLP, Policies Trans 3, DES1 and DES5 of the UDP and Policies S28 and S41 of the WCP. All these policies seek a high standard of design, to have regard to the needs of pedestrians and to create an attractive environment for them. In particular, I give weight to the UDP policies as they are consistent with the National Planning Policy Frameworks' requirement for good design. The appeal on ground (a) therefore fails.

The appeal on ground (g)

20. This ground of appeal is that the one month time period given to comply with the requirements of the notice is too short. It is therefore limited in scope to a consideration of the actual time needed to carry out the work specified in the steps. The basis of the appellant's appeal though is that he needs 16 weeks to commission and gain consent for alternative barriers around the seating area.

³ The London Plan, The Spatial Development Strategy for London, Consolidated with alterations since 2011, March 2016 (TLP): Policies 6.1 and 6.10; Westminster's Unitary Development Plan (UDP) adopted 2007 and subsequently saved: Policy Trans 3; and Westminster City Plan Consolidated with all changes since November 2013, adopted November 2016 (WCP): Policy S41.

⁴ Westminster Way: Public Realm Strategy, Design, Principles and Practice, adopted 2011

21. The screen is a simple structure and I consider its removal by a competent builder and the making good of the building could be achieved in the time specified. As such, I see no reason to vary the period for compliance. The appeal on ground (g) therefore fails.

Conclusion

22. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

D Fleming

INSPECTOR