



Appeal Decision

Site visit made on 5 June 2017

by **A U Ghafoor BSc (Hons) MA MRTPI**

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

Decision date: 07 June 2017

Appeal Ref: APP/G5750/X/16/3161263

626 Romford Road, Manor Park, London E12 5AQ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development ['LDC'].
 - The appeal is made by Mr Asad Chaudhry against the decision of the Council of the London Borough of Newham.
 - The application ref 16/02586/CLE, dated 16 August 2016, was refused by notice dated 10 October 2016.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended ['the Act']¹.
 - The development for which a certificate of lawful use or development is sought is fascia and hanging sign board.
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Decision

1. The appeal is dismissed.

Reasons

2. The main issue to consider is whether the Council's decision to refuse the LDC was well-founded.
3. The appeal is based solely on the ground that the advertisement being displayed on the site had the benefit of deemed consent under Class 13 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (as amended) ['the Regulations']. Essentially, Mr Chaudhry's submission is a simple one, namely, that at the date of the LDC application, the advertisement had been displayed for the preceding 10 years without express consent; that is that the site was used to display the advertisement on or before 16 August 2006. The Council's reasoning focuses on two grounds. Firstly, that the advertisement is excluded from control by virtue of Schedule 3, Part 1, Class 13 of the Regulations. Secondly, granting an LDC would contravene the requirements of an enforcement notice currently in force.
4. Jurisprudence establishes that, in this type of case, the onus of proof is firmly on the appellant, Mr Chaudhry, whose own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make his version of events less than probable, there is no good reason to refuse the application, provided the evidence alone is sufficiently precise and unambiguous on the balance of probability².

¹ If any person wishes to ascertain whether any existing use of buildings or other land is lawful he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

² See *Gabbittas v SSE & Newham LBC* [1985] JPL 630. The authority of *Ravensdale Limited v Secretary of State for Communities and Local Government* [2016] EWHC 2374 (Admin) reviews the body of case law regarding the onus of proof upon an appellant.

5. An advertisement displayed on a site that has been so used continually for the preceding 10 years without express consent falls within Class 13 description. For the avoidance of any doubt, there is no evidence of any advertisement being displayed on the site in the preceding 10 years with express consent. In the *Westminster*³ case, it was held that continually does not mean continuously, hence the display of advertisements on a basis which is regularly occurring is sufficient to secure deemed consent rights.
6. No. 626 is a two-storey building with accommodation in the roof space. It has a commercial unit at ground floor level, which is occupied as a take-away/restaurant (currently 'Munchies')⁴. The shop front comprises a glazed panel and main entrance as well as a projecting canopy. Prior to a change in the name of the business, the ground floor was occupied by *Oriental Khazana*. Newspaper cuttings from the Stratford & Newham Express (dated 17 July and 13 March 2004) clearly show that the commercial unit was in use as a place to consume food on or off the premises, and its frontage included letters above the shop front advertising *Oriental Khazana*. Further, witness statements by the current tenant, Mr Imran Javed, as well as an interested party, Mr Kashif Balooch⁵, confirm the existence of the advertisements from 2004 onwards. Both maintain that the site has been used for display of advertisements throughout the relevant 10-year period.
7. Having regard to all the evidence that has been provided, I am satisfied, on the balance of probabilities, that the canopy projection over the main entrance to no. 626 had been used for a 10-year period preceding the application for the LDC for the display of advertisements. However that is not the end of the matter. Class 13(1) of the Regulations explains that an advertisement does not benefit from deemed consent and fall within this classification of advertisements if, during the relevant 10-year period, there has been either a material increase in the extent to which the site has been used for the display of advertisements or a material alteration in the manner in which it has been so used. In *Clear Channel UK Ltd*⁶, the courts held that a larger structure with a different form of illumination was a material change which meant the deemed consent that had been built up over the previous 10 years had been lost and the display of the sign was unlawful.
8. The definition of an 'advertisement' in the Act has a wide meaning. Prior to the display of the hanging sign and fascia panel, I would describe the site as containing a row of letters advertising *Oriental Khazana* as illustrated in the August 2008 google street image. These are positioned on a strip fixed to the tiled canopy. The lettering was not fixed to any supporting structure and it was set in from the front edge of the canopy and did not extend the full width of the property. I would not describe the lettering as being supported by a structure like the fascia panel on display. The latter is about 90 cm high and 15 cm deep and forms a large supporting structure to the *Munchies* advertisement. It spans across the full extent of the shop front's canopy and is pointedly different from the previous sign. Additionally, I would not describe the first floor as being used to display a hanging sign, which is installed at first floor level roughly parallel with the windows. It seems to me that the size of the display has significantly increased so that it is clearly distinguishable and noticeable from various public vantages.
9. I am also of the firm opinion that the display's modification that occurred in about 2010, when the subject advertisements were first displayed due to a change in the name of the business and occupier, amounted to a material alteration in the manner in which the site

³ See the case of *Westminster City Council v Moran* [1998] EWHC Admin 637, [1999] JPL 41 QBD.

⁴ Taken from section 7 to the LDC application form submitted by the appellant to the Council.

⁵ Signed and dated 15 November 2016 attached to Mr Chaudhry's bundle of evidence.

⁶ See the case of *R (oao) Clear Channel UK Ltd v Hammersmith & Fulham LBC* [2009] EWCA Civ 2142.

has been so used. For example, the installation of a large supporting structure combined with the hanging sign advertising a telephone number and the Arabic word 'Halal'. I would say that this type and form of advertisement was not evident in the previous *Oriental Khazana* display. The latter would have had a far less impact on the appearance of the area than that caused by the size and scale of the fascia and hanging sign board.

10. Further there is no evidence that the *Oriental Khazana* sign was illuminated or even if it was what the brightness of the sign would have been. I would be surprised if it were illuminated given the evidence clearly shows strip of spaced letters fixed to the canopy. Further, the previous advertisement left the front elevation above ground floor level visible and exposed; the subject advertisements have largely obliterated the first floor and are capable of having an impact upon amenity⁷. Given my detailed explanation in the preceding paragraphs, I do not find favour with Mr Chaudhry's submissions because there is a material difference between the previous advertisement and the fascia and hanging sign board⁸.
11. On the basis of the available evidence, in my planning judgement, I find that, during the relevant 10-year period, there has been a material increase in the extent to which the site has been used for the display of advertisements and there has been a material alteration in the manner in which it has been so used. Accordingly, on the balance of probabilities, I concur with the Council that the fascia and hanging sign board do not have the benefit of deemed consent under Class 13 of the Regulations. Consequently, the use of the site for the display of the subject advertisements is not deemed to have planning permission granted by s222 of the Act.
12. I now turn to the second reason to refuse the LDC. On 18 March 2016 the Council issued a removal notice pursuant to s225A⁹ of the Act. That is the subject of an appeal to the Magistrates' Court, which has been suspended pending outcome of these proceedings. The Council argue that removal notice is extant although there is an appeal outstanding. Section 191(2)(b) states that for the purposes of this Act [TCPA] uses and operations are lawful at any time if they do not constitute a contravention of any of the requirements of any enforcement notice then in force [emphasis added]. Having regard to s172 of the Act¹⁰, in my considered opinion a removal notice issued under s225A does not fall within the meaning of s191(2)(b). I therefore disagree with the Council's second refusal reason.

Conclusion

13. Having regard to all other matters and on the facts and circumstances of this particular case, I am of the firm opinion that the Council's first reason for refusing the LDC was well-founded. I therefore conclude that this appeal is doomed and thus, in exercising powers transferred to me in s195(3) of the Act, it should be dismissed.

A U Ghafoor

INSPECTOR

⁷ *Wandsworth LBC v South-Western Magistrates' Court and Clear Channel* [2007] EWHC 1079 (Admin) QBD May 2 applied.

⁸ *Scotts Restaurant PLC v City of Westminster* [1993] JPL B34 applied.

⁹ See s 225A power to remove structures used for unauthorised display.

¹⁰ Section 172 Issue of enforcement notice - (1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them (a) that there has been a breach of planning control; and (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.