
Appeal Decision

Site visit made on 30 May 2017

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 12 July 2017

Appeal Ref: APP/X5990/C/16/3163157

2 Montpelier Street, London SW7 1EZ

- 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 by Mr Tarik Mubarek - Al Arez Ltd - against an enforcement notice issued by the City of Westminster Council.
 - The enforcement notice, ref. 16/61859/U, was issued on 10 October 2016.
 - The breach of planning control alleged in the notice is within the last 10 years:
 1. the material change of use of the land from Class A1 retail use (formerly a sandwich bar) to a mixed use comprising restaurant and hot food takeaway;
 2. the installation of the internal and external extract duct which facilitates the material change of use of the premises as a mixed use (*sui generis*) restaurant and hot food takeaway; and
 3. The material change of use of the public highway in connection with the unauthorised use of The Premises as a mixed use (*sui generis*) restaurant and hot food takeaway.
 - The requirements of the notice are to:
 - 1) Cease the use of the premises as a mixed use comprising part restaurant and part hot food takeaway;
 - 2) Remove from the premises the internal extract ducts and the external extract ducts located on the rear elevation (Marked A, B and C shown in photograph set 'A' attached to the enforcement notice) which facilitates the unauthorised use;
 - 3) Remove the tables and chairs outlined in blue on plan 'A' and shown in Photograph set 'B' from the public highway; and
 - 4) Remove from the land all materials associated with the unauthorised material change of use in accordance with steps (2) – (3) above.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (c) of the Town and Country Planning Act 1990 as amended. The prescribed fees have been paid within the specified period, and the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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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.

Preliminary matters

2. The appellant states that the ground (a) appeal and the deemed planning application relate solely to the external extract duct referred to in allegation 2 and requirement 2. However, the Council argue that a ground (a) appeal is made on the basis that planning permission should be granted
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for what is alleged in the notice, and that the entirety of the allegation must be addressed.

3. The ground set out in s.174(2)(a) of the Act says that 'in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted'. A notice may well contain several alleged breaches, and it appears to me that use of the word 'any' in s.174(2)(a) implies that all, or any number, of the allegations may be challenged. This view is reinforced by the provision of s.177(1)(a) of the Act, which states that planning permission may be granted for the development to which an enforcement notice relates, or for part of that development, or for the development of part of the land to which the enforcement notice relates.
4. Furthermore, in my view it would not be reasonable to require all aspects of a notice to be challenged if an appellant did not consider there to be a good case in support of each and every part. It follows that it is open for a ground (a) appeal to be made against only part of the matters alleged.
5. Nonetheless, if elements are not clearly separable, and independent of one another, it would create an artificial situation to consider one part without the other. In this instance the internal and external plant and ductwork comprise a single functional system, one part of which would not work without the other. In the light of this I have considered the ground (a) appeal in relation to the whole of the extraction system. The appellant has clearly looked at the installation in the same way, since matters of noise are his principal concern, and these would not exist if the external ductwork alone were the subject of the appeal.
6. The appellant has argued that the use by the previous tenant had subsisted continuously for more than 10 years before the present use started, that this present use was not distinguishable from the previous use, and is therefore immune from enforcement action. This amounts to an appeal on ground (d), and although no formal appeal has been made on this ground, I have determined the case as though there it had been.

Background matters

7. The appeal premises are within the ground floor and basement of a 4-storey, plus basement, terraced property standing on the eastern side of Montpelier Street, close to its junction with Brompton Road. The upper floors are in residential use, and are not subject of the notice. Other properties to both sides of no. 2 have various commercial uses on the ground floor, forming a short row before the street becomes mainly residential further to the north. The appeal site is within the Knightsbridge Conservation Area, and is also within the Borough's Central Activity Zone (CAZ).
8. To the rear of the property is a small enclosed yard, which is bounded by nos. 3 & 4 Montpelier Street, and nos. 124, 126 and 128 Brompton Road. The external ductwork referred to in the notice is within this yard.

9. In 2007 planning permission was granted for use of the first, second and third floors of the building – which had previously been in retail use - as a residential unit¹. In 2009 the then operator of the premises was refused planning permission on an application for use of the public highway for the placing of 2 tables and 4 chairs in an area measuring 1.15 metres by 3 metres in connection with the coffee shop². This area was to the front of the private forecourt to the property, defined by a low step. Planning permission subject to conditions was subsequently granted on appeal³.

The appeal on ground (c)

10. In a ground (c) appeal the burden of proof is on the appellant to show that on the balance of probabilities there has been no breach of planning control. The appellant argues that there is no planning history defining the use of the premises as Class A1 (retail) and that use as a restaurant and hot food takeaway has subsisted for at least 15 years.
11. Prior to the lease being taken over by the appellant, the premises had traded as O’Keefe’s Sandwich Bar until December 2015. It is argued that this use was essentially the same as the present operation, and no material change of use has occurred.
12. In support of this, photographs of the kitchen facilities and food counter of the previous establishment have been submitted, purporting to show that hot and cold food were prepared for consumption both on and off the premises. It is claimed there was the same extent of kitchen equipment, the same number of tables and chairs for consumption of food on the premises, and the same proportions of hot and cold food for consumption on and off the premises – that is, about 15% and 85% respectively.
13. The photographs of the kitchen as it was when in use by O’Keefe’s Sandwich Bar show a fridge/freezer, preparation table and shelves, and a gas cooker. A photograph of the daily hot food menu shows that on each weekday there were two or three hot dishes available. Photographs of the service counter show a number of containers for various prepared items – but it is not at all clear whether these were hot or cold.
14. I saw that externally there were two tables and four chairs standing on the private forecourt. There were none on the footway at the time of my visit. Internally on the ground floor there were four tables with eight chairs, and three seats at a bar/shelf along one wall. The serving counter had two cash tills, and above the counter was a menu board principally listing various types of hamburger and chicken dishes. Behind the counter were a hot cupboard, a cold drinks cabinet, and an infra-red chip warmer.
15. In the basement kitchen were a refrigerator next to which was a preparation counter. Along one wall were a hot plate, a fryer, and 2 deep-fat fryers. Above these was a bank of extract fans/grease-filters, with ducting across the ceiling to outside. Along other walls were two wash-up sinks, further preparation tabling, a marinating device, and a further fridge. In a separate space towards the front of the premises was a storage area with shelving, freezers and fridges.

¹ Decision notice ref. 06/09848/FUL, dated 1 May 2007.

² Decision notice ref. 09/03828/TCH, dated 27 July 2009.

³ Appeal decision ref. APP/X5990/A/09/2118263, dated 29 June 2010.

16. In the small yard to the back of the property I saw that the extract ducting came through the basement wall, set through several changes of direction, before the main vertical section rose up the wall of the adjacent building, no. 128 Brompton Road. It extended up to the cill level of a first floor window in that building. There was also an extensive installation of air-conditioning units and other ducting on this wall, but this was not related to the matters subject of the enforcement notice.
17. The Council maintain that the premises have been in Class A1 retail use for many years. In a Council report of 1971 on possible enforcement action against use of the upper floors of the building, it is stated that the whole of the building had been in use as a shop in 1948 and that this use had continued uninterrupted in the basement, ground and third floors. An officer's inspection note, also in 1971, records that the ground floor and basement were in use as a dress shop, with an ancillary use of the third floor. At some point after 1980 the use of the premises changed to that of a sandwich shop. An entry in the Council's database indicates that 'O'Keefe's of Knightsbridge' traded from there from at least 2000.
18. The Council have submitted photographs from the time when O'Keefe's were still operating. These show a food display counter on the ground floor, and seating at tables on the small forecourt. The awning to the front indicates that the shop sold 'sandwiches, salads, coffee, and cakes'.
19. In the 2007 planning application the Design and Access Statement refers to the basement and ground floors as being in commercial use as a catering unit. The 2009 application refers to the premises being variously a 'coffee shop' and a 'coffee and sandwich bar'. The appeal decision on that case refers to the premises being a 'coffee bar'.
20. The Town and Country Planning (Use Classes) Order 1987 as amended (the UCO) defines Class A1 as the use of shops for all or any of a number of purposes. These include the retail sale of goods other than hot food, and use for the sale of sandwiches or other cold food for consumption off the premises, where the sale, display or service is to visiting members of the public.
21. In this case it appears that in addition to sandwiches and other cold food O'Keefe's sold some quantity of hot food, as well as hot drinks. Furthermore, there was provision of seating, which could allow the consumption of food and drinks on the premises. However, the kitchen facilities at that time were very limited indeed, with only a relatively small and simple gas cooker and little else apparent for preparation of hot food on any scale. It appears to me that these facilities would have been suitable for little more than the heating up of previously prepared dishes. This is also indicated by the very limited hot food menu – as shown on the written menu, and in the photographs of the food counter.
22. It appears to me that any sale of hot food and drink at O'Keefe's was, as a matter of fact and degree, incidental to the primary use of the premises for the sale of sandwiches and other cold food.
23. The facilities now in use are in distinct contrast to those existing previously. The kitchen is fitted out for relatively elaborate commercial cooking operations, including marinating, grilling, deep-fat frying, and pressure

cooking. The extract and grease filtering installation is appropriate for a commercial kitchen used for cooking food on a significant scale. The front awning advertises 'The Ultimate Burger Bar', and the menu boards indicate that items for sale are primarily hot food. My overall view is that, as a matter of fact and degree, the present use is primarily for the sale of hot food, and its consumption on and off the premises. This is of a distinctly different character from the previous sandwich bar use, even though that entailed an element of hot food sales.

24. The appellant argues that the internal ducting does not require planning permission, since works such as this affect only the interior of the building – which is not listed – and are not to be taken as development under the provisions of s.55(2)(a)(i) of the Act. However, it is well established following the High Court case of *Murfitt*⁴ that where ancillary operational works have been carried out in connection with an unauthorised use of land, an enforcement notice may, where the works are part and parcel of the use, require the removal of those works. A similar conclusion was reached in the case of *Somak*⁵.
25. In this instance I consider that a commercial kitchen of this nature could not reasonably operate without an extract and ducting system of the type installed, and that the entire system is both part and parcel of, and integral to, the material change of use that has taken place. Its removal is necessary to remedy the breach of planning control. I appreciate that the appellant does not wish to include the external ductwork in the ground (c) challenge. Nevertheless, that too must be regarded as integral to the material change of use, and therefore is part of the breach.
26. The tables and chairs on the footway to the front of the property were not in position at the time of my visit, but are readily apparent in Photograph Set B attached to the notice. The appellants argue that the planning permission granted at appeal in June 2010 is valid for the present use of the premises. However, Condition 3 to which that permission is subject limits the hours during which the tables and chairs can be placed on the footway to between 0700 and 1800 on any day, and Condition 4 limits the permission to use by customers of the then coffee shop.
27. I have not been fully informed of the hours of use of the present operation, but understand there have been complaints about late night opening. Nor have I been informed as to whether the appellant could conform to the limitations of Condition 3. In my view, for the type of business that is being run, it is quite likely that the appellant would want to operate at different hours, and this would probably require a new planning permission. With regard to Condition 4, the appellant argues that this is not a 'personal' condition attached to the shop, and that there is effectively no functional difference between a coffee shop and the present use.
28. However, I have found that the new use is of a quite different character from the previous use. In order to properly test whether such conditions would be necessary, or different conditions should be imposed, it appears to me that full consultations should be made by means of a planning application.

⁴ *Murfitt v Secretary of State for the Environment and East Cambridgeshire District Council* [1980] 40 P&CR 254.

⁵ *Somak Travel v Secretary of State for the Environment and the Council of the London Borough of Brent* [1987] JPL 630.

Overall, as a matter of fact and degree, I consider it unlikely that the conditions on the former business carry over to the present use, and the 2010 planning permission granted at appeal cannot be taken to give permission for that use of the public highway.

29. I conclude that on the balance of probabilities there has been a material change in the use of the premises from the earlier A1 retail use to a *sui generis* use as a restaurant and hot food takeaway. Furthermore, the installation of both internal and external ductwork, is integral to the change of use, and can reasonably be enforced against. No planning permission has been granted for the change of use, or for placing tables and chairs on the public highway. These matters constitute breaches of planning control, and the appeal on ground (c) must fail.

The 'hidden' ground (d) appeal

30. Although no firm date is suggested, the Council say that the change to a sandwich shop occurred at some time after 1980. The two sworn affidavits put in by the appellant variously describe the use as 'restaurant', 'coffee shop', and 'takeaway restaurant'; that the premises were used for preparation and cooking food, and that this had been the case for over 10 years.
31. In an appeal on 'legal' grounds – such as ground (d) – it is settled law that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the appeal, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the case on the balance of probability.
32. In this case the evidence provided by the appellant that the present use is essentially the same as the previous use is far from precise and unambiguous – particularly with respect to comparison of the types of kitchen on the premises, the extent to which cooking was carried out, the range of food served, and whether it was hot or cold. Furthermore, the descriptions of the use provided in the affidavits are by no means precise or unambiguous.

I have come to the view in the ground (c) appeal that the previous and current uses are, as a matter of fact and degree, quite distinguishable, and in my opinion there was a material change of use when the present owner took over, less than 2 years ago. On the balance of probabilities I do not consider the appellant has demonstrated that the current use has subsisted continuously for a period of 10 or more years prior to issue of the notice. Had an appeal been made on ground (d), it would have failed.

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

33. This ground is that planning permission should be granted for the matters alleged in the enforcement notice – as noted above, I have considered this ground in relation to the whole extraction system. I have not considered the questions of the material change of use, or of use of the public highway.
34. I consider the main issue in the ground (a) appeal and the deemed planning application to be whether the ductwork installation causes harm to amenity

for occupants of nearby accommodation in terms of noise, general disturbance, and cooking smells.

35. The appellant argues that there is a significant amount of other air conditioning plant and ductwork within the enclosed courtyard to the back of the property, that this serves various commercial uses in the lower levels of the surrounding buildings, and already generates noise. It is submitted that this is a commonplace situation given the appeal site's location within the Council's Central Activity Zone (CAZ) frontage, and that the new installation does not have any harmful impact upon noise sensitive uses.
36. As noted above, I saw that the external duct extends up to the level of the first floor window of no. 128 Brompton Road. There is nothing to indicate that window is not part of commercial premises, as the appellant suggests, but I understand the accommodation above the appeal premises is in residential use. I also understand that the Council have received complaints about increased cooking smells, and have concerns about increased noise from plant. Furthermore, the Council say the present use continues well beyond the time at which the sandwich bar would have closed.
37. It appears to me that the ductwork, which exhausts at a relatively low level, is in such close proximity to windows of the residential upper floors of no. 2, and to windows of other properties around the yard, that an increase in both plant noise and cooking smells is likely to be readily noticeable. While the previously existing air conditioning plant and ductwork in the yard probably generates both noise and smells, I noticed that other ductwork is carried to a considerable greater height than that for no. 2. Furthermore, the existence of this other equipment does not justify any increase in nuisance that may occur.
38. While the appeal premises are within the CAZ frontage, it must be recognised that this is a mixed commercial/residential area, and that a balance should be struck between the sometimes conflicting needs of the different uses. No substantial evidence has been adduced as to noise levels that might be caused with extract system and ducting in operation, and in this instance I consider the likelihood of harm to residential amenity outweighs the commercial needs of the appellant, and of the area.
39. I conclude on the main issue that the external ductwork is likely to cause significant harm to amenity for occupants of nearby accommodation in terms of noise, general disturbance, and cooking smells. The development does not accord with the development plan, notably in respect of London Plan Policy 7.15, which seeks to minimise potential noise impacts of development; Policy S29 of the Westminster City Plan of 2016, which includes aims to protect residential amenity, and Policy ENV6 of the City of Westminster UDP of 2007, which seeks to minimise and contain noise in order to protect noise sensitive properties.
40. Given the harm I have found, the appeal on ground (a) does not succeed, and I intend to refuse planning permission on the deemed planning application.

Conclusions

41. 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.

Stephen Brown

INSPECTOR