
Appeal Decision

Hearing held on 21 June 2017

Site visit made on 21 June 2017

by Alexander Walker MPlan MRTPI

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

Decision date: 14th August 2017

Appeal Ref: APP/X5990/W/16/3162943

117 Edgware Road, London, City of Westminster W2 2HX

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Jihad Issa against the decision of City of Westminster Council.
 - The application Ref 15/12047/FULL, dated 23 December 2015, was refused by notice dated 11 July 2016.
 - The development proposed is the use of the basement and ground floor as a restaurant and use of the public highway for outdoor seating.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The change of use has already taken place. Therefore the proposal seeks to continue the restaurant use of the premises and use the public highway for outdoor seating.
3. During the Hearing, the Council introduced a suggested condition regarding the installation of a recirculation system which had been devised as a draft update to the Council's *Guidelines for the control of odour from commercial kitchen extract ventilation systems*. It was suggested that a recirculation system could be a suitable alternative to the high level ventilation system. The Council noted that these conditions were suggested by their Environmental Health Officer and the wording of them had not been endorsed by the Development Management department.
4. The appellant has confirmed that they are willing to install a recirculation system in lieu of a low level or high level ventilation system. In response to the Council's suggested conditions regarding such a system, they provided their own suggested conditions. Following the Hearing, both parties were given the opportunity to devise suitable conditions. The appellant has raised a concern regarding the Council's suggested conditions with regard to the requirement to effectively cease cooking of hot food until such time as a recirculation system has been approved. Such a condition would have obvious financial implications on the existing business. I am satisfied that an appropriately worded condition could be imposed that would require a recirculation system to be approved and installed within a specific time period, that would not have such implications on the business.

5. A recirculation system would overcome the Council's concerns regarding the effect of development on the character and appearance of the area as there would no longer be a need for the external duct. Furthermore, I am satisfied that appropriately worded conditions could ensure that the recirculation system would adequately control odours emitted from the premises and therefore address the Council's concerns regarding the effect on the living conditions of neighbouring occupants, with regard to odour pollution.

Main Issues

6. In light of the above, I consider the main issues in this appeal are:
- The effect of the proposal on the retail character and function of the Central Activities Zone and the vitality and viability of the Edgware Road area; and,
 - The effect of the development on the living conditions of the occupants of neighbouring residential properties, with regard to odour, noise and disturbance

Reasons

Background

7. The appeal property has been the subject of an extensive planning history in recent years. In March 2014 a temporary flexible use application was approved by the Council to allow the change of use of the property from retail to a restaurant on the ground floor for two years¹. Prior to this, the appeal property was last used as a carpet shop for a number of years.
8. In January 2015, planning permission was granted for the change of use of the basement to be used as a restaurant, in association with the ground floor use². In August 2015, planning permission was granted for the placing of tables and chairs on the highway³. Both of these permissions were granted on a temporary basis, with conditions seeking the cessation of the changes of use to coincide with the cessation of the temporary flexible use of the ground floor on 1 April 2016.
9. Whilst the above planning permissions are now time expired, the use of the property as a restaurant continues.

Retail Area

10. The appeal site is located within the Edgware Road Central Activities Zone (CAZ) frontage. In addition, it is also within the Edgware Road Stress Area, designated by the Council due to the number of restaurants, cafes, takeaways, public houses, bars and other entertainment uses having reached a level of saturation⁴.
11. The appeal property forms part of a large building complex that comprises ground floor commercial units that front Edgware Road with residential apartments on the upper floors.

¹ LPA Ref 14/01767/TFU

² LPA Ref 14/09331/FUL

³ LPA Ref 15/05147/FUL

⁴ Paragraph 8.93 of the City of Westminster - Westminster's City Plan (WCP) 2016

12. In accordance with the appellant's updated survey of the properties submitted at the Hearing, Edgware Road as a whole comprises approximately 57% A1 uses and 20% A3 uses, which includes the existing A3 use operating from the appeal property. The appeal property is one of approximately 22 units within the row, which comprise a mix of A1, A2, A3 and sui generis businesses. Twelve of these businesses are considered to be A1 units. There are three A3 uses, including the appeal property and an A3/A5 sui generis use (Café Helen). Within the two rows of commercial properties on the opposite side of the road, in between George Street and Harrowby Street, there are approximately 16 units, 8 of which are in A1 use and 6 are in A3 use. The Council expressed that a cautious approach should be adopted in the reliance of the appellant's survey as it does not account for whether or not the uses identified are lawful. Nevertheless, as pointed out by the appellant, if there are such instances it is likely to be with regard to the non-A1 uses, which would be in their favour.
13. Policy SS5 of the City of Westminster Unitary Development Plan (UDP) 2016 seeks to ensure that there is an appropriate balance of town centre uses in CAZ frontages. Policy SS5(A) states that A1 uses at ground, basement or first floor level in the CAZ frontages will be protected. Policy SS5(B) does allow for non-A1 uses, but only where they would not be detrimental to the character and function of the area or to the vitality or viability of a shopping frontage or locality. In accordance with Policy SS5(C) such proposals must not lead to, or add to, a concentration of three or more consecutive non-A1 uses; or, cause or intensify an existing over-concentration of A3 and entertainment uses in a street or area. There is no suggestion that the proposal would result in the concentration of three or more consecutive non-A1 uses.
14. Paragraph 7.49 of the UDP sets out how Policy SS5(B) should be applied and provides six factors to take into account when considering the effect of non-A1 town centre uses on an area's character and function and vitality and viability. These include if the number and range of shops, particularly local convenience shops, is reduced. The proposal would result in the loss of an A1 unit. Whilst it is currently occupied by the A3 use, there is no substantive evidence to indicate that an A1 use could not successfully operate from the property. Therefore, as a result of the proposal the number of shops available for occupation is reduced and therefore harms the vitality and viability of the area.
15. Paragraph 7.49 also states that if the proposal would change, or add to the cumulative change, in the character and function of a street, from a mixed to predominantly A3 and entertainment uses at ground floor this shall be taken into account in assessing the effect of development on the vitality and viability of an area and its character and function. Even if there are some discrepancies regarding the lawful use of some of the properties surveyed by the appellant, A3 and entertainment uses are by no means the predominant use within the area.
16. Policy S8 of the City of Westminster Westminster's City Plan (WCP) 2016 states that within the Edgware Road Stress Area, new entertainment uses will only be allowed where the Council considers that they are low-impact and would not result in an increased concentration of late-night uses. The reasoned justification for this policy acknowledges that the provision of cafes, restaurants and appropriate entertainment uses can help to support the retail function of the Edgware Road CAZ Frontage. However, creating a concentration of such uses within the area would unacceptably impact on the functioning of the area.

17. Neither the UDP nor the WCP provide a definition of what comprises 'late-night activity', in particular at what time of the day is considered to be 'late-night'. During the Hearing, the Council suggested that it is activity that goes on beyond 2300, which the appellant considered is consistent with paragraph 8.88 of the UDP, which states that entertainment uses in predominantly residential areas will be conditioned to open no later than 0030.
18. The appellant confirms that the business closes at 2300 and therefore is not a late-night activity. If I was minded to allow the appeal, I find no reason why a condition could not be imposed limiting the opening hours as such. Therefore, I do not find that the proposal would make a contribution to late-night activity within the area. Accordingly, I find that the proposal would not result in predominantly A3 and entertainment uses within the area and would not contribute to late-night activity.
19. Notwithstanding that the proposal would not result in A3 and entertainment uses becoming the predominant uses in the area and that it would not contribute to late-night activity, subject to conditions, it would nevertheless reduce the number and range of shops available in the area. As such, I find that there is conflict with Policy SS5(B) of the UDP.
20. Paragraph 7.50 of the UDP sets out how Policy SS5(C) should be applied. It states that an over-concentration of A3 and entertainment uses occurs when the numbers and sizes of these types of uses begin to dominate a street or area and the consequential effects of their operations including the numbers of people attracted begins to have a detrimental effect on the local environment and residential amenity. If such a concentration exists, additional A3 and entertainment uses will not be permitted.
21. Policy TACE9 of the UDP states that permission will only be granted for restaurants with between 150sqm and 500sqm inside the Stress Areas where they have no adverse effect upon residential amenity or local environmental quality. Policy TACE9(B)2 states that such development shall also have no adverse effect on the character or function of its area.
22. Similarly, Policy S24 of the WCP requires new entertainment uses, amongst other things, to demonstrate that they are appropriate in terms of their relationship to any existing concentrations of entertainment uses and that any cumulative impacts do not adversely impact on the character and function of the area.
23. The row of properties within which the appeal property is located has more A1 uses than any other uses. However, many of these units are small. In marked contrast, two of the A3 units, the appeal property and Al Arez, are larger units with a much greater presence in the frontage. As a result, I find that they dominate the row of properties, with the A1 units being viewed as secondary to the non-A1 units. Furthermore, there are a number of other A3 uses nearby, in particular those on the opposite side of Edgware Road. However, I note that approved developments along Edgware Road⁵ would result in a reduction in A3 units and an increase in A1 units. Nevertheless, overall, I find that there is an overconcentration of A3 uses in the area, which the appeal property contributes towards. This overconcentration results in the A3 uses dominating the street frontage and detracts from the distinctive retail character of the CAZ. I find

⁵ LPA Refs 14/07461/FULL, 13/12710, 16/01554 and 17/01095/NMA

therefore that there would be conflict with Policies SS5(c) and TACE9(B)2 of the UDP and Policies S8 and S24 of the WCP.

24. The appellant has referred me to the City of Westminster Central Activities Zone Frontage Shopping Area 19: Edgware Road (South) Shopping Area Health Check Survey 2008 and the Edgware Road (South): 2013 Health Check Report. Both of these reports found that the vitality and viability of Edgware Road is 'healthy' and the 2013 report noted an improvement on the 2008 findings. Whilst this maybe so, the proposal has nevertheless resulted in the loss of an A1 use, and consequently the number of available A1 units, particularly of this size, has been reduced. Therefore, whilst the vitality and viability of the area may well be healthy, I find that the reduction in A1 units will have had a detrimental effect on it. Moreover, the WCP was adopted in 2016, and therefore post-dates these reports. It is not clear whether or not the reports informed the policies within the development plan. Nevertheless, Edgware Road remains a Stress Area in the WCP. Therefore, whilst I acknowledge the findings of the health check reports, I attribute greater weight to the policies within the UDP and the WCP.
25. I find therefore that by reason of the existing over concentration of A3 uses in the area, the proposal development does have a significantly harmful effect on the retail character and function of the CAZ and the vitality and viability of the Edgware Road area, contrary to Policies SS5 and TACE9 of the UDP and Policies S8 and S24 of the WCP.

Living Conditions

26. Edgware Road is a heavily trafficked road and is lined on either side by a wide range of retail and commercial units. As I have identified above, there is a concentration of A3 units within the locality, some of which are open until late at night. The appeal property is within close proximity of a large number of residential properties, which are situated on the upper floor. The proximity of the residential units to the road makes their occupants particularly sensitive to noise, disturbance and odours.
27. The appellant has confirmed that he would accept a condition requiring a recirculation ventilation system. Therefore, providing such a system is adequately maintained and serviced, I am satisfied that the concerns the Council have regarding odour emissions could satisfactorily be mitigated.
28. In respect of noise and disturbance, a condition could be imposed restricting the opening hours to 2300 as suggested by the appellant. Given the location of the site and the existing businesses within the area that are open beyond this time, I am satisfied that even if the business was fully occupied the noise and disturbance generated, for example through the comings and goings of customers and customers and staff conversing, would not make a significant contribution to existing noise levels to the extent that it would be detrimental to the living conditions of neighbouring occupants.
29. I find therefore that, subject to appropriately worded conditions regarding ventilation and opening hours, the proposal would not significantly harm the living conditions of the occupants of neighbouring residential properties with regard to noise, disturbance and odour. As such, with regard to this matter, I find that it would comply with Policy TACE9 of the UDP and Policy S24 of the WCP, which seek to protect residential amenity.

Other Matters

30. During the Hearing, it was confirmed that the appellant works with a number of charities. Whilst this is commendable, I do not consider that it outweighs the harm I have identified above.
31. The appellant also stated during the Hearing that were I to find the proposed development unacceptable he is content to omit the basement part of restaurant from the application, by way of condition, which would reduce the floor space of the A3 use to below 150 sqm and therefore the policy considerations would be different. However, the basement contains the preparation kitchen, including fridges and freezers which serve the restaurant and there is limited preparation area in the ground floor kitchen. Furthermore, the basement forms a substantial part of the application proposal which is integral to the overall business. Therefore, I am not satisfied that the basement is severable from the ground floor and do not consider that a condition prohibiting its use would pass the test of reasonableness as set out in paragraph 206 of the National Planning Policy Framework (the Framework).
32. I have also had regard to the severability of the external duct and the outside tables and chairs. However, as I have found the overall change of use unacceptable, I have not considered these elements any further.
33. I have had regard to the various appeal decisions referred to me by the Council. I note that the policy considerations for each of these decisions were different to the proposal before me, by reason of them predating the WCP or being located within a different area. Nevertheless, I note that the conclusions in respect of the effect on the character and function of the retail area and the vitality and viability were generally similar to mine. Notwithstanding this, I have determined the appeal before me based on an assessment of the merits of the application.

Conclusion

34. For the reasons given above, having regard to all matters raised, the appeal is dismissed.

Alexander Walker

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Sebastian Head	Barrister, Headland Chambers
Mrs Emma McBurney	Consultant, Michael Burroughs Associates
Mr Michael Burroughs	Head of Michael Burroughs Associates
Mr Abbas Issa	On behalf of appellant
Mr Jihad Issa	Appellant
Dr Michael Bull	Odour Consultant, Arup

FOR THE LOCAL PLANNING AUTHORITY:

Mr Tom Burke	Head of Design and Conservation, City of Westminster Council
Mr Max Jones	Planning Officer, City of Westminster Council
Mr Anil Drayan	Environmental Health Officer, City of Westminster Council
Mr Maxwell Koduah	Environmental Health Officer, City of Westminster Council
Ms Louise Metson	City of Westminster Council

INTERESTED PERSONS:

Councillor Heather Acton

DOCUMENTS SUBMITTED AT THE HEARING

- 1 Letter from Park West Residents Association
- 2 Updated survey of units, submitted on behalf of the appellant
- 3 Noise Assessment of Outdoor Seating, undertaken by Bickerdike Allen Partners, dated 2 April 2015, submitted on behalf of the appellant
- 4 Proposed Recirculation scheme guidance update to 'Guidelines for the control of odour from commercial kitchen extract ventilation systems', submitted by the Council.
- 5 Proposed condition regarding a recirculation system suggested by the Council's Environmental Health Officer, submitted on behalf of the Council.
- 6 Notes and power point slides taken from a speech given by Mr Walker, Director of Planning for City of Westminster Council, at a conference on 5 June 2017, submitted on behalf of the appellant.
- 7 Proposed condition regarding a recirculation system suggested on behalf of the appellant.
- 8 Proposed Sitting Area at Main Entrance, drawing no. Pr/SIT02, submitted on behalf of the appellant.

DOCUMENTS SUBMITTED AT THE HEARING

- 9 LPA Suggested Conditions, dated 22 June 2017
- 10 Appellant's Comments on LPA's Suggested Conditions, dated 4 July 2017