



Appeal Decision

Site visit made on 17 April 2018

by Daniel Hartley BA Hons MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 April 2018

Appeal Ref: APP/L5810/C/17/3180313

Land at 16 High Street, Teddington TW11 8EW

- 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 Alaa Chehade against an enforcement notice issued by the Council of the London Borough of Richmond-upon-Thames.
 - The enforcement notice was issued on 15 June 2017.
 - The breach of planning control as alleged in the notice is the change of use of the ground floor unit from A1 (Retail) to A3 (café) use.
 - The requirements of the notice are (i) cease the unauthorised non-retail use of the land; and (ii) make good any damage caused by complying with step (i).
 - The period for compliance with the requirements is three calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied by deleting paragraph 5(ii) and deleting the words "*three calendar months after the notice takes effect*" in paragraph 6 and replacing them with "*four calendar months after this notice takes effect*". Subject to these variations, the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Ground (a) and the deemed planning application

2. The appeal is made under ground (a) which is that planning permission ought to be granted in respect of any breach of planning control alleged in the enforcement notice.
3. I have considered the reasons for issuing the notice and have taken into account the representations made by other interested parties. In this regard, the main issues in respect of the deemed planning application are (i) the effect of the development upon (i) the vitality and viability of Teddington District Centre and (ii) the living conditions of the occupiers of neighbouring residential properties in respect of odour generation.

Vitality and viability of Teddington District Centre

4. The appeal site comprises a ground floor property and falls within a long terrace of commercial properties within the defined Teddington District Centre. The upper floors of the building are in separate residential use. The site is

within a key shopping frontage as outlined in appendix 3 of the Council's adopted Local Development Framework Development Management Plan 2011 (DMP). It also falls within the High Street (Teddington) Conservation Area (CA). It is currently in use as a café. The issuing of the notice follows the Council's refusal of planning permission for retrospective change of use of the ground floor from A1 (retail) to A3 (café) use and the installation of an extract flue to the rear on 23 May 2017 (Ref No 17/0088/FUL).

5. Policy CP8 of the Council's adopted Local Development Core Strategy 2009 (CS) states that retail and town centre uses should be of an appropriate scale and not *"adversely impact on the vitality and viability of any existing centre"*. There is no suggestion that the A3 use is inappropriate in terms of its scale. Whilst the property was temporarily used for A3 use class purposes a few years ago, as a consequence of a two year General Permitted Development Order temporary planning permission, this temporary period came to an end. There is no dispute between the parties that the lawful use of the premises is A1 retail. Policy CP8 of the CS does not provide any detail in terms of how vitality and viability impacts should be assessed.
6. The relevant adopted development plan policy for the purposes of assessing vitality and viability impacts is Policy DM TC 3 of the DMP. The appeal site falls within a key shopping frontage and in this regard criteria A of the policy states that *"proposals that result in the loss of retail space in key shopping frontages will be generally resisted. The Council will support other uses converting to retail, subject to there being no adverse impact on the centre, and seek to retain key facilities, including Post Offices"*. The reasoned justification to the policy states at paragraph 4.2.24 that the *"key frontages have been designated on the parades that form the core of the retail centre, and as such they are mostly A1 retail. The loss of A1 space will generally be resisted, and conversions to A1 generally supported, whilst acknowledging the contribution that non-A1 units can make to the parade"*.
7. Criteria B of Policy DM TC 3 refers to secondary shopping frontages and states that non retail proposals will be acceptable subject to meeting criteria (a) to (f). It is evident from reading the policy as a whole that the Council's development plan strategy is to allow more flexibility in terms of allowing non-retail uses in the secondary shopping frontages and to maintain A1 retail uses within the key shopping frontages. The appeal development has resulted in the loss of an A1 use in a key shopping frontage and in this respect I do find some conflict with the town centre strategic aims of Policy DM TC 3 of the DMP.
8. Notwithstanding the above, I do recognise that criteria A of Policy DM TC 3 does say that the loss of retail space in key shopping areas will be *"generally resisted"*. It therefore falls to me to determine whether the development has caused harm to the vitality and viability of Teddington District Centre. The appellant has submitted statistical information relating to an assessment of a "sub area" of the District Centre comprising the north and south side of High Street. I have no reason to doubt the findings which are that 54% of units in this "sub area" are in retail use (14); 27% are in A2 use (6 units) and 7.7% of available units are in A3 use. However, there is no policy basis for assessing only a "sub area". In my view, the appellant should have assessed the whole of the District Centre as it functions as one defined area. Had he done so, and taken into account other areas in the District Centre where there are high concentrations of A3 uses (e.g. 112-196 High Street as referenced in criteria D

of Policy DM T3 of the DMP and as seen on my site visit), the position might have been a very different one.

9. In this case, if the development were allowed it would result in two A3 uses in the same key frontage. In addition, the overall number of non-retail uses within such a key frontage would be eight out of a total of seventeen (i.e. 47%). In my view, the continued use of the site for non-retail purposes would unacceptably exacerbate an existing issue where there is already a high proportion of non-retail uses in the parade. In the context that Policy DM TC 3 seeks to generally resist the loss of A1 retail uses, I consider that the proposal would have the effect of unacceptably harming the overall mix of retail and non-retail uses in both the key shopping frontage and the wider District Centre. I note the appellant's point that there used to be an A3 café at No 8 High Street and that this is now an A2 use. However, my assessment is based on what exists now and, in any event, the change of use of the above property did not involve the loss of an A1 retail use. I have no reason to dispute the Council's information which demonstrates that vacancy rates are low in the District Centre. Consequently, it cannot be said that the use should be permitted as vacancy rates are high or because the District Centre is in decline. I therefore consider that the proposal would cause significant harm to the vitality and viability of the District Centre.
10. I do acknowledge that to some extent the above matters are down to subjective planning judgment. However, even if one were to disagree with my views on the above matters, I do also attach some limited weight to emerging Policy LP 26 of the Council's Local Plan (Publication Version for Consultation) as a material planning consideration. I accept that this policy has been the subject of some objections. For this reason, and given its status, it can only be afforded very limited weight. This emerging policy does seek to essentially mirror Policy DM TC3 of the DMP, but it also states that "*where a proposal involves a change of use not supported by policy, the Council will require satisfactory evidence of full and proper marketing of the site for at least 2 years*". I have found that the proposal does materially harm the District Centre and the appellant has not provided any information relating to marketing the premises for retail use. Consequently, the proposal does not accord with emerging Policy LP 26.
11. In conclusion, use of the premises as an A3 café causes significant harm to the vitality and viability of Teddington District Centre and therefore fails to accord with the town centre aims of policies CP8 of the CS; Policy DM TC3 of the DMP and emerging Policy LP 26 of the Council's Local Plan.

Living Conditions

12. The notice has been served in part as the Council does not consider that the café has adequate extraction equipment and states that "*this has resulted in unacceptable odour generation*". I cannot be certain whether the existing extraction system is adequate as I have been provided with little detailed information relating to it. I do note the representation made by the occupier of No 16A High Street who claims that cooking smells have been the source of nuisance.
13. The appellant considers that this is a matter which could be addressed by means of the imposition of a planning condition on the deemed planning application. However, given the very close proximity of No 16A High Street to

the appeal premises (as well as residential properties on the other side of the back street), I do not consider that this is a matter which should be dealt with by a planning condition. The appellant has not submitted details as part of the ground (a) appeal so that both odour and noise issues associated with an extraction system could have been assessed. Furthermore, the site falls within the CA and in the event that it was necessary to undertake external works to the building (e.g. a flue or duct) this would need to be assessed on the basis of whether or not such development preserved or enhanced the character or appearance of such a CA. This is therefore a matter which strikes at the heart of whether or not the use is acceptable in land use principle terms.

14. In conclusion, the appellant has not demonstrated that the café is capable of operating without significant harm being caused to the living conditions of the occupiers of neighbouring residential properties in respect of odour. In addition, an assessment of such information could have ramifications from conservation point of view. For the reasons outlined above, a planning condition would not be appropriate. Therefore, I am unable to conclude that the proposal would accord with the amenity aims of Policy DM DC 5 of the DMP and the National Planning Policy Framework. Whilst emerging Policy LP8 of the Council's Local Plan (Publication Version for Consultation) can only be afforded very limited weight as a material planning consideration, I am also unable to fully assess the proposal against the amenity aims of such a policy.

Other Matters

15. I have taken into account representations made by other interested parties. I note the concerns raised by the occupiers of No 16A about noise from within the premises, the use of refuse bins and general untidiness. Had these been the only issues, then I am satisfied that they would have been capable of being addressed by means of the imposition of planning conditions relating to hours of use, a dedicated area for the storage of bins and internal noise insulation. There are no other matters raised which alter or outweigh my overall conclusion on the ground (a) appeal below.

Ground (a) conclusion

16. For the collective reasons outlined above, I conclude that planning permission should be withheld for continued use of the property as an A3 café use and the ground (a) appeal fails. Even if there was no objection relating to odour control matters, this would not have overcome the significant harm caused by the development to the vitality and viability of Teddington District Centre.

Ground (f)

17. The appeal on ground (f) is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
18. In respect of the ground (a) appeal above, I have already concluded that use of the premises for A3 use class purposes is not acceptable in planning terms. Such a use cannot be made fully acceptable in planning terms by means of the imposition of planning conditions. Therefore, there are no lesser steps available other than ceasing use of the premises as an A3 use to remedy the

breach of planning control and injury to amenity which has been caused by the breach.

19. In the event that the ground (a) deemed planning application were not to be approved, the appellant has suggested that the notice should be varied so that it allows an "ancillary A3 use" of the premises in conjunction with a primary A1 retail use.
20. The ground floor premises are currently being used as a primary A3 use. Ceasing use of the premises as a primary A3 use would not preclude any future ancillary use. Future use of the premises for ancillary use class purposes would not amount to development requiring planning permission. However, this appeal is not the appropriate mechanism by which a conclusion should be reached about whether or not it would be possible to use the premises for ancillary use class purposes. This would be a matter for the appellant to discuss separately with the Council which may or may not involve the submission of a certificate of lawful development application. For the reasons outlined above, it is not necessary to vary the requirements of the notice so that the premises can be used for ancillary use class purposes.
21. The allegation in the notice relates to a change of use from use class A1 (Retail) to use class A3 (Cafe). Section 5(i) of the notice requires the breach of planning control to be remedied by ceasing the A3 use. However, in conjunction with ceasing the A3 use the notice also imposes a requirement at paragraph 5(ii) to "*make good any damage caused by complying with step 5(i) above*". The Council state that this has been imposed as a precaution, but has not outlined what damage may be done to the property as a direct result of ceasing the A3 use. I do not consider that this is either a precise or a necessary requirement. Ceasing use of the premises for A3 use class purposes would in itself remedy the breach of planning control. In this regard, I agree with the appellant that step 5(ii) is excessive. I shall vary the notice in so far as deleting paragraph 5(ii). To this limited extent, the appeal on ground (f) succeeds.

Ground (g)

22. The appeal on ground (g) is that the period specified in the notice in accordance with s173(9) falls short of what should reasonably be allowed.
23. The notice requires the A3 use to cease within three calendar months. The appellant states that a period of twelve months should be allowed as it will take time to find alternative premises and therefore avoid having to make three members of staff redundant. In addition, he says that a longer period is needed to either surrender or to reassign the lease which runs to 2030. He says that a compliance period of 3 months would undoubtedly put him in a disadvantaged position as the landlord or future tenant would use this for their commercial advantage.
24. I am satisfied that a period of up to 3 months is sufficient to simply cease using the premises as a café. I do acknowledge that the appellant appears to have entered into a lease on the property and that a longer period would make it easier for him to secure re-use of the property and to find alternative premises. However, the lease was presumably entered into in the knowledge that planning permission was not in place for use of the premises as an A3 café.

Consequently, this issue has to be balanced against the planning harm that I have identified.

25. My main concern relates to minimising the potential for redundancies. I must decide whether or not a longer compliance period is justified in so far as achieving an appropriate balance between the need to bring this inappropriate and harmful development to an end and the interests of the business and the employees. Taking into account all of the above, I consider that a compliance period of four months would be proportionate and reasonable. To this limited extent, the appeal on ground (g) succeeds.

Conclusion

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

Daniel Hartley

INSPECTOR