
Appeal Decision

Site visit made on 16 September 2019

by JP Roberts BSc(Hons) LLB(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 October 2019

Appeal Ref: APP/A5270/C/19/3220344

66 North Road, Southall, Middlesex UB1 2JL

- 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 Harjinder Singh of Maharaja of London Ltd against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice was issued on 3 December 2018.
 - The breach of planning control as alleged in the notice is:
The material change of use of A1 retail unit to a mixed use of restaurant (A3) & hot food takeaway (A5) and operational development consisting of installation of kitchen extraction flue on the rear elevation of the property.
 - The requirements of the notice are:
 - a) *Cease the use of the unit for restaurant and/or hot food takeaway.*
 - b) *Remove all items associated with the restaurant & takeaway use including the kitchen, serving counter and all tables and chairs.*
 - c) *Remove in its entirety the kitchen extract system located on the rear elevation of the property and make good any resulting damage.*
 - d) *Remove all resulting debris from the land.*
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the ground set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Application for costs

2. An application for costs was made by the Council of the London Borough of Ealing against Maharaja of London Ltd. This application is the subject of a separate Decision.

Main Issue

3. The main issue is whether the matters alleged in the notice constitute a breach of planning control.

Reasons

4. The appellant argues that the use of the premises as a restaurant and takeaway benefits from deemed permission under the Town and Country Planning (General Permitted Development) Order (England) 2015. In an

undated letter the Council was notified of the intention of a Mr Virdi to implement the temporary change from a shop to a flexible use as a restaurant under Class D of Part 4 of Schedule 2 of the Order. The letter says that it was intended that the use should commence on 1 September 2016 but, supported by photographic evidence, the Council indicates that the use commenced by June 2016. An Inspector on a previous appeal records that it commenced on 12 September 2016.

5. At the time that the use was implemented, the temporary permission granted was for single continuous period of 2 years' duration. Condition D.2(e) provides that the site reverts to its previous lawful use at the end of the period of flexible use. Thus, that permission expired, at the latest, in September 2018, well before the date of issue of the notice. The Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019 extended the temporary period to 3 years. However, this amendment came into effect on 25 May 2019, by which time the temporary permission had expired. Accordingly, the use of the restaurant cannot be permitted under this Class. Moreover, the flexible use permitted under this Class does not include use as a hot food takeaway, nor does it permit the erection of fume extraction equipment.
6. There are also permitted development rights under Class C, Part 3 to Schedule 2 of the Order to change permanently the use of a Class A1 retail shop to a Class A3 restaurant, and to erect an external flue. However, these rights are subject to condition C.2(1) that, before beginning the development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to various impacts of the development. No such application was made to the Council. This pre-commencement condition goes to the heart of the deemed permission and cannot be granted retrospectively. Accordingly, the appellant cannot avail himself of this deemed permission. Notwithstanding this, the use being enforced against does not solely involve a Class A3 use, but is a mixed use as a restaurant (A3) and a hot food takeaway (A5). The deemed permission under Class C does not permit use as a hot food takeaway or as a mixed use as a restaurant and a hot food takeaway.
7. I therefore find that the uses alleged in the notice are not uses permitted under the Order. No planning permission has been granted for the uses alleged, and in fact planning permission has been refused for the change of use to a Class A3 restaurant/café, and an appeal against that refusal was upheld in a decision dated 24 April 2017 (Ref: APP/A5270/W/17/3167392).
8. I therefore conclude that the matters alleged in the notice constitute a breach of planning control and that the appeal on ground (c) fails.

Other matters

9. The appellant has made several points about the Council's stated reasons for issuing the enforcement notice. However, they deal with the planning merits of the development, and as the relevant fees have not been paid, there is no deemed application for planning permission before me. Third parties have also commented on planning merits. Such matters are not ones which I can take into account on the narrow legal grounds available in an appeal under ground (c).

Conclusion

10. For the reasons given above, I conclude that the appeal should be dismissed and the notice upheld.

JP Roberts

INSPECTOR