
Appeal Decision

Site visit made on 30 September 2019

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 23 October 2019

Appeal Ref: APP/X5990/W/19/3232986
272 Harrow Road, London W2 5ES

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under a development order.
 - The appeal is made by Mr Mor Altimimi against the decision of City of Westminster Council.
 - The application Ref 19/01736/APA, dated 28 February 2019, was refused by notice dated 1 May 2019.
 - The development proposed is described as the change of use from A1 (Retail) to A3 café without primary cooking and without extraction canopy/kitchen extraction system on the ground floor only.
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Decision

1. The appeal is dismissed.

Main Issue

2. The first, and in the event only, main issue in the appeal is whether the proposed development benefits from the permission conferred by Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ('the Order').

Reasons

3. Article 3(1) of the Order confers planning permission for the types of development set out in the Schedules to the Order, subject to complying with the conditions, restrictions and limitations therein. Part 3 of Schedule 2 to the Order concerns changes of use. Class C of Schedule 2 confers a permission to change the use of a building, with a floor space not exceeding 150 sqm, from a use falling within Class A1 (shops) of the Use Classes Order ('UCO') to a use falling within Class A3 (restaurants and cafés).
4. A number of conditions, limitations and restrictions apply.
 - (i) The first is that the building (or the relevant part thereof) must be in an existing shop use in Class A1 before the permitted change of use can take place: Class C, description of permitted development.
 - (ii) The second is that, like any permission conferred by the Order, the existing use or operations must be lawful in order to benefit from the permission granted by the Order: article 3(5).

- (iii) The third is that an application to the local planning authority must be made for a determination as to whether the authority's prior approval is required as to matters concerning the impacts of noise, odour, storage, waste handling, opening hours, transport and highways, and whether it is undesirable for policy reasons whether the change of use should take place.
5. In relation to the first issue, I observed at my site visit that the appeal property is not presently in use as a shop falling within Class A1 of the UCO. The premises consist of a kitchen to the rear with serving area forwards offering fresh food and drinks for consumption on or off the premises. A price list displays differential prices depending on whether products are consumed on the premises or elsewhere. A chilled drinks cabinet is sited in front of the serving area, and the remainder of the floor space is taken up by café tables and chairs. To the front, an enclosed pavement area contains further tables and chairs. During my site visit a number of café patrons were present at the tables, and I did not witness any off-premises sales (albeit my site visit was after lunchtime when this might not be expected).
6. It therefore appeared to me that the primary use of the premises was not as a shop falling within Class A1. It appeared to me to be already in use for Class A3 café purposes.
7. On the second issue, it appears from the planning history and the parties' submissions that the lawful use of the premises is as a Class A1 shop use. However, it follows from my analysis above that this is not the premises' existing use. Class W of Schedule 2 to the Order provides that the development permitted under Class 3 must not begin before the local planning authority has given notice in relation to the matters requiring prior approval, or a time limit has expired without that notice having been given. As prior approval has not already been given, and because the use of the premises is no longer in a Class A1 use, it follows that the existing use is not a lawful one for the purposes of article 3(5) of the Order. Therefore the premises cannot presently benefit from the relevant permission conferred by the Order.
8. It follows that it is unnecessary to consider the third issue, the matters requiring a determination as to prior approval, because the change of use to Class A3 cannot at this point benefit from the permission conferred by the Order in any event.

Conclusions

9. For the above reasons, the proposed development does not benefit from the permission conferred by the Order and therefore the appeal is dismissed.

Laura Renaudon

INSPECTOR