
Appeal Decision

Site visit made on 5 November 2019

by Rajeevan Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 December 2019

Appeal Ref: APP/X5990/C/19/3219658
22 Cranbourn Street, London WC2H 7AA

- 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 Dror Appell of Wok to Walk Leicester Ltd against an enforcement notice issued by City of Westminster Council.
 - The enforcement notice was issued on 17 December 2018.
 - The breach of planning control as alleged in the notice is without the requisite planning permission and within the last ten years a material change of use has occurred at the property from a café/restaurant (A3 use class) to a hot food takeaway (A5 use class).
 - The requirements of the notice are:
 - (i) Cease using the site for hot food take-away (A5 Use Class); and
 - (ii) Remove any and all items, equipment, fixtures and fittings (including air handling/extraction and plant equipment), brought onto the site for the purposes of operating a hot food take-away use (A5 Use Class).
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(b) of the Town and Country Planning Act 1990 as amended.
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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 City of Westminster Council against Mr Dror Appel of Wok to Walk Leicester Ltd. This application is the subject of a separate Decision.

Procedural Matter

3. The Appeal has only been lodged under ground (b). However, it is clear from the substance of their appeal submissions that the appellant is also seeking to appeal under ground (c), in so far as they consider that there has been no material change of use and ground (f), since they state that the subject extractor was already in place before they took over the premises. As the Council have provided detailed comments on the appellant's statement, I am satisfied that neither party would be prejudiced by the inclusion of this. I have therefore determined the appeal on this basis.

The appeal on ground (b)

4. To succeed on Ground (b), it is necessary for the appellant to demonstrate, on a balance of probabilities that as a matter of fact hot food take-away sales

have not been made from the unit in question. This has not been demonstrated. On the contrary, the appellant confirms that there are takeaway orders. Since the appellant accepts that the take-away use occurs, the appeal fails on ground (b).

The appeal on ground (c)

5. Under this ground of appeal, it is contended that the take away use is so minor that it does not constitute a material change in the use of the site and should be regarded as de minimis. It is further stated that the sales data and the layout of the premises confirm this.
6. The concept of material change of use is not defined in statute or statutory instrument and therefore it is a question of fact and degree in each case. For there to be a material change of use, there needs to be some significant difference in the character of the activities from what has gone on previously.
7. The Council state that the previous use of the premises was as a café/restaurant (A3 use class), with ancillary take away, and that a material change of use has taken place to a hot food take away (A5 use class), with some ancillary seating. The appellant states that Wok to Walk started operation in early 2018 and operates as a restaurant as per the previous operator. It is also stated that Wok to Walk refurbished the premises maintaining the capacity and kept the layout as the previous occupier and maintained the tables and chair license in the forecourt of the premises.
8. The primary use of a restaurant (Class A3) is to serve food for consumption by customers on the premises. Occasional take-away sales (unless prohibited by a planning condition) or customers occasionally choosing to take rather than complete the end of their meal, would not necessarily be incompatible with the primary restaurant use. In this case, there is only limited evidence from either party as to whether hot food take-away sales are at a scale so as to amount to a primary use of the premises.
9. The appellant has submitted sales figures, for the business from January to August. Whilst no year has been provided for these figures, the appellant has later confirmed¹ that these relate to 2019 (i.e. after the date of the enforcement notice). However, there is no supporting evidence or sworn affidavit to demonstrate its accuracy. Furthermore, no details of online orders have been provided. This would form part of the takeaway service, and the evidence provided by both parties indicates that the business does provide online orders. As such, in the absence of the above information only limited weight can be given to the sales figures provided.
10. A screen shot of the Companies House online record submitted list a number of Wok to Walk businesses. All of these describe the nature of their business as "Take-away food shops and mobile food stands", including Wok to Walk Leicester Limited. The registered address for this company is listed as "22 Cranbourn Street, London WC2H 7AA".
11. As suggested by the name of the business, food is prepared in woks, and then packaged and sold to customers in disposable boxes, with disposable cutlery/chopsticks. When ordering food, customers are given a ticket with a number on it. Drinks are offered within a self-service fridge. The ticketing style

¹ Letter from Mr Dror Appel dated 27 October 2019.

service provided means that staff service is limited to taking orders/payment and the preparation of food.

12. I also observed that there was limited floor space for seating within/outside the premises for dining in. In total, there were only three tables with approximately 15 high stools inside the premises, and two tables and four chairs outside on the forecourt. A significant proportion of the ground floor area is given over to staff areas for taking orders and preparation of food.
13. Whilst the appellant contends that they have maintained the layout and capacity of the previous restaurant operator, photographic evidence submitted shows that the former restaurant operator at this address provided additional floor space for tables and chairs at first floor level in addition to the ground floor area. These photographs also demonstrate that the former operator had tables laid with cutlery. Conversely, the current use does not provide table service, nor were the tables laid with cutlery. From the evidence presented and from what I saw during my site visit, the character of the building has changed significantly since the use of the premises by the current operator and take away sales are not ancillary to the preparation of food for consumption on the premises. This change is materially different from the previous use.
14. On the balance of probability and based on all the evidence before me it appears that a material change of use has occurred. Planning permission is required for such a change of use. There is none in place and the change of use is not permitted development. There has therefore been a breach of planning control and the appellant has not discharged the onus on him to demonstrate otherwise. Accordingly, the appeal fails on ground (c).

The appeal on ground (f)

15. The appeal on this ground 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 (i.e. the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. On this occasion the notice has been issued to remedy the breach of planning control.
16. Requirement (ii) of the enforcement notices states: "Remove any and all items, equipment, fixtures and fittings (including air handling/extraction and plant equipment), brought onto the site for the purposes of operating a hot food take-away use (A5 Use Class)". Photographs and plans have been submitted to indicate that an extractor has previously been in place at the property, but the evidence does not indicate that it is the same extractor. Nor is it clear if there is an obvious alternative scheme. I am therefore unable to conclude, on the limited evidence before me, that the existing extract system is lawful.
17. The appellant also states that residents noise complaints have been resolved and this is confirmed in an email from the noise case officer². However, given that a ground (a) appeal has not been pleaded, I cannot assess the planning merits of the case, and I must take the notice at face value. No other lesser steps have been proposed which would overcome the breach of planning

² Dated 4.4.2019 (appendix 6)

control and planning permission would still be required. On this basis, the Ground (f) appeal fails.

Conclusion

18. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

R. Satheesan

INSPECTOR