



Appeal Decision

Site visit made on 8 January 2020

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 February 2020

Appeal Ref: APP/X5990/C/19/3225495

Basement and Ground Floor, 80 Queensway, London W2 3RL

- 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 Mrs Soniya Joshi on behalf of Polish Me Pretty London Limited against an enforcement notice issued by City of Westminster Council.
 - The enforcement notice was issued on 21 February 2019.
 - The breach of planning control as alleged in the notice is without the requisite planning permission and within the last 10 years, the unauthorised material change of use from a Class A1 (Retail) use to a Class A2 (Financial and professional services) use comprising a nail bar and for the provision of beauty treatments.
 - The requirements of the notice are:
 - I. Cease the use of the Property (for the avoidance of doubt the ground and basement floors of the Building) as a nail bar and for the provision of beauty treatments (Class A2 use under the Town and Country Planning (Use Classes) Order 1987; and
 - II. Remove from the Property all the equipment associated with the unauthorised material change of use, including but not limited to the following:
 - a. the work stations at ground floor and basement level as shown in Photographs H and I;
 - b. the pedicure stations at basement level as shown in Photograph J; and
 - c. the treatment bed and wax-treatment equipment at basement level, as shown in photograph K.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. The appeal is allowed, and the enforcement notice is quashed.

The Enforcement Notice

2. The Appellant states that the Enforcement Notice is defective as it makes no reference to the Article 4 direction introduced on 1 January 2017. However, whilst a complete omission would render the notice a nullity, under S173(1)(a) of the Town and Country Planning Act 1990 (the Act), the Enforcement Notice makes clear what the alleged breach is (as outlined in the banner heading above). There is no legal requirement for the enforcement notice to specifically mention the Article 4 direction or reasons why it was introduced. I am therefore satisfied that the Enforcement Notice meets the relevant requirements of the Act and is not defective.

The appeal on ground (c)

3. This ground of appeal is that the development enforced against did not constitute a breach of planning control. The burden of providing relevant facts in this appeal rests with the appellant, and the test of the evidence is the balance of probability.
4. The evidence submitted indicates that the previous lawful use of the property was Class A1 (retail), which is not in dispute. The planning history for the appeal site includes a refused application for a Certificate of Lawful Use or Development for the existing use of part of the ground floor and entire basement as beauty salon and nail bar use Class A2 (Financial and professional services)¹.
5. Change of use from Class A1 to Class A2 is permitted development pursuant to Article 3, Schedule 2, Part 3, Class D of the Town and Country Planning (General Permitted Development (England) Order 2015 (as amended). However, an Article 4 Direction came into effect in Westminster on 1 January 2017, which removed the permitted development rights for such changes of use within the Core Central Activities Zones and designated shopping centres. The Property falls within the Queensway Major Shopping Centre and as such, the Article 4 Direction applies, after the 1 January 2017.
6. The appellant states that that the changes were made to the premises over the course of 2016, prior to the Article 4 Direction coming into force, as part of the material change of use of the premises from Class A1 (Retail) to Class A2 use nail bar/beauty salon (Financial and Professional Services). As such, the appellant contends that planning permission for the change of use is not required, where such permitted development rights have been exercised.
7. The *Impey* case², as confirmed in the Supreme Court in *Welwyn-Hatfield*³, held that a material change of use may take place when physical works are carried out for the proposed use in advance of the activity which constitutes the proposed use occurring. Therefore, a change of use could take place as a result of the physical works, but it is necessary "to look at the matter in the round and to ask what use the building has or of what use it is"³. "The physical state of these premises is very important, but it is not decisive. Actual or intended or attempted use is important but not decisive²." It is a matter of fact and degree as to when the change of use occurs, and relevant considerations include the former use of the building; the physical state of the building at the relevant date and the actual use of the building at that date.
8. In a statutory declaration of Soniya Joshi, the appellant, declares that she is the Director or Polish Me Pretty London Ltd, and has a lease for a term of ten years from the 4 January 2016. The statutory declaration further states that when taking over the lease it was necessary to re-configure the layout, create separate areas for each type of beauty treatment, redecorate and fit out with new furniture, in order to provide the full range of beauty services and products they offer (which include waxing, threading, facials, massage, manicures, pedicures and nail extensions).

¹ Council reference: 17/05840/CLEUD refused on 19 September 2017.

² *Impey v SSE and Lake District SPB* [1984] 47 P & CR 157.

³ *Welwyn Hatfield BC v SSCLG and Beesley* [2011] UKSC 15.

9. The statutory declaration also states that when the lease was in place, the appellant's husband, who has a building company called New Build Construction Solutions Ltd, began the process of changing the property to enable them to provide the beauty salon. The works carried out to facilitate the change of use of the property included layout changes, plumbing and electrical work, between February 2016 and November 2016. A number of contractors were also employed for the Korean Pedicure units; the installation of the CCTV, alarm and the media system; and interior design including furniture and chairs. All substantive works, decorations, (except for a mirrors) and all furniture (except for some therapist pedicure chairs) was completed by November/December 2016. In order to facilitate the changes a structural report was also commissioned, and a copy of the report prepared by Jampel Davison and Bell Consulting Engineers dated 24 February 2016 has been included with the Statutory Declaration.
10. A 'soft launch' of the beauty salon occurred in September 2016, before final fitout works were completed, namely the external signage. The declaration also states that the beauty salon opened on a number of days in September and October 2016, and accounts for the business have been submitted with the Statutory Declaration showing income raised from 2016. The beauty salon name was installed in January 2017, and the beauty salon fully opened on 9 May 2017. The appellant states that the delay to opening was due to, firstly, the appellant's illness between November 2016 and February 2017, and then further delayed upon receipt of the Council's enforcement letter dated 20 February whilst legal advice was sought.
11. In support of the Statutory Declaration, the submitted evidence includes the leasehold for the subject property, demonstrating that 'Polish Me Pretty London Ltd' has a lease for a term of ten years from the 4 January 2016; Structural Report prepared by Jampel Davison and Bell Consulting Engineers dated 24 February 2016; Accounts for the business year ending 2016 showing income from the business for 2016; Invoices to the appellant and receipts of purchases made in relation to the internal refurbishment works dated in 2016.
12. Whilst the Council consider that their own photographs of the site on 2 February 2017⁴, indicate that further fit-out works were required to facilitate the change of use, I do not agree. Indeed, the photographs support the appellant's statements in that the shop signage was installed by this date. Within the unit the internal layout of the beauty salon was also at a sufficiently advanced stage with the majority of furniture and fittings installed, which includes tables and chairs for the nail bar, light fittings and lamp shades above the nail bar, and a front counter close to shop entrance. All of these fixtures, fittings and furniture were installed and intended for use by the nail bar/beauty salon.
13. The Council has not provided any substantive evidence to contradict the contents of the appellant's statutory declaration, and I have no reason to question it. For instance, lack of online reviews from three years ago or that the business may have also been trading from within Whiteleys Shopping Centre does not demonstrate that the 'soft launch' did not occur in September 2016.

⁴ Approximately a month after the Article 4 direction came in to force.

14. I note that the Statutory Declaration states that the nail/bar beauty salon officially opened on 9 May 2017. However, taking account of legal authorities referred to above, physical works appear to have been carried out which facilitated the use of the premises and there was also some use of the premises before the Article 4 direction came into force⁵. Therefore, I do not consider that the official opening date is determinative in deciding when a change of use is likely to have occurred, since I am required to look at the matter in the round and sufficient and compelling evidence has been submitted which demonstrates that the change of use of the premises occurred before the pertinent date⁵. Furthermore, there was no intervening use between the 'soft launch' of the beauty salon and the article 4 direction coming into force.
15. Therefore, I am also satisfied that on the balance of probability and based on all the evidence before me, it appears that sufficient physical works to facilitate the material change of use as alleged on the notice occurred prior to the date when the Article 4 direction came into force⁵. Planning permission was therefore not required for the change of use which is permitted development. There has therefore been no breach of planning control. Accordingly, the appeal succeeds on ground (c).

Conclusion

16. For the reasons given above, I conclude that the appeal should succeed on ground (c). The enforcement notice will be quashed. In these circumstances, the appeal on grounds (a) and (g) do not fall to be considered.

R Satheesan

INSPECTOR

⁵ 1 January 2017.