



Appeal Decision

Site visit made on 4 February 2020

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 March 2020

Appeal Ref: APP/E5900/C/19/3227585

Land at 123 Meridian Place, London E14 9FE

- 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 Komoto Group Limited against an enforcement notice issued by the Council of the London Borough of Tower Hamlets.
 - The enforcement notice, numbered ENF/15/00502, was issued on 27 March 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises from use as retail (Class A1) to a Sui Generis mixed use for restaurant and hot food takeaway (A3 and A5).
 - The requirements of the notice are:
 - i) Cease the use of the premises as a Sui Generis mixed use for restaurant and hot food takeaway (A3 and A5).
 - ii) Remove all primary cooking facilities (e.g. cookers, ovens, grilles, hobs, fryers, extractor flues etc.) from the premises.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (f) 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. It is directed that the enforcement notice is corrected by the deletion of 'Sui Generis mixed use for restaurant and' and '(A3 and A5)' from the breach, and the deletion of ' Sui Generis mixed use for restaurant and' and '(A3 and A5)' from requirement i); and varied by the deletion of '3 months' and substitution of '6 months' in the period for compliance.
2. Subject to the corrections and variation, the appeal is dismissed, 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.

Preliminary Matters

3. Since the appeal was lodged, the Tower Hamlets Local Plan 2031 (LP) was adopted on 15 January 2020. Policy DM25 of the Managing Development Document of the Local Plan 2013 is replaced by Policy D.DH8. Both parties have had the opportunity to comment on the implications for the case.
4. In relation to the appeals on grounds (b) and (c), the burden of proof lies with the appellant, and the standard of proof is the balance of probability. Some of the arguments put forward in support of the ground (b) appeal are more

appropriately considered under ground (c), and I have dealt with them accordingly.

The ground (b) appeal

5. To succeed on this ground the appellant would have to demonstrate, on the balance of probabilities, that the matters that led to the service of the notice have not occurred, as a matter of fact.
6. Class A1 is defined in the Town and Country Planning (Use Classes) Order 1987 (as amended) (UCO) as a use for the retail sale of goods other than hot food, and can include the sale of sandwiches or other cold food for consumption off the premises. Class A3 is the use for the sale of food or drink for consumption on the premises (restaurant), while class A5 is the use for the sale of hot food for consumption off the premises (hot food takeaway).
7. The appellant states that the current use of the premises falls within class A1, as it does not include any cooking of food on the premises, only the reheating of a limited range of foods prepared offsite, which could also be eaten cold. A Statutory Declaration from Aleks Mikeli who is the owner of the company that occupies the premises, indicates that a small amount of hot non-sandwich food is sold, although no cooking takes place on the premises and there is no seating inside the shop.
8. The Council's evidence refers to observations made by an officer that in addition to sandwiches and hot/cold drinks, hot food including breakfasts, grilled chicken, grilled potatoes, rice, vegetables and burgers was being advertised from the premises, and people were observed leaving the premises with hot food within containers. There were seating areas for the consumption of food on the premises under awnings to the front of the building. The Council also refers to the presence of a flue and cooking equipment including a deep fat fryer, a hob, microwave, small toaster and oven. Cooking smells were also noted by the Council Officer and local residents. Photographs have been provided with the Council's evidence showing the extract flue, the menu on display, cooking equipment within the premises and extracts purporting to be from a website showing the menu and photographs of cooked food in takeaway containers.
9. While I did not see a deep fat fryer or oven on my site visit, I saw that the displayed menu includes hot food such as bacon, sausages and eggs, grilled chicken, grilled potatoes, rice and vegetables, with cold food and drinks displayed in a chiller counter. I also saw disposable food containers of a type that is often used for takeaway food. There was an electric rice cooker and a microwave oven. The extract duct shown in the Council's photographs was no longer in place.
10. There is a small area for customers to stand in front of the chiller counter to order and pay for food and drink, while the area behind the chiller counter is used by staff for food preparation etc. There is very limited space within the building for customers to consume hot food on site, with a small number of tables and chairs located outside the building. It is not unusual for a sandwich bar or hot food takeaway to provide some outdoor seating, but this does not of itself indicate a restaurant use. On the basis of the evidence before me, I am satisfied that hot food was being prepared on site, primarily for consumption off site, and this led to the enforcement notice being served.

11. I conclude, on the balance of probability, that a use as a hot food takeaway has been taking place. I do not agree that a restaurant use has taken place.
12. I have powers to correct the notice under section 176(1) of the Act, including to make significant changes to the terms of the notice to provide an accurate description of the alleged breach, provided the change would not cause injustice. I am satisfied that removing the reference to a mixed A3 and A5 use so that the allegation refers only to hot food takeaway would not cause injustice to either party. I shall also vary the requirements of the notice to reflect the change in the description of the breach.
13. To this limited extent the appeal on ground (b) succeeds.

The ground (c) appeal

14. This ground of appeal is that the matters stated in the notice which give rise to the alleged breach of planning control, do not constitute a breach of planning control.
15. The Planning Practice Guidance (PPG)¹ advises that not all uses of land or buildings fit within the use classes order. Where buildings are being used for different uses which fall into more than one class, then the overall use of the land or buildings is regarded as a mixed use. The exception to this is where there is a primary overall use of the site, to which the other uses are ancillary.
16. The concept of a 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 the lawful use of the premises, which in this case is Class A1.
17. The appellant argues that the limited amount of hot (reheated) food being sold from the premises is ancillary to the main use as a sandwich bar which sells primarily hot and cold sandwiches, cakes and drinks and falls within the definition of a class A1 shop. It is therefore contended that no material change of use has taken place, and the appellant makes reference to cancelled Circular 03/2005 which refers specifically to sandwich bars, and an appeal in a different London Borough². The latter relates to the use of premises for the sale of food or drink for consumption on the premises rather than a hot food takeaway and is not directly comparable.
18. In this case, there is clear evidence that food has been cooked and/or reheated on site, and this has given rise to odours that have been noted by the Council Officer and local residents. Furthermore, the food on the menu displayed at the site indicates an extensive range of hot food being available. While there was no evidence of food being cooked at the time of my visit, and there was no deep fat fryer or oven (microwave only), the enforcement notice refers to the breach that was taking place, not to a subsequent use. The evidence points towards the provision of hot food for takeaway as having given rise to a material change in the character of the use. The hot food takeaway element is therefore not ancillary to an A1 use as a sandwich bar, but has resulted in a material change of use to a hot food takeaway.

¹ Paragraph: 010 Reference ID: 13-010-20140306 Revision date: 06 03 2014

² Appeal ref APP/Z5060/C/16/3148465

19. The appeal on ground (c) therefore fails.

The appeal on ground (a) and the deemed planning application

20. The ground of appeal is that planning permission should be granted for the developed described in the alleged breach.

Main Issue

21. Having regard to the reason for issuing the notice, the main issue is the effect of the development on the living conditions of neighbouring occupiers with regard to smell/odour.
22. The site is located in a densely developed urban area close to Canary Wharf. Meridian Place is a primarily residential building, with six floors of flats above a number of ground floor units, some of which are in commercial use. The appeal site is a small unit located immediately adjacent to the main entrance to the flats, and is located in a covered walkway under the upper floors of the building. Although there was no cooking taking place at the time of my site visit, the unit has its only doorway in close proximity to the entrance to the flats. The extraction system shown in the Council's photographs has now been removed, but the evidence indicates that it was not able to adequately control cooking smells and odours from the premises. Although I saw that there are other takeaways in the locality, and it is not unusual to have such uses in close proximity to dwellings in a location such as this, any cooking odours need to be adequately controlled to ensure that living conditions are not unduly affected.
23. The Council has suggested conditions in the event that I am minded to allow the ground (a) appeal. Although controlling the hours of use would alleviate some of the effect on living conditions, odours are likely to linger and affect living conditions even after the cooking activity has ceased, and the suggested hours would include evenings until 8pm. Details of mechanical ventilation could be required, but I have seen no firm evidence that a system could be designed that would adequately deal with the cooking odours, given the small size of the premises and their location underneath the covered walkway and immediately adjacent to the entrance to the flats. I am therefore not satisfied that a condition would overcome the harm I have identified. The appellant suggests that a condition could be imposed to control the type of food that would be sold, but it is not clear how this would meet the tests set out in the Planning Practice Guidance.
24. I therefore conclude that the development is harmful to the living conditions of neighbouring occupiers with regard to smell/odour. It is therefore in conflict with Policy D.DH8 of the LP, insofar as it seeks to protect the amenity of existing occupants.

Conclusion in relation to the ground (a) appeal

25. For the reasons given above and with regard to all other matters raised, I conclude that the appeal on ground (a) should fail and the deemed application should be refused.

Ground (f) appeal

26. This ground of appeal is that the steps for compliance with the notice are excessive. The purpose of the enforcement notice is clearly to remedy the

breach, as it requires the use to cease. The appellant suggests that a lesser step would be to impose conditions requiring a restriction on the hours of use of the premises. However, and notwithstanding the clear purpose of the notice, I have concluded that such a condition would not be sufficient to overcome the injury to amenity that is caused by the breach.

27. The appellant also suggests that the removal of primary cooking facilities is excessive as the use of the premises as a sandwich bar allows for the use of these items. However, these items facilitate the use for the preparation of hot food, and it is therefore legitimate to require their removal.
28. The appeal on ground (f) fails.

Ground (g) appeal

29. The ground of appeal is that the period for compliance is unreasonably short. The notice gives a period of 3 months for compliance, and the appellant requests a period of 12 months to allow the tenant time to find suitable alternative premises in order to relocate their premises.
30. There is a balance between bringing the identified harm to an end without unnecessary delay, and the interests of the appellant. I consider that 6 months is sufficient to enable the tenant to look for alternative premises.
31. To this extent the appeal on ground (g) succeeds and I will vary the notice accordingly.

N Thomas

INSPECTOR