



Appeal Decisions

Site visit made on 13 January 2020

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 16 April 2020

Appeal A: APP/X5990/C/19/3232401

117 - 119 Edgware Road, London W2 2HX

- 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 Daejan Investments Limited against an enforcement notice issued by City of Westminster Council.
- The enforcement notice was issued on 30 May 2019.
- The breach of planning control as alleged in the notice is *Without the requisite planning permission and within the last 10 years, the material change of use of the ground floor and basement of the property from a retail shop (A1 use class) to a café/restaurant (A3 use class)*.
- The requirements of the notice are to:
 - (a) Cease the use of the ground floor and basement as a café/restaurant (A3 use class); and
 - (b) Remove from the Property any and all plant, fitting, fixtures and equipment brought onto the premises for the purposes of operating a café/restaurant.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the ground set out in section 174(2)(g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal succeeds in part and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.

Appeal B: APP/X5990/C/19/3232435

117 - 119 Edgware Road, London W2 2HX

- 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 Jihad Issa against an enforcement notice issued by City of Westminster Council.
- The enforcement notice was issued on 30 May 2019.
- The breach of planning control as alleged in the notice is *Without the requisite planning permission and within the last 10 years, the material change of use of the ground floor and basement of the property from a retail shop (A1 use class) to a café/restaurant (A3 use class)*.
- The requirements of the notice are to:
 - (a) Cease the use of the ground floor and basement as a café/restaurant (A3 use class); and
 - (b) Remove from the Property any and all plant, fitting, fixtures and equipment brought onto the premises for the purposes of operating a café/restaurant.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal succeeds in part and the enforcement notice is upheld as corrected and varied in the terms set out below in the Formal Decision.

Preliminary Matters

1. An administrative mix-up resulted in the parties not being informed of the proposed arrangements for my accompanied site visit. Arriving on site I was afforded access by the occupier and proceeded to view the site.
2. The notice identifies that the Council perceive a breach of planning control under section 171A(1)(b) of the 1990 Act as amended. That sub-paragraph relates to breaches consisting of failing to comply with any condition or limitation subject to which planning permission has been granted. The allegation set out in the notice however alleges the carrying out of development without planning permission, namely a material change of use. The breach as thus described would fall under section 171A(1)(a).
3. The appeal property appears to have benefitted from 2 planning permissions allowing the use for Class A3 purposes as a café/restaurant. The ground floor of 117 – 119 benefitted from permitted development rights to make a temporary 'flexible use' change under article 3 and Schedule 2, Part 4 Class D of the General Permitted Development Order ('the GPDO') as it existed in 2014 (which is to say the Town and Country Planning (General Permitted Development) Order 1995/418). The permission conferred by the GPDO (to which I refer below as '14/01767/TFU') included a condition that the temporary use should cease at the end of the relevant 2 year period, expiring on or around 1 April 2016.
4. Separately, an express temporary permission (to which I refer below as '14/09331/FUL') was granted by the Council for the use of the basement to No 117 for the same purpose. A condition attached to that permission also required the use to cease on 1 April 2016, following which the land was required to return to its previous condition and use.
5. Whether both of those permissions were implemented is a contested matter. The Council's letter dated 7 March 2014 relating to 14/01767/TFU, in response to the notification given to them on 20 February 2014, stated that it appeared to them that the GPDO conditions had been complied with and, as such, planning permission was not (expressly) required for the change of use. In response to my questions however, the Council states that the temporary flexible use permission conferred by the GPDO has yet to be taken advantage of. Their case is that the change of use had begun before the date stated in the relevant notification, and therefore did not benefit from the GPDO permission at all.
6. The Council have supplied photographs of the site dated 18 March 2014, so post-dating the notification given to them, but pre-dating the 1 April 2014 date stated in it for the flexible use period to begin. No customers are present in those photographs, but the premises are shown to be laid out with tables containing menus and condiments. It may therefore be that the change of use to Class A3 had already by then taken place, but there is nothing before me to contradict the Council's statement on 7 March 2014 that 'the conditions have been complied with', which would include the use not having already begun at the time of the notification.
7. Development is permitted by Class D subject to conditions including that the developer must notify the local planning authority of the date the site will begin to be used for the relevant flexible use before the use begins. The text now

differs in the 2015 Order, but at the relevant time it simply granted a permission to change the use of a building and any land within its curtilage to a flexible use for a single continuous period of up to two years beginning on the date the building begins to be used for one of the flexible uses. Although the notification to the local planning authority is required to state the date when the use will be begun, it does not appear to me to be a condition of the (then) Class D permission that the use is actually begun on exactly that date. The requirement is merely to notify the local planning authority of the intended use before the use begins.

8. Therefore, although the change of use may have taken place prior to 1 April 2014, there is nothing before me to suggest that it had already begun by the time of the notification given to the Council on 20 February 2014. Accordingly, I find that the permitted development right has been exercised, and that the relevant breach of planning control is the breach of the relevant condition of the GPDO requiring the site to revert to its previous lawful use at the end of the period of flexible use.
9. The temporary basement permission 14/09331/FULL was apparently predicated on the lawfulness of the ground floor use, referring to the 'Temporary Flexible Use' in the reason for the relevant time-limiting condition. There is no dispute that this permission was implemented and that the use has continued in breach of that condition, no. 2. Although both parts of the building appear together to form a single planning unit, it is not suggested by any of the parties that the permission 14/09331/FULL had any application beyond the basement, or that the temporary flexible use permission 14/01767/TFU had any application beyond the ground floor.
10. The appellant in Appeal B contends that if the alleged breach of planning control requires correction, as I have concluded it does, then the notice cannot be amended without injustice and is a nullity. It is contended that prejudice arises because the appellant may have appealed on ground (a) to seek an extended temporary permission and that this opportunity has been denied.
11. I do not accept this to be the case. However the allegation is framed, it amounts to alleging the continued use of the premises as a café/restaurant without authorisation by a planning permission. It does not fail the *Miller-Mead* test. An appeal on ground (a) to seek a temporary permission could have been made on either basis and no injustice will be caused by correcting the notice.
12. Therefore I shall correct the alleged breach of planning control to refer to the failure to comply with conditions no. 2 of planning permission 14/09331/FULL on the basement floor and D.2(e) of Class D of Part 4 of Schedule 2 of the GPDO on the ground floor.

Applications for costs

13. Applications for costs were made by the Council against each of the appellants, and by one of the appellants against the Council. These applications are the subject of separate Decisions.

The Appeal B appeal on ground (f)

14. The appeal on ground (f) seeks to adjust requirement (b) of the notice to allow the premises to remain in use as an A1 sandwich bar/coffee shop, which would involve allowing some of the existing equipment to remain on the premises.

The appellant proposes that this resumption of an A1 use can be achieved by requiring the basement to cease use as a kitchen and seating area and the associated equipment to be removed; the ground floor seating to be reduced to 9 covers and the remaining seats and tables to be removed; and service of hot meals prepared on the premises to cease.

15. Having corrected the alleged breach of planning control in respect of the basement to one constituting the failure to comply with the time-limiting planning conditions attached to 14/01767/TFU and 14/09331/FUL, I turn to what the relevant conditions require.
16. 14/01767/TFU: At the relevant time, development was permitted by Class D subject to conditions including (e): the site reverts to its previous lawful use at the end of the period of flexible use. The previous lawful use in this case is as Class A1, the premises having previously operated as a carpet shop. The conditions attached to the Class D permission do not however expressly require the restoration of the land to its former condition or require the removal of any plant, fixtures, fittings or equipment. The requirements of the notice as they relate to the removal of such features from the ground floor of the premises therefore exceed the steps required to remedy the (corrected) breach of planning control. I shall therefore vary the notice to disapply step (b) from the ground floor of the premises.
17. 14/09331/FULL: The relevant condition attached to the basement permission required the land to return to its previous condition and use at the end of the temporary period. Although the requirement of step (b) to remove plant, fixtures, fittings and equipment may be commensurate with the requirement of the condition to return the land to its previous condition, I shall nonetheless re-word requirement (b) so that it tallies with the requirement of the condition; namely, to restore the land to its previous condition before the A3 use permitted by 14/09331/FUL began.
18. For these reasons and to this extent the Appeal B appeal on ground (f) succeeds, and the enforcement notice will be upheld as varied in the terms set out below in the Formal Decision.

The appeals on ground (g)

19. Both appellants seek a 12 month period for compliance for themselves, although the appellant in Appeal A ('the landlord') considers that the stipulated 3 month period for compliance as it relates to the appellant in Appeal B ('the tenant') is reasonable. Any compliance period must however relate to the steps required by the notice, rather than to the particular recipients or parties appealing it, and so it is not possible to impose different periods for compliance according to the identity of the parties.
20. The landlord is not presently in or entitled to possession of the property, and so seeks further time in order to take possession and so secure compliance with the notice. A copy lease has been supplied identifying the expiry of the term on 24 March 2020, although the landlord explains that forfeiture proceedings, which were stated to start by the beginning of July 2019, may be prolonged. The tenant is in possession, and seeks further time in which to find alternative restaurant premises to avoid redundancies.

21. Neither party has contended that the Class A3 use should not cease, the tenant's appeal on ground (f) being limited to the particular steps concerning internal works. The appeal on ground (g) does not expressly seek further time to carry out the works required to return the basement to its former condition, although I acknowledge that such works would be likely to follow rather than pre-date the cessation of the use.
22. The Council's reasons for issuing the notice include the potential for harm to residential amenity, although no such particular harm is in the event identified. There is thus no pressing amenity harm identified to require the use to cease as soon as possible. No real justification is offered by the tenant to support the request for a one-year period for compliance. The justification offered by the landlord for a 12 month period refers to the time required for possession proceedings, those proceedings having already been commenced, by July 2019, since when a number of months have elapsed. The tenant does not explain whether any, or how many, of the current restaurant employees could be retained in the Class A1 use that he proposes for the premises following compliance with the notice. He does however express an intention to find alternative restaurant premises that could secure some of those jobs.
23. I have varied the steps on ground (f) concerning the removal of fittings and the like, but because there is no appeal on ground (a) I agree with the Council that it has been evident for several months that the restaurant use at the premises will have to cease, thus giving a window of opportunity already for the tenant to find alternative premises. I also accept, however, that the uncertainty as to the extent of the fixtures and fittings having to be removed is likely have affected, to some degree, the tenant's business planning for a sandwich shop at the premises and estimates of the required investment, profitability and number of jobs likely to be retained at these premises as against a restaurant elsewhere. In the round, and mindful also of the present public health circumstances giving rise to considerable disruption, I consider that 3 months is too short a reasonable period for compliance, but that 12 months is considerably in excess of what would reasonably be required. I shall vary the notice to allow 6 months to comply.
24. For these reasons and to this extent the appeals on ground (g) succeed and the enforcement notice is upheld as varied in the terms set out below in my Formal Decision.

Conclusion

25. For the reasons given above I conclude that the requirements of the notice are excessive and that a reasonable period for compliance would be 6 months. I am varying the enforcement notice accordingly, prior to upholding it. The appeals under grounds (f) and (g) succeed to that extent.

Formal Decision

26. The appeal is allowed on grounds (f) and (g) and it is directed that the enforcement notice be corrected and varied as follows:

- Delete the text from paragraph 3 and replace it with:
 - (i) The failure to comply with condition D.2(e) of the permission conferred by article 3 and Schedule 2, Part 4, Class D of the Town and Country Planning

(General Permitted Development) Order 1995. The permission was for the temporary flexible use of the ground floor of the premises at 117 – 119 Edgware Road, London W2 2HX as a restaurant (Class A3) for a single continuous period of up to 2 years beginning on the date the building began to be used for the flexible use. Condition D.2(e) required that the site reverted to its previous lawful use at the end of the period of flexible use.

- (ii) The failure to comply with condition no. 2 of planning permission granted on 12 January 2015 under reference 14/09331/FULL for the temporary change of use of the basement level at 117 Edgware Road, London W2 2HX to restaurant (Class A3) until 01 April 2016 in connection with the existing restaurant at ground floor level. Condition no. 2 required that the A3 restaurant use allowed by the permission can continue until 01 April 2016. After that the land must return to its previous condition and use.
- Delete the text from paragraph 5(b) and replace it with "Restore the land comprising the basement of 117 Edgware Road to its previous condition".
 - Delete "3 months" and replace it with "6 months" as the time for compliance.

27. Subject to those corrections and variations the enforcement notice is upheld.

Laura Renaudon

INSPECTOR