The Planning Inspectorate

Appeal Decision

by P N Jarratt BA DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 29 April 2020

Appeal Ref: APP/N5660/X/19/3236499
182 Norwood Road, London SE27 9AU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Ghulam Rasool against the decision of the Council of the London Borough of Lambeth.
- The application Ref 19/02042/LDCE, dated 3 June 2019, was refused by notice dated 29 July 2019.
- The application was made under section 191(1)(a)of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is for use of the ground floor as a restaurant (Use Class A3).

Decision

1. The appeal is dismissed.

1. Procedural Matters

1. For the avoidance of doubt, I should explain that the planning merits of the use are not relevant, and they are not therefore issues for me to consider in the context of an appeal under section 195 of the Town and Country Planning Act 1990 as amended, which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

2. A site inspection was unnecessary in view of the determination of the case being dependent on the date sensitive evidence submitted.

3. I consider that the main issue is whether the Council's decision to refuse to grant a lawful development certificate was well-founded.

Reasons

4. For this appeal to succeed it is necessary for the appellant to demonstrate that the ground floor premises have been used as a restaurant for a period in excess of 10 years prior to the date of the application (the relevant period) and that this use has been continuous, in order to achieve immunity from enforcement action through the passage of time. The onus of proof rests with the appellant and the standard of proof is on the balance of probability.

5. The appeal site is the ground floor of a three storey mid-terrace property with residential units on the upper floors.

6. In support of his case, the appellant has submitted a range of documentary evidence including a lease agreement; licence, insurance, hygiene and safety records; utility and business rates bills; and a trademark certificate, covering a period from 2000 to 2019.

7. The 2000 lease agreement refers to the premises as a ground floor shop, not as a restaurant. Early references to a restaurant includes an AXA insurance document 11 October 2005 specifying the business at the appeal premises as an Indian Restaurant, a London Energy bill addressed to Mirch Masalah Restaurant dated 31 March 2006 and a hygiene certificate from Kitchen Hygiene Ltd dated 16 June 2007 addressed to 'Mirch Masalah Indian Resteurant' (sic). Other documents fail to refer to a restaurant explicitly, such as the business rate demand of 15 March 2007 referring to 'shop and premises', which is the same description in the business rates bill dated 9 November 2018 addressed to Norwood Food Ltd. At a later date the business appeared to be Norwood Spice Limited trading as Village Masaleh.

8. Although by the Council's analysis the majority of document references failed to identify the appeal premises as a restaurant, for reasons unknown their analysis concludes that the first reference to a restaurant at the premises is 16 June 2007, despite the Axa insurance cover being from October 2005. The Council have also identified several periods of time unaccounted for in the relevant period – March 2007; May-July 2008; December 2009 – January 2010; April 2015; and from April 2019. They express concern that there is no evidence to prove that the restaurant use was occurring during these gaps, particularly in the two 3 month gaps (in 2008 and 2019). The appellant points out that the second 3 month gap was only 2 months at the time of the application for the LDC. I note that the case officer carried out a site visit on 4 July 2019 and observed that the front section was set out for approximately 16 covers and that it was clear that the observed operations included 'that which is typical as a restaurant'.

9. That aside, the appellant offers no explanation regarding the gaps other than to say that the Council has no evidence of their own to contradict the appellant's version. Whilst this may be the case, it is not unreasonable for the Council to question these gaps and for the appellant to respond with robust evidence such as statutory declarations. However, case law makes it clear that it is not necessary for the appellant's own evidence to be corroborated by independent evidence for it to be accepted[1].

10. Looking at the totality of the evidence I am satisfied that on the balance of probability a restaurant use commenced in late 2005 and that any periods unaccounted for would not necessarily have represented a material break in the continuity of the use such that it would have prevented the Council from taking enforcement action should it have considered it expedient to do so. However, establishing a 10 year period of continuous use as a restaurant is complicated by the additional use of the premises as a takeaway. At the Council's site inspection the case officer observed that the premises also had a high counter typical of takeaway premises (which fall within Use Class A5). Takeaway menus were evident inside the premises and signage at the front of

[1] FW Gabbitas v SSE and Newham LBC [1985] JPL 630

the shop promoted the takeaway business as well as through an online website that directs visitors to the JustEat website.

11. On the basis of verbal information from the manager of the premises at the time of the case officer's site inspection, some 45% of the weekly income was from takeaway services. This represents a significant proportion of the income of the business which in my view exceeds what would normally have represented that part of the business ancillary to a restaurant use. The appellant believes that this information is not hard evidence and should be discounted. Unfortunately the appellant has failed to provide any evidence by way of audited accounts or other reliable information that would demonstrate that the value of the takeaway element of the business is genuinely ancillary to the primary use of the premises as a restaurant and for the period over which it has taken place. Asserting that the takeaway use is ancillary is insufficient for the purposes of an LDC.

12. It appears that a mixed use of Classes A3 and A5 has been taking place. No evidence has been provided to indicate when this change from restaurant to a mixed use may have occurred. It is therefore impossible to conclude either that a restaurant use has existed for 10 years or more before the takeaway use became significant, or that a mixed use has been occurring for a period of 10 years or more.

Conclusion

2. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use of the ground floor of the premises as a restaurant (Use Class A3) was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

P N Jarratt

Inspector