



Appeal Decision

Site visit made on 6 October 2020

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 October 2020

Appeal Ref: APP/N5660/C/19/3236945 42-43 Lower Marsh, London SE1 7RG

- 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 Gengiz Arif of Arif Holdings against an enforcement notice issued by the Council of the London Borough of Lambeth.
- The enforcement notice, numbered 18/00674/COU, was issued on 1 August 2019.
- The breach of planning control as alleged in the notice is without planning permission, the material change of use of the premises from a shop (Use Class A1) to a restaurant (Use Class A3) ('the unauthorised restaurant use').
- The requirements of the notice are:
 - a) Cease the unauthorised A3 restaurant use; and
 - b) Remove all cooking and extractor equipment, appliances and apparatus that facilitate the unauthorised A3 restaurant use of the premises.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (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.

Decision

1. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the change of use of the premises from a shop (Use Class A1) to a restaurant (Use Class A3) at 42-43 Lower Marsh, London SE1 7RG as shown on the plan attached to the notice and subject to the conditions in the attached schedule.

Procedural Matters

2. Since the enforcement notice was issued on 1 August 2019, the South Bank and Waterloo Neighbourhood Plan (SBWNP) was made by Lambeth Council on 16 December 2019. It now forms part of the development plan for the area and the appellant has made reference to Policy P11 in his submissions.
3. The appellant has also referred to the draft Lambeth Local Plan 2020 (draft LP). The Proposed Submission Version January 2020 was published for public consultation, prior to independent examination. It is therefore at a relatively early stage. Having regard to the guidance in paragraph 48 of the National Planning Policy Framework (NPPF), I have not been provided with information regarding the extent of unresolved objections to the relevant policies, nor the

degree of consistency of the relevant policies in the emerging plan to the NPPF. Therefore, I can only give the policies referred to by the appellant limited weight.

4. On 1 September 2020 the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987 (UCO). As a result, from 1 September 2020, Class A was revoked and a new broad 'commercial, business, service' use (Class E) was created, which incorporates the previous A1 shops and A3 restaurants and cafes. Under Article 3(1) of the UCO, a change of use within the same use class will not be taken to involve development and therefore does not require planning permission.
5. However, paragraph 4 of the Regulations 2020 provides that, if an application is submitted, or deemed to be submitted, to the local planning authority, the application must be determined by reference to the use classes in place at the time it was submitted. As the ground (a) deemed application was made prior to 31 August 2020, it must be determined by reference to those use classes. The appeal on ground (b) requires me to consider whether, at the time the notice was served, the alleged breach had occurred, and therefore my decision must be made based on the use classes in force at that time.

Ground (b)

6. The ground of appeal is that the matters stated in the notice which may give rise to the breach of planning control, have not occurred. The burden of proof is on the appellant, and the standard of proof is the balance of probabilities. The concept of a material change of use is not defined in statute or statutory instrument and is a matter of fact and degree in each case.
7. The appellant's case is that the alleged breach of planning control has not occurred, as the change of use is a *sui generis* use as a cafe, that involves a mix of A1 retail and A3 cafe uses. This is stated to be as a result of the high proportion of cold food sold to takeaway, the lack of waiter service and an early closing time of 7pm. In addition, the appellant has previously applied for planning permission for a mixed A1/A3 use¹ with an appeal being dismissed. The concept of a mixed use is of two or more primary uses existing within the same planning unit, where one is not ancillary to the other.
8. Class A1 was defined in the 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 was the use for the sale of food or drink for consumption on the premises (cafe or restaurant).
9. In this case, hot and cold food and drinks are sold to be consumed both on the premises and for takeaway. The menu includes hot food items that are prepared and cooked on site, for example cooked breakfasts, pancakes and omelettes. I saw on my site visit that there is a commercial kitchen with an extraction system which was in use. The kitchen has equipment for the preparing and cooking of hot food, and such food forms a substantial part of the range of food on offer. It is not the case that food which has been prepared and cooked off-site is simply reheated.

¹ Ref 18/01985/FUL and 18/03572 were both refused, with the latter dismissed at appeal ref. APP/N5660/W/18/3219373

10. The premises are relatively small, but a significant part of the floor space is laid out with tables for customers, and a bar counter with stools by the front window. There are also customer toilets. Overall, the character of the premises resembles a cafe rather than a shop, with the customer area dominated by tables and chairs, where customers can linger over their food. The Council's evidence from previous site visits indicate that a large proportion of seated customers and limited takeaway purchases were observed. While these are only a snapshot in time, they confirm my own impression from my site visit, that the primary use of the premises is as a cafe (A3), with hot and cold food being primarily sold for consumption on site.
11. A number of cold food items are available, including cakes, ice cream, sandwiches and salads, and hot and cold drinks. The sale of such items is not unusual in a cafe, as an ancillary element of the business. The appellant states that a high proportion of sales is for cold food sold to takeaway and has provided evidence that the number of transactions is fairly evenly split between takeaway and eat in. However, the details do not contain information regarding the nature of those sales, for example whether the sales relate to drinks, hot food or cold food. It does not contradict my finding that the primary use of the premises is as a cafe falling within Class A3.
12. While a waiter service can indicate a restaurant use, it is not unusual for a cafe to be reliant on counter service. I do not therefore consider this to be a decisive factor. Nor is it unusual for a cafe to close at 7pm. It is not similar to a bakery falling within Class A1, where the produce is primarily sold for consumption offsite.
13. On the basis of the submitted evidence and my observations on site, I conclude that the primary use of the premises is as a cafe (A3), with ancillary sales of hot and cold food and drink for consumption off-site. It is not a *sui generis* mixed A1/A3 use. The allegation in the enforcement notice is therefore correct and the appeal on ground (b) fails.

Ground (a)

14. The ground of appeal is that planning permission should be granted for the breach of planning control. Having regard to the reasons for issuing the notice, the main issue is the effect of the development on the Lower Marsh Central Activities Zone (CAZ) Primary Shopping Area.
15. Policy ED6 of the Lambeth Local Plan 2015 (LLP) sets out that the vitality and viability of areas such as the CAZ frontage will be supported by supporting retail, service, leisure and other appropriate uses, and maintaining the retail function of primary shopping areas.
16. LLP Policy PN1 provides specific guidance for Waterloo and identifies it as, amongst other things, a mixed residential area with appropriate supporting community, service and shopping facilities. It aims to support and enhance Waterloo as a key part of central London and Lambeth and its economy in its various roles. The policy sets out how this will be achieved, and part (b) states that the role of Lower Marsh/The Cut as a centre for local needs and specialist independent retailing will be safeguarded and promoted. At least 50% of original ground floor units in the primary shopping area of the Lower Marsh/The Cut CAZ frontage should be in A1 retail use.

17. SBWNP Policy P11 is more recent and requires that in Lower Marsh, planning applications should retain an appropriate mix of retail units, by resisting the loss of an A1 unit if the resulting percentage of A1 units is not above 50%, and resisting the loss of an A3 unit if the resulting percentage of A3 units is not above 30%.
18. The draft LP Policy PN1 reflects the approach in SBWNP Policy P11. It proposes a Special Policy Area to include Lower Marsh, The Cut and Leake Street Arches, and requires that 50% of units remain in A1, and 30% in A3. While this can be given limited weight for the reasons previously set out, it reflects the direction taken by the adopted SBWNP policy.
19. The Council's most recent evidence of the uses in Lower Marsh is from a survey carried out in May 2019, which indicates the proportion of A1 uses to be 45.2%, with A3 uses being 16.7%, with a total of 84 units.
20. The appellant carried out a survey of 80 units in the primary shopping area in February 2020. It indicated that the development has resulted in the non-A1 units making up 48.75%, so that A1 uses still exceed 50%. The same survey found that 17.8% of the units were either in A3 or a mixed use including an A3 element. This is a more detailed analysis than appears to have been provided with the previous appeal, where the Inspector was able to give only limited weight to the appellant's survey as it was based on Valuation Office Agency classification, which do not fully correspond with land use classes.
21. There is however some uncertainty regarding the use of some of the units, and permission has recently been granted for a change of use from A1 to A3 in Lower Marsh². Moreover, the survey area covers a relatively limited number of units, so that small changes or problems with identifying uses can bring the number of A1 units below the threshold. I consider it likely therefore that the development contributes to the lowering of the number of shops to below 50% and conflicts with the relevant policies seeking to protect A1 uses.
22. However, since the policies were written, the Government has introduced the amendment to the UCO, so that changes between uses within Class E are no longer development, and the Council will not be able to control such changes of use. The regulatory framework has therefore evolved since the enforcement notice was issued, and this is a material consideration to which I attach significant weight in favour of the development. I also saw on my site visit that a number of units in Lower Marsh are vacant, which the evidence indicates to be a local concern. It is also evident that the use contributes to the vibrancy of the area, as identified in local representations. The ground (a) appeal and the deemed application provide an opportunity to control matters that could give rise to impacts on the surrounding area, as suggested by the Council, and is therefore less harmful than an unrestricted use as a cafe or restaurant under Class E.
23. These considerations are sufficient to outweigh the limited harm that is caused by the development to the Lower Marsh Central Activities Zone (CAZ) Primary Shopping Area. I therefore conclude that the limited conflict with LLP Policies PN1 and ED6, insofar as they seek to promote and safeguard the role of Lower Marsh/The Cut as a centre for local needs and specialist independent retailing,

² 20/00581/FUL on 11 August 2020

is outweighed by other considerations. The appeal on ground (a) therefore succeeds.

Conditions

24. The Council has suggested conditions, which I shall consider in the light of the guidance in the Planning Practice Guidance (PPG). The appellant has suggested that conditions are not required due to the change to the UCO. However, I have determined the deemed application based on the alleged breach of planning control stated in the notice, which allows me to impose conditions.
25. A condition requiring details of flues and extraction, noise and vibration, waste and recycling is necessary in the interests of the living conditions of neighbouring properties, living conditions and to provide adequate storage for refuse and recycling. Conditions setting a noise limit for amplified sound and customer opening times are necessary to avoid disturbance to local residents. The pedestrian footway to the front of the premises is relatively narrow, and a condition controlling the use of the footway for seating is justified in order to prevent obstruction to pedestrians.
26. It is not necessary to set a noise limit for mechanical equipment, as this can be covered through the first condition. I have seen no evidence that the use of the premises as a cafe or restaurant is likely to lead to customers leaving the premises causing a nuisance and a condition requiring customer management is therefore not justified.
27. The purpose of the first condition is to require the appellant to comply with a strict timetable for providing and implementing the required details. The condition is drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matter because the development has already taken place. The condition therefore provides for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority ("LPA") or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable, then the planning permission falls away.

Conclusion

28. For the reasons given above I conclude that appeal succeeds on ground (a). I shall grant planning permission for the development as described in the notice. The appeals on grounds (f) and (g) do not therefore fall to be considered.

N Thomas

INSPECTOR

Schedule of Conditions

- 1) The use shall cease within 30 days of the date of failure to meet any one of the requirements set out in i) to iv) below:

i) Within 1 month of the date of this decision the following information shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation:

a) details and full specifications of fume extraction and filtration equipment and an ongoing maintenance plan;

b) details and full specifications of noise and vibration attention;

c) a servicing management plan to include frequency of deliveries and other servicing vehicles, dimensions of vehicles, proposed loading and delivery locations and a strategy to manage vehicles servicing the site;

d) details of disposal of waste, fats and oils from the cooking process.

ii) If within 11 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.

iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.

iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

2) Noise from any source of amplified sound, speech or music shall not exceed the background noise level L90B(A) 15 minutes, when measured from outside the building.

3) Customers are not permitted on the premises other than within the following times:

07:00 to 24:00 Mondays to Saturdays

07:30 to 23:30 Sundays, bank holidays or public holidays.

4) There shall be no seating or other obstructions located on the footway outside the frontage of the premises at 42-43 Lower Marsh.