



Appeal Decisions

Site visit made on 11 August 2020

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 January 2021

Appeal A Ref: APP/X5990/C/19/3231976

Appeal B Ref: APP/X5990/C/19/3231988

The Trocadero, 13 Coventry Street, London W1D 6DG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Five Guys JV Ltd and Appeal B is made by Simply Sugar 2 Ltd. Both appeals are against an enforcement notice issued by City of Westminster Council.
 - The enforcement notice was issued on 23 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 parts of the building shown edged in red in the attached photographs A, B and C to the use for the display of advertisements.
 - The requirements of the notice are:
 - a) Cease the unauthorised use of the parts of the Property shown edged in red on the attached Photographs A, B and C for the display of advertisements; and
 - b) Remove from the Property any fixtures, or fittings attached to the Property to facilitate the unauthorised use; and
 - c) Repair any damage caused to the Property by the carrying out of requirements a) and/or b) of this Notice.
 - The period for compliance with the requirements is four months.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a), (b) and (d) 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.
 - Appeal B is proceeding on the grounds set out in section 174(2)(c), (f) and (g) of the 1990 Act. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) for Appeal B and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed for Appeal B.
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Decisions

1. Appeal A and Appeal B are dismissed and the enforcement notice is upheld.
2. For Appeal A planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Applications for Costs

3. Applications for costs were made by City of Westminster Council against Five Guys JV Ltd and Simply Sugar 2 Ltd. These applications are the subject of separate Decisions.

Preliminary Matters

4. Appeal B was originally lodged as an Inquiry. A review of Appeal B indicated it could be determined by way of written representations. The views of the parties were sought on this and I have taken any comments made in this regard into account in my reasoning. I am satisfied Appeal B may be determined by written representations, together with Appeal A.
5. Section 55(5) of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) brings the display of advertisements within the definition of development. The use for the display of advertisements of any external part of a building which is not normally used for that purpose is to be treated as involving a material change in the use of that part of the building. So advertisements may be subject to enforcement action by means of an enforcement notice issued pursuant to section 172 of the 1990 Act. It makes no difference that other means may be used to control the unlawful display of advertisements and it is for the Council to decide how to pursue such a matter.
6. From the information provided, express advertisement consent was granted by the Council on 3 July 2006 for the advertisements described in the enforcement notice, reference 06/03562/ADV. Additional condition 1 of that consent stated: *"The advertisements hereby granted consent shall be displayed for a limited period of three years from the date of this consent, on or before the expiry of which period the signs shall be removed."*
7. Class 14 of Part 1 of Schedule 3 of The Town and Country Planning (Control of Advertisements) (England) Regulations 2007 (the advertisement regulations) grants deemed consent to any advertisement that has been displayed with express consent once the express consent expires. But an advertisement will not benefit from deemed consent under Class 14 if it would contravene a condition which has been imposed on an express consent. From the information provided, this is the case here.
8. Because additional condition 1 of the relevant express consent has not been complied with, the advertisements which are the subject of this appeal do not benefit from deemed consent. Therefore, discontinuance action, pursuant to Regulation 8 of the advertisement regulations, is not available as discontinuance action deals only with advertisements being displayed with deemed consent.
9. In a letter to the appellant for Appeal A, dated 25 November 2019, it was acknowledged that the facts of their case seem to relate to ground (d) in addition to grounds (a) and (b) which were initially pleaded. The appellant was asked to confirm their grounds of appeal and provide any additional facts to support them. Consequently, the appellant chose to add ground (d) to Appeal A.
10. The appellant for Appeal A states the enforcement case is limited to the 2 'Five Guys' banners on Great Windmill Street and the 2 'Kingdom of Sweets' banners on Coventry Street. But this is not the case. The development before me in these appeals is that described as the breach of planning control in paragraph 3 of the enforcement notice, ie including the 4 advertisements shown edged in red in photograph B on the Rupert Street elevation of the building, notwithstanding the fact that the advertisements may since have been removed.

The Notice

11. The Council have invited me to amend the notice to clarify that additional condition 1 of consent reference 06/03562/ADV is breached. But in my judgment, the notice contains all the vital elements needed to satisfy section 173 of the 1990 Act and The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002. In addition, it is clear what the notice is directed at and what recipients of the notice are required to do. Therefore, the notice is not a nullity, as has been suggested by the appellant for Appeal B, nor in my judgment does it require any correction.
12. The appellant for Appeal A has suggested the notice is invalid. This is on the basis that 4 of the advertisement banners have been removed and as there is said to be inconsistency between photographs submitted and the actual appearance of the appeal building in terms of the advertisements present across the relevant façades. The appellant for Appeal B considers there is no specific or clear description in the notice of the advertisements on which the notice bites.
13. But removal of part of a breach alleged does not render a notice invalid and the photographs provided as part of the notice assist in clearly describing the matters which appear to the Council to constitute the breach of planning control. In my view, the photographs enable any person on whom a copy of the notice was served to know exactly what the alleged breach of planning control is. Therefore, the notice is not invalid and the description of the breach is clear.
14. The appellant for Appeal B indicates they are a lessee of part of the appeal site and that they do not have sufficient interest in all of the land referred to in the notice or the necessary legal rights to carry out the requirements of the notice. But this is not a matter for me to address in an appeal under section 174. Moreover, no appeal has been made on ground (e) to suggest that the notice was not correctly served.
15. I do not accept that the Council should have served 3 separate notices or that the notice binds a wider landholding than is lawfully possible, as is suggested by the appellant for Appeal B. From the information provided, the notice was correctly served on the owners and occupiers of the land and there is no evidence anyone has been substantially prejudiced or disadvantaged. Both appellants are clearly interested parties as they are beneficiaries of advertisements which are the subject of the notice. So it is right that the notice was served on them, irrespective of whether they are able to carry out its requirements or not.
16. The appellant for Appeal B states the advertisements are arguably the responsibility of the freeholder. Be that as it may, it does not affect the validity of the notice. The same appellant also states it is not clear on the face of the notice which owner or occupier is required to remedy the breach. But there is no requirement for the notice to specify this level of detail. Nor does an enforcement notice need to identify the planning unit as has also been suggested.
17. The requirements of the notice refer to the 'Property', which the appellant for Appeal B states is not a defined term in the notice. But in my view, it is obvious what is meant by this from inclusion of the phrase "shown edged in red on the attached Photographs A, B and C", in paragraph 5 of the notice.

Reasons

The Appeal A ground (b) appeal

18. The ground (b) appeal is principally on the basis that the appellant states 4 of the advertisement banners referred to in the notice are no longer in position. Whilst those banners on the Rupert Street elevation have been removed, they clearly existed as is evidenced by Photograph B attached to the notice and the banners' fixtures and fittings which were still in place at the time of my site visit. Thus it cannot be argued pursuant to section 174(2)(b) that this part of the breach has not occurred. Accordingly, the appeal on ground (b) fails.

The Appeal B ground (c) appeal

19. The burden of proof in a ground (c) appeal falls on the appellant to make out their case. The appellant claims there has not been a material change of use as the unit within the appeal building that they occupy remains a retail unit with or without the advertisements. This is not relevant because the material change of use alleged in the notice is in respect of external parts of the building edged in red shown on the photographs attached to the notice and not the retail unit occupied by the appellant.
20. Section 55(5) of the 1990 Act is clear that the use for the display of advertisements of any external part of a building which is not normally used for that purpose shall be treated as involving a material change in the use of that part of the building. From the information provided, consent for the display of advertisements on the parts of the building which are the subject of the notice has only ever been granted twice on a temporary basis, for what are, in my view, relatively short periods.
21. In my judgement, this does not mean these parts of the building are 'normally' used for the display of advertisements. No evidence has been provided which satisfies me this is not the case. Moreover, I do not accept the appellant view that the relevant parts of the building have a 'long history' of advertisement consents.
22. My attention has been drawn to a recent appeal decision¹ which the appellant suggests grants consent for the advertisement banners on the Coventry Street elevation. But this is not the case. Whilst paragraph 2 of that appeal decision allowed some specified advertisements, paragraph 1 dismissed the 2 non-illuminated banners at the first to second floor level. From the information provided, these are the same advertisements which are shown in Photograph A attached to the notice. Considering all of the above points, the appeal on ground (c) fails.

The Appeal A ground (d) appeal

23. The appellant states banner advertisements at this same location have been present since 2002 and that therefore the use against which the notice is served has continued for in excess of the necessary 10 years needed for the use to become lawful. However, this view does not recognise that for some of that time the advertisements which are the subject of this appeal have been displayed unlawfully. This is because of additional condition 1 of the express

¹ Reference APP/X5990/Z/19/3232302 dated 18 October 2019

consent, set out above, which the appellant accepts is the operative consent for these advertisements.

24. The appellant describes the operative consent as largely irrelevant. But I do not agree this is the case, as from the information available to me, the enforcement notice was served within 10 years of when the display of the advertisements became unlawful. This began when the consent for the advertisements expired, 3 years after it was granted, meaning the advertisements no longer had deemed planning permission pursuant to section 222 of the 1990 Act.
25. It would not have been open to the Council to take action during the 3 year period when the adverts had consent and so they were not unauthorised until that consent expired. Not until this point did the immunity period for taking action begin.
26. On this basis, on the date the notice was issued, it was not too late for the Council to take enforcement action for the purposes of section 171B(3) of the 1990 Act. I conclude the appeal development is not immune from enforcement action and so the appeal on ground (d) fails.

The Appeal A ground (a) appeal

27. The main issue in the ground (a) appeal is the effect of the appeal development on the visual amenity of the area, with particular regard to the character and appearance of the area, including the Soho Conservation Area (in which the building is situated) and adjacent conservation areas, and the setting of adjacent Grade II listed buildings.
28. The advertisements identified in the enforcement notice relate to 3 different elevations as shown in photographs A, B and C attached to the notice. These are the Coventry Street, Rupert Street and Great Windmill Street elevations respectively.

Coventry Street elevation

29. My attention has been drawn to a recent appeal decision² which dismissed the same non-illuminated banners at the first to second floor level on the Coventry Street elevation, which form part of the appeal development before me. There is no evidence of any material change in circumstances since that appeal was decided.
30. The previous Inspector found these advertisements create a sense of clutter, detract from the appearance of the building and fail to preserve or enhance the character or appearance of the conservation area or the setting of the adjacent listed buildings. In respect of this elevation, these listed buildings are 18-20 Coventry Street and the Trocadero itself, that being the listed part of the complex at 7-14 Coventry Street. I have no reason to disagree with the previous Inspector's conclusions in this regard.

Rupert Street elevation

31. Rupert Street is a relatively narrow street lined with tall terraced buildings on either side. It forms part of the boundary between the Soho and Chinatown Conservation Areas. Whilst the advertisement banners themselves were absent

² Reference APP/X5990/Z/19/3232302 dated 18 October 2019

from this elevation of the appeal building at the time of my visit, their fixtures and fittings remained in place. So it was obvious where the banners were and what their overall effect was, particularly when considered together with Photograph B attached to the notice.

32. At my site visit I found that advertisements on Rupert Street are generally limited to ground floor level. Exceptions to this are a limited number of small hanging projecting signs advertising the business undertaken on the premises to which they were attached. These are markedly different from the large banners which are the subject of this appeal.
33. In my judgement, the banners and their fixtures and fittings, displayed on this elevation of the appeal building resulted in a cluttered appearance of the building at a high level and obscured views of architectural features of the building, including the projecting bays of the building when looking in either direction along this narrow street. As such they harmed the visual amenity of the area, including the character and appearance of the conservation area the building is in and that which is adjacent, ie on the opposite side of this street.
34. The adjacent listed building in respect of this elevation is the Trocadero itself, that being the listed part at 7-14 Coventry Street. But in my judgement, the position of the closest advertisement banner on this elevation is far enough away from the listed building, and set between 2 projecting bays, so as not to affect the setting of this listed building, or any others.

Great Windmill Street elevation

35. My attention has been drawn to a second recent appeal decision³ which dismissed the same high level banner signs on the Great Windmill Street elevation, which form part of the appeal development before me. There is no evidence of any material change in circumstances since that appeal was dismissed.
36. Whilst the previous Inspector found these advertisements not harmful to the setting of the listed buildings situated at 20-24 Shaftesbury Avenue and 18-20 Coventry Street, he concluded that the advertisements harm the visual amenity of the area, with particular regard to the appearance of the appeal property and the character and appearance of the conservation area. I have no reason to disagree with the previous Inspector's conclusions in this regard.

Other Matters

37. My attention has been drawn to other advertisements in the area, including at 13-15 West Street, 39 Coventry Street, 107 Charing Cross Road and 109-113 Shaftesbury Avenue. However, I have not been provided with full details of these advertisements or the circumstances of how they came to exist. Moreover, these sites are either not seen within the context of the appeal site and/or sit within a different context. So I do not find them directly comparable to the appeal site before me and I therefore give them limited weight in this decision, particularly those sites which are occupied by theatres, where there is a historic association with advertisements, including at high level.
38. I appreciate the advertisements which are the subject of this appeal have previously been granted express consent. But that was in a different context

³ Reference APP/X5990/Z/19/3231934 dated 22 November 2019

and on a temporary basis. From the information provided, special circumstances existed at that time and there is no evidence those circumstances exist now.

Conclusions on ground (a)

39. Given the size and scale of the advertisements within the context of the affected conservation areas and listed buildings noted above as a whole, I consider the appeal development causes less than substantial harm to these designated heritage assets. Nevertheless, any harm to their significance should require clear and convincing justification and in accordance with paragraph 196 of the National Planning Policy Framework, I must weigh the harm against the public benefits of the appeal development. But no public benefits have been suggested.
40. Whilst the advertisements on the Great Windmill Street and Rupert Street elevations are not harmful to the setting of listed buildings, in light of my other findings above, I conclude overall the appeal development harms the visual amenity of the area, including the character and appearance of the Soho Conservation Area and the adjacent conservation area noted above, and the setting of adjacent Grade II listed buildings in respect of the Coventry Street elevation.
41. In these regards, the appeal development does not comply with Policies 7.4 and 7.8 of the London Plan 2016 (as amended), Policies S25 and S28 of the Westminster City Plan 2016, saved Policies DES1, DES8, DES9 and DES10 of the Unitary Development Plan 2007, the Soho & Chinatown Conservation Area Audit SPG 2005 or the Advertisement Design Guidelines 2004. Considering all of the above points the appeal on ground (a) fails.

The Appeal B ground (f) appeal

42. Under section 173(4) of the 1990 Act, when serving an enforcement notice the Council may seek to (a) remedy the breach by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or (b) remedy any injury to amenity which has been caused by the breach. In this case, the purpose of the enforcement notice is to remedy the breach of planning control and this is clear from the requirements of the notice.
43. The appellant refers to the previous appeal decision⁴ which they understand granted consent for advertisements which are the subject of this appeal. But that appeal decision did not grant consent for any of the advertisements which are the subject of this appeal so the requirements of the notice are not excessive for this reason and no variation to the notice is necessary in this regard.
44. The appellant seeks variations to the notice to identify who is and who is not responsible for each component of the breach. But there is no need for an enforcement notice to specify this level of detail and should the notice not be complied with in any regard, it is a matter for consideration under section 179 of the 1990 Act rather than in an appeal under section 174.

⁴ Reference APP/X5990/Z/19/3232302 dated 18 October 2019

45. Taking into account the above points, no lesser steps have been suggested which would achieve the purpose of the notice. Accordingly, the appeal on ground (f) fails.

The Appeal B ground (g) appeal

46. The appellant seeks at least 12 months to comply with the notice and refers to disruption to the business and operational and logistical requirements without detailing what these might be. They also refer to the need for discussions on the precise nature of the works required which they describe as very vague. I do not accept this is the case as section 5 of the notice clearly sets out what is required to comply with the notice.
47. I am satisfied that 4 months reflects what should reasonably be allowed for the requirements of the notice to be complied with, even taking into account liaison with the freeholder, the appointment of the necessary contractors and the Covid-19 pandemic given that the works are external. Should this prove not to be the case, it is entirely a matter within the discretion of the Council to draw on its powers under section 173A(1)(b) of the 1990 Act, without prejudicing its right to take further action. I conclude the appeal on ground (g) fails.

Conclusion

48. For the reasons given above, I conclude that the appeals do not succeed and I uphold the enforcement notice. For Appeal A I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended

L Perkins

INSPECTOR