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## Appeal Decision

Site visit made on 1 December 2021

**by S A Hanson BA(Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 2 March 2022**

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**Appeal Ref: APP/H5390/C/20/3262490**

**Land at 152 Wandsworth Bridge Road, London SW6 2UH**

- 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 Vincenzo Dafeo against an enforcement notice issued by the Council of the London Borough of Hammersmith & Fulham.
  - The enforcement notice, numbered 2020/00505/BOUND, was issued on 7 October 2020.
  - The breach of planning control as alleged in the notice is: *Change of use from retail (Ea) to drinking establishment (sui generis) without planning permission.*
  - The requirements of the notice are: *Cease the use of the property as a drinking establishment (sui generis).*
  - The period for compliance with the requirements is 3 (three) months.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (g) of the Town and Country Planning Act 1990 as amended (the 1990 Act). 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 1990 Act.
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### Decision

1. It is directed that the enforcement notice be corrected by the deletion of the breach of planning control alleged in part 2 '*Change of use from retail (Ea) to drinking establishment (sui generis) without planning permission*' and its substitution with the words:

*'Without planning permission, the material change of use from retail to a mixed use comprising a café and drinking establishment.'*

And that the requirements of the notice be varied by the deletion of '*Cease the use of the property as a drinking establishment (sui generis)*' and its substitution with the words:

*'Cease the mixed use of the property as a café and drinking establishment'*

2. Subject to this correction and variation, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

### Matters concerning the notice

3. From the evidence submitted, I consider the appeal site (No.152) to be in a mixed use whereby it operated as a café<sup>1</sup> and a drinking establishment<sup>2</sup>.

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<sup>1</sup> Class E. Use, or part use, for all or any of the following purposes—

(b) for the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises

4. I wrote to the parties concerning the notice and offered them the opportunity to comment on whether there would be injustice, should the alleged breach of planning control on the notice be corrected to reflect my opinion. The council did respond and agreed that officers “were of the opinion that the premises was in use as a café during the day and a drinking establishment in the evenings”. The council acknowledged that the alleged breach of planning control may not reflect the mixed uses occurring on site and did not object to the revision of the notice.
5. No response was received from the appellant.
6. In appeals under section 174 of the 1990 Act, section 176(1) allows the Inspector to correct the notice provided they are satisfied that there would be no injustice to either of the main parties by doing so. In this case the appellant has been able to appeal under ground (a) and put forward a full case that planning permission should be granted if required, and I am satisfied that no material disadvantage arises in respect of the other grounds. Furthermore, reversion to the last lawful use (retail) is permitted by s57(4) of the 1990 Act, and since the café use is within the same use class, that use would be lawful. Accordingly, I consider that no injustice would result from correcting the notice as I have proposed.

### **The appeal on ground (c)**

7. For an appeal on ground (c) the burden of proof is on the appellant and the relevant test of the evidence is the balance of probabilities. Section 174(2)(c) of the 1990 Act sets out the basis for an appeal on ground (c) and states “that those matters (if they occurred) do not constitute a breach of planning control.” The reference to “those matters” is to the matters set out in the breach of planning control alleged by the notice, as corrected. However, the arguments put forward seem more akin to an appeal on ground (b) that the matters alleged have not occurred. There is often an overlap between appeals on grounds (b) and (c) therefore I will deal with the arguments as put.
8. It is common ground that the former use of the appeal site was a retail unit selling craft beer. Such a use falls within Class E(a)<sup>3</sup> of Part A, Article 3 of Schedule 2 of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO). It is the appellant’s case that the use of the premises at present falls entirely within Class E and that there has not been a material change of use. The Council on the other hand consider that the level of alcohol sales/consumption at the premises suggests that the appeal site is a drinking establishment rather than a place where the main element is the sale of food and drink for consumption mostly on the premises.
9. The appellant points to the facts that the opening hours of the café are from 8am – 9pm, which are more typical of café opening hours than those of drinking establishments that generally open later than 8am and stay open later into the evening. Furthermore, they say that the sale of alcoholic drinks is small compared with the sales consisting of typical café food and the limited selection of alcoholic beverages, craft beers and wine, is not typical of a drinking establishment, which would normally have a wide range of alcoholic drinks available.

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<sup>2</sup> Sui generis

<sup>3</sup> for the display or retail sale of goods, other than hot food, principally to visiting members of the public,

10. Although there is no distinction between alcoholic and non-alcoholic drinks provided by Class E(b), there is clearly a difference between an establishment operating as a café and one operating as a drinking establishment. The evidence provides that No.152 operates differently from how a café would be considered to operate by way of selling alcohol to take away or to drink on the premises, whether food accompanies it or not. The outdoor area to the rear is similar to what one might expect to find at a bar or pub. Indeed, photographs provided show customers congregating to the front and rear of No.152 with pints of beer and glasses of wine. Furthermore, alcohol is clearly displayed with 8 beer taps in a wall, bottles of gin on a shelf and cans and bottles of beer in the fridge. Screenshots of the website for the premises provided by an interested party also show the venue advertising itself as "Jack's Café & Bar" stating that "at 3pm each day, we transition into the best sports bar in Fulham with craft beer and a selection of popular drinks on tap".
11. Nevertheless, the evidence also shows that the use as a café remains. The internal layout of the premises is typical of such a use with an ice cream counter, food display cabinet and self-service drinks fridges. The appellant provides that the predominant use is as a café selling food such as light lunches, breakfasts, coffees and juices all of which would normally be associated with a café.
12. However, based on the evidence before me, the level of reported activity is such that I consider that the café is not the primary use of the site. As a matter of fact and degree, it would seem that the use as a drinking establishment has grown to become the predominant activity during the late afternoon/evening hours. Consequently, and with no evidence such as financial statements or invoices to demonstrate otherwise, I consider that two primary uses operate at the site and therefore the appeal site is in a mixed use which constitutes a breach of planning control.

13. Whether considered on ground (b) or (c) the appeal cannot succeed.

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

#### **Main Issue**

14. This is the effect of the development on the living conditions of the occupiers of neighbouring properties in terms of noise and disturbance.

#### **Reasons**

15. The appeal site comprises an unlisted three storey (plus basement) mid terrace building situated on the west side of Wandsworth Bridge Road in Fulham. A residential unit occupies the first and second floors of the building. An outside seating area for customers is provided on the pavement area to the front. To the rear of the building an outside seating area is partly enclosed by a single storey structure with side blinds.
16. The site lies within the Hurlingham Conservation Area and Wandsworth Bridge Key Local Centre. The surrounding area contains a mix of uses including shops, cafes, restaurants, commercial and residential uses. Whilst the area hosts several commercial premises operating on the ground floors along the west side of the road, there are residential properties above and most of the properties on the opposite side, in addition to the rear of No.152, are in residential use.

17. Two key principles, NN4 and NN5, within the Hammersmith and Fulham Planning Guidance Supplementary Planning Document February 2018 (SPD), which is a material consideration to which I attach substantial weight, require that noise generating development should be carefully located away from noise sensitive facades or be effectively screened. Outdoor seating at cafes and licensed premises may not be permitted or the times of external use of tables and chairs may be restricted, based on the potential effects of noise on the amenity of neighbouring residents.
18. From the documented evidence submitted it is clear that the level of noise generated and, at times, the anti-social intrusion of this disruption has had a negative impact on the living conditions of nearby residents. There is a general disturbance created by customers congregating outside both the front and rear of the premises. The road is undoubtedly busy with traffic and this will have some impact on the level of noise generated to the front. Whereas the rear is reasonably enclosed, and the effect of noise generated within the space will likely increase as more people enjoy the space and more alcohol is consumed.
19. Whilst it is acknowledged that the Council look to enhance the vitality and viability of local centres and support economic development, it also aims to protect the living environment for its residents. In this respect, Policies TLC5, CC11 and CC13 of the Hammersmith and Fulham Local Plan February 2018 (LP) seek to manage the impact of food, drink and entertainment uses on residential amenity. They aim to control opening hours and protect residents from noise generating development that would be liable to materially increase noise experienced in the vicinity and require no undue detriment to the general amenities enjoyed by existing surrounding occupiers of residential properties.
20. The appellant considers, and would accept, that the hours of operation could be controlled with a planning condition to comply with Policy TLC5, which says that such uses as "drink establishments" will be subject to conditions controlling hours of operation to 23:00 in town centres. TLC5 of the LP is not an enabling policy, rather it aims to control the "leisure uses" cited in the policy, permitted through compliance with other policies in the LP. Nevertheless, it seems to me that, from the evidence submitted, the noise and disturbance is not only confined to the evenings and controlling the hours of operation in the evening would be unlikely to mitigate the adverse effects of the use in this location.
21. Overall, the material change of use of the appeal premises to a mixed café and drinking establishment is considered to be materially harmful to the living conditions of the adjoining and neighbouring residential occupiers. In the absence of an acoustic impact assessment, I consider it likely that the use results in detrimental harm by reason of noise, disturbance and general nuisance particularly during the evenings and at weekends when local residents are more often than not, in their homes. In this respect the development conflicts with Policies TLC5, CC11, CC13 and Planning Guidance Key principles NN4 and NN5 of the SPD.

### **Conclusion on ground (a)**

22. There are no material considerations that indicate the deemed application should be determined other than in accordance with the Development Plan. For the reasons given above I therefore conclude that the appeal on ground (a)

should not succeed, and I shall refuse to grant planning permission on the deemed application.

**The appeal on ground (g)**

23. The appeal on ground (g) is that the period specified in the notice falls short of what should be reasonably allowed. The appellant argues that 3 months is too short a period to enable the disconnection of kegs, sale of the remaining stock, notice to be given to staff in terms of ceasing employment and the reconfiguration of internal and external space within the building to return it to a retail use.
24. The notice requires the cessation of the mixed use of the site. As referred to previously, reversion to the last lawful use (retail) would be permitted, and since the café use is within the same use class, that use would be lawful. Therefore, there would be no requirement to reconfigure the internal or external space nor remove the structure in the back yard as it is the use of the site and not the operational development that is attacked by the notice. Furthermore, it is likely that the kegs could be removed in a timely manner and no employment details have been provided to show that staff would require more than 3 months' notice.
25. Overall, and having regard to both parties, I consider that three months is a reasonable amount of time to comply with the notice. Accordingly, the appeal on ground (g) fails.

*SA Hanson*

INSPECTOR