

## Appeal Decision

Site visit made on 22 February 2022

**by R Curnow MA BSc(Hons) CMS MRTPI**

An Inspector appointed by the Secretary of State

**Decision date: 07<sup>th</sup> March 2022**

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**Appeal Ref: APP/N5660/C/21/3272457**

**Ground Floor Unit (Right) (AKA Katakata), 132A Brixton Hill,  
London SW2 1RS**

- 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 Francklin Evagle against an enforcement notice issued by the Council of the London Borough of Lambeth ('the Notice').
  - The enforcement notice, numbered EN/20/00300/3CND, was issued on 10 February 2021.
  - The breach of planning control as alleged in the notice is: Without planning permission, the erection of a wood and corrugated metal, mono-pitch roofed structure, on the front forecourt of the premises – and the erection of an open-sided wooden covered stage in the rear garden of the premises ('the unauthorised front and rear structures').
  - The requirements of the notice are: a) Remove the unauthorised front and rear structures from the premises and reinstate the land as existed prior to the breach of planning control; and b) Remove all associated waste and debris resulting from compliance with above steps, from the premises.
  - The period for compliance with the requirements is 6 months.
  - The appeal is proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.
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### Decision

1. The appeal is dismissed and the enforcement notice is upheld.

### Application for costs

2. Applications for costs have been made by the Council of the London Borough of Lambeth against Mr Francklin Evagle, and by Mr Francklin Evagle against the Council of the London Borough of Lambeth. These applications are the subjects of a separate Decision.

### Reasons

3. An appeal made under ground (c) is that those matters alleged in the Notice (if they occurred) do not constitute a breach of planning control. This is a legal ground of appeal where the onus lies with the Appellant to make his case, on the balance of probability.
4. No appeal was made under ground (a). Therefore, I cannot take any of the Appellant's arguments about the planning merits of the case into account, such as the community use of the structures, the condition of the property prior to his purchase or that similar developments have been undertaken elsewhere. The appeal is limited to an assessment of whether or not what has been undertaken comprises a breach of planning control.

5. The Appellant has put forward a case in respect of what is termed the 'front structure' in the Notice. However, nothing in support of the ground (c) case has been submitted in relation to the 'rear structure'.
6. The appeal site comprises one half of 132 Brixton Hill (No 132), an imposing building with four floors of accommodation above ground level. It is a Grade II listed building in an Italianate style, which lies within the Rush Common and Brixton Hill Conservation Area ('CA')<sup>1</sup>. There are two cafés at ground floor level, with residential accommodation above. The café to the right, when looking from the front, is that to which the alleged breach of planning control relates.
7. No 132 has a paved yard area to its front, with a fairly long garden to its rear. The structure to its front has a timber frame with low 'walls' and a roof of corrugated metal. It takes up part of the property's forecourt. That to the rear is larger, extending across the width of the property. It consists of a mainly open sided timber frame that is covered by a clear plastic roof.
8. The Appellant makes the case, in his appeal form, that "the structure" complies with the requirements of Schedule 2, Part 7, Class C of the Town and Country Planning (General Permitted Development) (England) Order 2015, as amended (the 'GPDO'). This case was made for a structure in the singular and clearly relates to that on the front forecourt.
9. Permitted development ('PD') in Class C allows for "development consisting of the erection or construction of a collection facility within the curtilage of a shop". The PD right is subject to compliance with a number of provisos and conditions.
10. Planning permission, and listed building consent, was granted retrospectively for the change of use of the appeal site from a shop within Use Class A1<sup>2</sup> to a café within Use Class A3 on 17 September 2015. Therefore, at the time that the structure to the front of the building was erected, the appeal site was not a shop and did not benefit from the PD rights in Class C. Even had it been in shop use at that time, given its listed status and siting within the CA, the erection of the structure would not have been PD by reason of Class C, C.1.(f)(i) and (iii).
11. The Appellant did not submit a statement of case but did make comments in response to the Council's case. In these, he submitted evidence of email correspondence between his agent and the Council.
12. This shows that the Council was informed, on 7 July 2020, of the Appellant's intention to exercise PD rights set out in Schedule 2, Part 4 of the GPDO to operate temporarily as a mixed use of café and A5<sup>3</sup> hot food takeaway. From the Council's response, dated 8 July 2020, it is clear that it was of the view that this was a notification under the terms of Class DA of Part 4 of the GPDO.
13. Class DA was introduced on March 24 2020. Amongst other things, it authorises the change of use from premises within Class A3 to a mixed use of Class A3 and use for the provision of takeaway food. Amongst its terms, this PD right is conditional on: the Council being notified of the intention to use the property, including its curtilage, for this purpose; and that if the land is so used, its use reverts to its former lawful use when either the takeaway use ceases or, (at the time of the email correspondence) by 23 March 2021.

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<sup>1</sup> Council Appendix 6

<sup>2</sup> Use classes as defined in the Town and Country Planning (Use Classes) Order 1987 (as amended)

<sup>3</sup> *ibid*

14. In his email of 7 July 2020, the Appellant was notifying the Council of his intention to operate under the temporary change of use allowed by Class DA from a small gazebo. The Council acknowledged this notification in its response of 8 July 2020. In this, a Principal Planning Officer stated "I am writing to confirm that notification of the temporary change of use of a building and any land within its curtilage (as listed below) for the provision of takeaway food has been received by the local planning authority. This temporary change of use is permitted development by way of Class DA, Part 4..." [of the GPDO]. It went on to set out the terms for the cessation of the temporary use.
15. I note that the Council's email of 8 July 2020 was entitled '20/0013/P4DA Notification of temporary operation as hot food takeaway'. I read this as being some form of reference number and description for the Appellant's notification under Class DA. That this does not feature in the list of planning applications for the property submitted by the Council<sup>4</sup> does not mean that the Appellant did not act in accordance with the conditions of Class DA. I find that he did. On the balance of probability, it seems that the fact it was not included in the list was down to the Council.
16. For reasons that I am not aware of, the Council did not comment on the matter of the small gazebo in its response. Notwithstanding this, the PD right in Class DA is for a change of use. There is nothing in it that would allow the erection of a building to serve the temporary use. Therefore, whilst the notification established the Appellant's right to use the property as a café and takeaway, it could not be relied on for the erection of either structure.
17. Very little has been said by the Appellant regarding the structure in the rear garden. I have taken this as his acceptance that it does not benefit from PD rights and, thus, a ground (c) argument is not made. If I am wrong, and such an argument is being made, it does not benefit from PD rights. Those in Classes C and DA do not apply for the same reasons given for the front structure.
18. The structures are clearly buildings when the tests of size, permanence and physical attachment, as set out in established case law, are applied. The Appellant cannot rely on the terms of Class DA to support their erection, and I am not aware of any other part of the GPDO that would afford PD rights for this work. Furthermore, my attention has not been drawn to any.
19. On the basis of the evidence before me, I find that, on the balance of probability, the case under ground (c) has not been made by the Appellant.

## **Conclusion**

20. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

*R Curnow*

Inspector

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<sup>4</sup> Statement of case – Appendix 8