The Planning Inspectorate

Appeal Decision

Site visit made on 14 December 2021

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 June 2022

Appeal Ref: APP/V5570/C/21/3277829
Ground floor and basement, 35 Camden Passage, London, N1 8EA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by London Grace Limited against an enforcement notice issued by London Borough of Islington.
- The notice, numbered ENF/2018/342, was issued on 12 May 2021.
- The breach of planning control as alleged in the notice is, without planning permission, the change of use of the ground floor and basement from a retail use (Class E (a)) to a mixed use consisting of nail bar, retail (including but not limited to, clothing, fashion accessories and health & beauty/nail products), café, cocktail bar and party/event venue hire.
- The requirements of the notice are to:
  1) Cease the unauthorised mixed use elements of the ground floor and basement unit; these being a nail bar, café, cocktail bar and party/event venue hire.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (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 Town and Country Planning Act 1990 Act as amended for the development already carried out, namely the change of use of the ground floor and basement from a retail use (Class E (a)) to a mixed use consisting of nail bar, retail (including but not limited to, clothing, fashion accessories and health & beauty/nail products), café, cocktail bar and party/event venue hire, at ground floor and basement, 35 Camden Passage, London, N1 8EA, as shown on the plan attached to the notice and subject to the following condition:

   1) The cocktail bar and party/event venue hire uses hereby permitted shall only take place between the following hours:

      - 0900 – 2100 hours Mondays – Fridays;
      - 0900 – 2000 hours on Saturdays; and
      - 1000 – 1600 hours on Sundays and Bank Holidays.

Preliminary Matters

2. The appeal form cites grounds (a), (f) and (g). However, the appellant has raised issues which relate to ground (c). The parties have had an opportunity to consider the representations made by the appellant and I have therefore determined the appeals as proceeding with the additional ground.

The Appeal on Ground (c)

3. A ground (c) appeal is that the matters alleged in the notice do not constitute a breach of planning control. In this case, the alleged breach is the change of use of the ground floor and basement from a retail use (Class E (a)) to a mixed use consisting of nail bar, retail, café, cocktail bar and party/event venue hire.

4. The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (Use Class Regulations 2020) came into force on 1 September 2020, amending the Town and Country Planning (Use Classes) Order 1987 (UCO). The amendments created a new broad 'commercial, business and service' use class (Class E) that incorporates former classes, including A1 (shops), A3 (food and drink), elements of D1 (non-residential institutions) and D2 (assembly and leisure), as well as other uses deemed suitable for a town centre.

5. Consequently, the sale of food and drink principally to visiting members of the public, where consumption is mostly undertaken on the premises, now falls under Class E. As a change of use within a single use class does not amount to development requiring planning permission[1], the change of use from retail, to a mixed use including retail and café, does not constitute a breach of planning control.

6. The appellant also argues that the nail bar use could be deemed to fall within Class E(c)(iii) – '*other services which it is appropriate to provide in a commercial, business or service locality'*. Prior to the Use Class Regulations 2020 coming into force, a nail bar would have been a sui generis use. However, I am mindful that the explanatory memorandum for those Regulations[2] states that the Government considered a complete overhaul to be required '*to better reflect the diversity of uses found on high streets and in town centres and to provide the flexibility for businesses to adapt and diversify to meet changing demands.'*

7. It is further recognised that '*Modern high streets and town centres have changed so that they now seek to provide a wider range of facilities and services, including new emerging uses, that will attract people and make these areas viable now and in the future'*. The Memorandum clarifies that the reforms '*are primarily aimed at creating vibrant, mixed use town centres by allowing businesses greater freedom to change to a broader range of compatible uses which communities expect to find on modern high streets, as well as more generally in town and city centres.'* Such sentiments can reasonably be applied to a nail bar, which has clearly become a well-established feature of modern high streets.

8. As part of the revisions to the UCO, a number of classes, and uses within classes, have been removed in recognition that they can give rise to important local considerations. Those have been included in the list of uses which are specifically identified in Article 3(6) of the UCO as uses which do not now fall within any use class. This means that changes to and from these uses will be subject to full local consideration through the planning application process.

[1] Subject to the provisions of the UCO
[2] Explanatory Memorandum to the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (2020 No.757)

9. It was clearly open to the Government to include nail bars, which is not a new or novel use, in that list, but, it did not do so. Therefore, having regard to the above stated reasons for changing the UCO, I find, on the balance of probabilities, that a nail bar falls within Class E(c)(iii). The change of use from retail, to a mixed use including retail and nail bar, does not therefore constitute a breach of planning control.

10. A wine bar and drinking establishment is included within Article 3(6). A change of use from retail to a mix use including retail and cocktail bar, therefore requires planning permission. A breach of planning control has therefore occurred. Moreover, it is not suggested that a material change of use to a party/event venue hire premises does not require planning permission.

11. On the basis that the previous use was retail, that element of the mixed use is not in breach of planning control. Indeed, the enforcement notice does not require the retail use to cease.

12. Because there is a mixed use, it is not open to me to decouple elements of it; the use is a single mixed use with all its component activities. Consequently, it would not be appropriate to correct the allegation by deleting reference to the nail bar and café, and the ground (c) appeal fails.

The Appeal on Ground (a) and the Deemed Planning Application

Main Issues

13. The main issues are:

- whether the alleged mixed use results in an unacceptable loss of a retail unit and/or a break in the continuity of the primary retail frontage; and
- the effect on the living conditions of neighbouring residents, with particular regard to odour and noise.

Reasons

Retail unit and primary retail frontage

14. The appeal relates to the alleged change of use of the ground floor and basement of No 35 Camden Passage, which has a Primary Retail Frontage within the Angel Town Centre.

15. From the outside, the premises has the appearance of a café, with the coffee making machine and grinder sitting on top of a counter directly behind the shopfront. The counter also acts as the cocktail bar with the drinks located on shelving behind. A small table and two stools are located to its side. Beyond the counter, along one side wall, is a retail display area, selling beauty related items, jewellery and clothing. Much of the remainder of the ground floor is taken up by two manicure tables. In the basement there are four manicure tables and one pedicure bench.

16. The vast majority of the floorspace is therefore used for nail treatments, retail and café. That is reflected in the completed Planning Contravention Notice (PCN) which details approximately 85% of sales from the same. However, I have found under ground (c) that those uses are not in breach of planning control. If the appeal on ground (a) were to fail, when I came to consider ground (f), I would nevertheless delete the requirements to cease the nail bar,

retail and café elements of the mixed use, as those requirements would exceed what is necessary to remedy the breach of planning control. For the purposes of the ground (a) appeal, my consideration is therefore limited to those uses which are in breach, namely the cocktail bar and party/event venue hire.

17. The appellant explains that drinks (both hot and alcoholic) are only to be purchased by customers receiving nail treatments. Indeed, there are no sitting places other than two small stools and nail stations. The cocktail bar element therefore has a limited presence within the premises.

18. The appellant further explains that the basement can be hired for a range of occasions for groups of up to 20 people, with nail treatments as the main component of the event. For some of these events, alcohol is also served along with food that is bought in. Operationally that makes sense as the ground floor could continue to be used separately and in the normal way.

19. Islington's Core Strategy February 2011 Policy CS 5 lists the areas to continue to be the main shopping area, and Camden Passage as a specialist retail area for the antiques trade. The mixed use is not antique related and as such does not conform in that regard.

20. The alleged mix use does however accord with paragraph A of Core Strategy Policy CS 14 which states that '*Islington will continue to have strong cultural and community provision with a healthy retail and service economy providing a good range of goods and services for the people who live, work and study in the borough'.* Indeed, the popularity of the services provided is demonstrated by the significant number of submissions made in support of the appeal.

21. Paragraph D of Policy CS 14 seeks to limit the excessive loss of shops to other uses whilst Islington's Local Plan: Development Management Policies June 2013 (LPDMP) Policy DM4.1 places great weight on the need to retain any shops which currently or could potentially be utilised by small and independent retailers. However, the loss of such a premises has been able to occur without a breach of planning control taking place. Whether or not cocktails are served to customers and whether or not the basement is sometimes used for private events, does not alter that.

22. Given the alleged mixed use, I see no conflict with Policy DM4.4 insofar as it seeks to maintain and enhance the retail and service function of Islington's Town Centres. The mixed use also complies with a number of the relevant criteria of Paragraph C of Policy DM4.4 in that the scale of the use is consistent with the small units of Camden Passage. The premises retains an attractive historic shopfront thereby respecting the centre's heritage. It also provides an active and open shopfront of an independent operator which contributes to the vitality, viability and vibrancy of the centre. The overall character, function and local distinctiveness of the centre is not unacceptably diminished.

23. I am also mindful that a retail use could change to other uses within Class E, such as financial services, without the requirement for planning permission. Such a use would be significantly more harmful to the character of Camden Passage.

24. LPDMP Policy DM4.5A states that within the primary frontages proposals to change the use of existing retail premises will not be permitted unless five criteria are satisfied. As the premises is not an existing retail premises and that

change was able to occur without planning permission, the relevance of the policy is questionable. Moreover, the event hire relates to the basement and is not technically primary frontage. The cocktail bar is but has a very limited presence.

25. In any case, the first criteria of the policy, A.i), is that the resulting proportion of retail units would not fall below 70%. The appellant has provided survey evidence that even with the alleged change of use, the centre retains 79% of the frontage in retail use (Class E(a)).

26. The Council refer to a figure of 71.18% from its Retail Survey of 2019 and question whether the appellant has surveyed all units. In any event, the Council has not shown that the alleged mixed use, which includes retail, would reduce the figure of 71.18% to less than 70%. Based on the evidence before me, retailing remains the principal and dominant land use. I note that the Council refer to its emerging Local Plan Policy R7 which raises the percentage figure to 75, but that attracts less weight than the adopted figure of 70% of Policy DM4.5.

27. The level of support for the business also points towards a valued service with a significant number of customers being attracted to the premises, thereby stimulating footfall in Camden Passage and supporting/complementing independent retail and café businesses through linked trips. The cocktail bar and event hire form part of the overall offer and attraction.

28. Therefore, although the appellant acknowledges that the alleged mixed use results in a break in continuity of retail frontage of more than one non-retail unit (two) - contrary to criteria Aii), I do not find that individually or cumulatively that results in a harmful effect on the predominantly retail function, so as to conflict with criteria A.iv). Indeed, a retail element is retained and in overall terms the alleged mixed use positively contributes to the vitality and viability of Camden Passage.

29. In respect of criteria A.v), an active frontage is retained, both during the daytime and evening. Although the retail role is limited, the mixed use is clearly appropriate within a town centre location.

30. Although the appellant refers to extensive marketing following the vacation of the shoe shop that previously occupied the premises, evidence to that effect has not been provided. In any case, the appellant acknowledges that the marketing period fell short of the two years required by criteria Aiii). However, the appellant has provided a list of 18 premises that are currently vacant. Consequently, it is unlikely that the mixed use is precluding occupation by an antique dealer or other specialist retailer.

31. LPDMP Policy DM4.9 states that the Council will continue to protect and promote the role of specialist shopping areas in the borough, particularly at Camden Passage and Fonthill Road. However, for the reasons explained, the policy is now unable to protect the premises from changing its use from specialist retail to other uses within Class E of the UCO. Moreover, for the reasons explained, I find the uses to be compatible and complementary to the predominant retail use of Camden Passage and presents an attractive and active frontage in keeping with the character of the specialist shopping area. I do not therefore find conflict with the corresponding parts Policy DM4.9.

32. I have also found the alleged mixed use to comply, in overall terms, with Core Strategy Policy CS 14 and Policy DM4.4. Although there is conflict with parts of Policies CS 5, DM4.1 and DM4.5.A, the weight I have attached to the same is limited because of the individual merits of the alleged development and the significant change in circumstances arising from the revised UCO, which means that the loss of the retail unit and break in the continuity of the primary retail frontage were able to occur without a breach of planning control.

33. Moreover, the use of the basement for nail treatments could continue whether or not it is used for private hire/events. Similarly, the ground floor uses (café, retail and nail bar) could continue with or without the cocktail bar use. The loss of retail unit and the break in the primary retail frontage can and has occurred, irrespective of those two uses.

34. The material considerations in this case therefore indicate that the deemed planning application could be decided otherwise than in accordance with those development plan polices where conflict has arisen.

Living conditions

35. As noted, the alleged mixed-use business occupies the ground floor and basement of No 35. The two upper floors of No 35 form a residential dwelling, accessed via a door adjacent to the shopfront.

36. The reason for issuing the enforcement notice refers to the potential to cause harm to neighbouring residential amenity but is not explicit in what that harm might be. Nevertheless, the occupants of the residential property directly above object on the basis of noise and odour arising from the solvents used in nail treatment products, as well as the associated mental and physical effects.

37. Whilst I sympathise with the occupants, for the reasons explained, the nail bar use is not in breach of planning control and therefore I would not require that element of the mixed use to cease. Consequently, it cannot form part of my ground (a) considerations relating to living conditions which are restricted to the noise effects of the cocktail bar and party/event venue hire.

38. In respect of the former, the premises is subject to a licence for the consumption of alcohol but the appellant explains that no drink can be consumed on the premises unless ordered by a customer purchasing a nail service. Moreover, the completed PCN refers to the consumption of alcoholic drinks amounting to 5% of the total turnover. Accordingly, the level of noise disturbance would not be comparable to that of a typical bar.

39. As noted the basement can be hired for a range of occasions for groups of up to 20 people, with nail treatments as the main component of the event. For some of these events, alcohol is also served along with food that is bought in. The information contained within the PCN details only 5% of turnover is derived from such events, thereby implying that they are relatively infrequent. The ground floor also buffers the use from the dwelling above.

40. I appreciate that the premises operates during the evening and that noise can travel through the building. However, the nail bar, café and retail uses can occur anyway without the requirement for planning permission. Within the context of a relatively lively commercial street with nearby night time uses, and having regard to the extent and nature of the cocktail bar use and likely infrequency and extent of the event venue hire use, unacceptable noise

disturbance is unlikely to occur from the inclusion of those two uses, so long as they do not carry on late into the evening time, beyond 2100 hours. A condition could be imposed to that effect.

41. On that basis, I do not find conflict with LPDMP Policies DM4.2 or DM4.3 or paragraph 130 of the National Planning Policy Framework. Those policies seek, amongst other things, to resist uses that detrimentally affect the amenity of an area.

Other Matters

42. An interested party has queried whether the premises is primarily used as a nail bar, or whether it is in a mixed use. However, this was considered by an Inspector in a previous appeal[3] who found the premises to be in mixed-use. I find no reason to disagree.

43. The appeal property is a Grade II listed building situated within the Angel Conservation Area. As set out above, I have found that the premises retains an attractive historic shopfront that is in keeping with neighbouring units and adds to the vitality of Camden Passage. Accordingly, the alleged mixed use preserves the character and appearance of the Conservation Area.

44. The Council also confirms that listed building consent was granted in October 2017 for internal alterations. Although it states that planning permission and listed building consent is required for an extraction flue, that is a matter for the Council and the appellant.

45. Reference is made by the occupants of the flat at No 35 to a statutory odour nuisance and the issuing of an Abatement Notice by the Council under the Environmental Protection Act 1990. However, I note that following a review, the Council deemed that it would not be in the public interest to proceed with the prosecution.

46. The occupants contend that the appellant has a track record of ignoring the requirements of licencing agencies and is not a reliable operator. However, the Council has granted Special Treatment Premises Licences[4] for manicures and pedicures at the appeal property and the minutes from the Licensing Regulatory Committee on 11 June 2019 confirm that the Committee was satisfied that the appellant had taken reasonable steps to carry out remedial works to allay the odour issues and complaints and had taken on board recommendations and suggestions made by the Council’s Environmental Health Team. The Committee also noted that the appellant was being proactive by installing odour sensors on the premises and developing an alternative to the use acetone.

47. Reference is made to the appellant being fined for incorrectly disposing of chemical refuse but that is dealt with under separate legislation and is not an issue for this appeal.

48. Concern is raised that the appellant has not met the requirements of Article 7 of the Town and Country Planning (Development Management Procedure) Order 2015 (the DMPO) for applications for planning permission. However, the

[3] Appeal Ref: APP/V5570/C/19/3236444
[4] Under the London and Local Authorities Act 1991, Part ll

appeal is made against the issue of an enforcement notice, rather than refusal of a planning application. Article 7 does not therefore apply.

Conditions

49. The Council has suggested a condition be imposed that, following the cessation of the mixed use, the premises is returned to a retail use. However, that would be contrary to the intentions of the recent changes to the UCO and is not justified in the particular circumstances of this case.

50. The Council has also suggested an hours of operation condition, which in respect of the cocktail bar use and event hire is reasonable and necessary to ensure those aspects do not operate late into the evening. The appellant has confirmed such a condition to be acceptable should I consider it necessary. In any case, the hours suggested by the Council do not restrict the use beyond those hours displayed at the time of my site visit.

51. I appreciate that other businesses in the vicinity operate later but I am unaware whether there are residential uses above them. Shortening the business hours to between 1100 and 1700 hours, as suggested by the occupants of No 35, is not justified having regard to my above findings and the particular circumstances of this case. Notwithstanding the duty placed on me to have regard to the desirability of preserving the listed building or any features of special architectural or historic interest which it possesses, I reach the same conclusion for a condition requiring sound proofing measures.

52. I note that the occupants have also requested conditions be attached to resolve the odour nuisance through measures including mechanical ventilation. However, for the reasons explained the nail bar use is not in breach of planning control. It is not therefore reasonable to attach conditions relating to that aspect of the mixed use. Further conditions are suggested requiring compliance with a Hazard Awareness Notice, but such matters are dealt with under separate legislation. The resolution of any property damage that may have been caused is a matter for the parties involved and as such cannot be reasonably included as a condition.

Conclusion on the Ground (a) appeal

53. For the reasons given above, I conclude that the 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.

Richard S Jones

INSPECTOR