



Appeal Decisions

Inquiry Held on 27, 28 & 29 February 2024, and 5 March 2024

Site visit made on 28 February 2024

by Paul Freer BA (Hons) LL.M PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 July 2024

Appeal A Ref: APP/E5330/X/22/3293510

Trafalgar Tavern, Park Row, Greenwich, London SE10 9NW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Trafalgar Tavern Lease Ltd against the decision of Royal Borough of Greenwich Council.
 - The application Ref 21/3034/CE, dated 13 August 2021, was refused by notice dated 25 October 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as Use Class E(b) - Sale of food and drink for consumption (mostly) on the premises / Previously A3/A4.
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Appeal B Ref: APP/E5330/X/23/3318421

Trafalgar Tavern, Park Row, Greenwich, London SE10 9NW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a failure to give notice within the prescribed period of a decision on an application for a LDC.
 - The appeal is made by Trafalgar Tavern Lease Ltd against Royal Borough of Greenwich Council.
 - The application Ref. 22/3283/CE is dated 28 September 2022.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as existing use and operation in breach of a planning condition, limiting the hours and months of use of external seating under consent ref 04/1611/F.
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Summary Decisions

Appeal A is dismissed.

Appeal B is dismissed.

Procedural Matters

1. All evidence at the Inquiry was given under oath by way of affirmation. In addition, all of the witnesses appearing on behalf of the appellant submitted Statutory Declarations. Those Statutory Declarations all included the wording required by the Schedule to the Statutory Declarations Act 1835 and were all signed, witnessed, and dated. Accordingly, I have afforded those Statutory Declarations the appropriate weight.

2. The Council has divided the wider appeal site into four areas¹. Area 1 is the Trafalgar Tavern itself. Area 2, immediately to west of and adjacent to the Trafalgar Tavern, was referred to as Trafalgar Square throughout the Inquiry². Area 3, referred to as The Ramp throughout the Inquiry, is between Trafalgar Square and the Old Royal Naval College (ORNC). Area 4 is to north of Areas 2 and 3 and was referred to throughout the Inquiry as The Knuckle³. I will adopt these names in this decision.
3. The descriptions of the uses for which certificates of lawful use or development are sought set out in the header above are taken from the respective application forms. The description of the use subject to Appeal A is disputed by the parties.
4. The Council considers that the description should be:
External drinking area and seating on land adjacent to the Trafalgar Tavern known as The Knuckle (sui generis use).
5. The appellant considers that the description should be:
Use of The Knuckle in conjunction with the existing use of Trafalgar Tavern.
6. The first point to make is that neither description refers to The Ramp. The plan submitted at the Inquiry, which the parties agree correctly reflects the land subject to the application, includes the area known as The Ramp. The description should therefore be amended to be consistent with the agreed application plan.
7. I see no reason to refer to the fact that the use referred to in the description is a *sui generis* use. That is not a point in dispute in this case and I have not been asked to decide the point. Moreover, this remains the position irrespective of whether it is referred to in the description or not.
8. The Planning Practice Guidance (PPG) advises that precision in the terms of any certificate is vital, so that there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it. The PPG goes on to indicate that a certificate for an existing use must include a description of the use, operations or other matter for which it is granted regardless of whether the matters fall within a use class. The PPG explains that, if future problems interpreting the certificate are to be avoided, the description needs to be more than simply a title or label. The certificate needs to spell out the characteristics of the matter so as to define it with precision. This is particularly important for uses which do not fall within any "use class", as in this case.
9. The description advanced by the Council is inadequate in these respects. To begin with, the description refers only to an 'external *drinking* area' (emphasis added). It is clear from the evidence before me that the consumption of food at tables/benches placed on The Ramp and The Knuckle is an integral and important element of the use for which a certificate is sought. The description of the use for which the certificate is sought therefore needs to expressly refer to the consumption of food purchased at the Trafalgar Tavern.

¹ Proof of Evidence of Mr Lucas Zoricak, Appendix F.

² As shown on Appeal Map B.

³ As shown together with Area 3 on Appeal Map A.

10. The description of the use for which the certificate of lawful use or development is sought advanced by the appellant refers to the use of The Knuckle⁴ in conjunction with the existing use of Trafalgar Tavern. I can see the logic of that approach although, in my view, this needs to be qualified by the inclusion of the term 'ancillary to' or 'incidental to' in order to have greater consistency with the concept of the planning unit.
11. The Council also make a valid point here: the whole of the Ramp and The Knuckle are not in such use because parts are being used for unobstructed public highway use. The Council therefore suggest that the description needs to refer to 'parts of that area known as The Ramp and The Knuckle'. As a matter of principle, I agree with that approach and will amend the description accordingly. However, that in turns raises the spectre as to which 'parts' are so used. The plan on which it was agreed I should rely for this purpose does not include any such demarcation⁵.
12. The description advanced by the appellant also lacks the necessary precision in a further key respect: the hours of operation. In accordance with the guidance set out in the PPG, it is necessary to define the hours of operation in any certificate that may be granted in this case so that any subsequent change may be assessed against it.
13. The difficulty is that the Trafalgar Tavern does not have defined hours of opening as such. The Premises Licence, as last varied on 30 June 2022, is quite complex⁶. The Premises Licence permits the sale of alcoholic beverages over a wide range of times, with the latest time generally being 01:00 Monday to Thursday, 02:00 on Fridays and Saturdays and 00:00 on Sundays.
14. The Premises Licence, as varied on 30 June 2022, specifically refers to Plan 0690/BP. That plan includes The Ramp and The Knuckle. The Premises Licence authorises the carrying on of Licensable Activities in two defined areas: the Ground Floor bar and First Floor areas, and the Second and Third Floors. The Premises Licence sets out hours during which alcohol may be sold (including both On and Off sales) and during which other activities may take place (some of which are restricted to Indoor Only).
15. The Premises Licence does not specifically state that the hours of operation apply to the outdoor areas referred to in Plan 0690/BP (including The Ramp and The Knuckle): that can only be inferred from the inclusion of that plan in Annex 4 of Part A of the Premises Licence, and the reference to 'indoors only' in relation to some licensable activities. Accordingly, on my reading, I am not persuaded that the hours set out in the Premises Licence do relate to the outside areas such as The Ramp and The Knuckle. I therefore cannot rely on the opening hours set out in the Premises Licence for present purposes.
16. Accordingly, I reverted to the parties to seek their views on the opening hours I should use in connection with this appeal. In response, the appellant indicated that the hours of 12:00 to 23:00 on Monday to Friday and 11:00 and 23:00 on Saturday and Sunday reflects the hours when the Ramp and the Knuckle are used in association with the Trafalgar Tavern. The appellant also confirms that the Ramp and the Knuckle have been used during the above hours since the

⁴ As above, this needs to include The Ramp.

⁵ Appeal Map A

⁶ Licence Number: LN/000004975

premises licence was granted in 2005 other than that prior to 2016 the hours of use on Sundays started from 12:00 rather than 11:00, this being in accordance with the premises licence at that time. I accept that this slight increase in hours of use, in accordance with the premises licence as varied, would not amount to a material change of use.

17. I will therefore amend the description of the use for which the certificate is sought to:

Use of the land adjacent to the Trafalgar Tavern known as The Ramp and The Knuckle as an external drinking area, for the consumption of food and for seating, all ancillary to the use of the Trafalgar Tavern and limited to between 12:00 to 23:00 on Monday to Friday and 11:00 and 23:00 on Saturday, Sunday and Bank Holidays.

I have considered Appeal A on the basis of this amended description.

18. The existing use subject to Appeal B also requires clarification. The use for which a certificate of lawful use or development is sought is described as existing use and operation in breach of a planning condition, limiting the hours and months of use of external seating under consent ref 04/1611/F (the 2004 permission⁷).
19. However, to be precise, Condition 2 imposed upon permission 04/1611/F restricted the use for the placing of tables and chairs on the public highway from 10.00 am until 22.00 pm Monday to Sunday, during the time period 15th April through to the 15th October only. Pursuant to the guidance set out in the PPG and in the interest of precision, the description of the existing use for which the certificate ought properly to reflect the exact wording of Condition 2 imposed upon permission 04/1611/F. This is uncontroversial and I shall amend the description accordingly.
20. The plan associated with this appeal covers the entirety of Trafalgar Square. Consequently, the issues surrounding the plan submitted with Appeal A do not arise in connection with Appeal B.
21. A total of eight representations were received in relation to Appeal A, including one from Mr Matthew Pennycook MP. A total of three representations were received in relation to Appeal B. I have taken those representations into account only insofar as they relate to the continuity of the use(s) subject to those appeals.
22. However, some of those representations set out views on the planning merits of those uses including, for example, on noise disturbance. I am not able to take those points into account in relation to these appeals made under Section 195 of the Act and have not done so.

The Planning Unit

23. The leading case for the determination of the planning unit is *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207. This case indicates that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically and/or

⁷ Although referred at the Inquiry as the 2004 Permission, planning permission 04/1611/F was actually granted on 7 April 2005. In the interest of continuity, I will refer to as the 2004 permission in this decision.

functionally separate and distinct, and/or occupied for different and unrelated purposes. In *Burdle, Bridge J* suggested three broad categories of distinction:

- a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary;
- b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another;
- c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.

24. The Trafalgar Tavern, Trafalgar Square, The Ramp and The Knuckle are all in the same unit of occupation: specifically, the Trafalgar Tavern.
25. There is a public right of way passing through The Ramp and The Knuckle, and which forms part of the Thames Path. I recognise that some people using the right of way may, on occasion, stop and linger on The Knuckle to take in the panoramic views from there. The evidence shows that some members of the public using the right of way and who, at that time are not customers of the Trafalgar Tavern, sit on the benches placed on The Knuckle or on the concrete plinth⁸. During times when the pub is open to customers, the staff at the Trafalgar Tavern routinely request those members of the public to vacate the seating so that it is available for paying customers⁹.
26. The right to pass and re-pass along a public right of way is not an occupation of that land. Those people using the right of way are essentially passing through that space, notwithstanding that they may linger for a period of time to enjoy the view as part of their walk and/or to take advantage of the seating placed there by the Trafalgar Tavern. The public right of way does not therefore create a separate unit of occupation.
27. There is a balustrade with planters between Trafalgar Square and The Ramp. This gives Trafalgar Square an enclosed, intimate feel that is markedly different from the openness of The Ramp and especially The Knuckle. However, Trafalgar Square is open at each end with access onto The Knuckle. There is also a gap in the balustrade that facilitates access between Trafalgar Square and The Ramp. Consequently, despite having a very different feel to the space, Trafalgar Square is not physically separate from The Ramp and The Knuckle.
28. Similarly, there is no difference in the functionality of Trafalgar Square, The Ramp and The Knuckle. All of those spaces are used by customers of Trafalgar Tavern for the consumption of food and drink purchased there, and to take advantage of the seating provided by the public house whilst doing so. At times when the pub is particularly busy, the photographic evidence shows that the consumption of food and drink by customers of the Trafalgar Tavern also takes place on the public right of way¹⁰.

⁸ The Statutory Declarations of Mr Horatio Blood, paragraph 17; Ms Kate Rogers, paragraph 14, and Ms Lorraine Harrow, paragraph 15.

⁹ The Statutory Declaration of Ms Lorraine Harrow, paragraph 15.

¹⁰ For example, the Statutory Declaration of Mr Frank Dowling, Exhibit FD10, page 16.

29. I therefore conclude that, as a matter of fact and degree, The Trafalgar Tavern, Trafalgar Square, The Ramp and The Knuckle combine to form a single planning unit.

Appeal A

30. Section 191(4) of the 1990 Act states that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful on the date on which the application was made.
31. The time limits for taking enforcement action are set out in s171B of the 1990 Act. The use subject to this appeal constitutes 'any other breach of planning control' for the purposes of section 171B of the 1990 Act. The period required to achieve immunity from enforcement action, and therefore to be considered lawful, is 10 years pursuant to 171B(3) of the 1990 Act. The relevant date, being the latest date on which the use could have commenced in order to achieve immunity from enforcement action, is 13 August 2011. The 10-year 'immunity period' is therefore 13 August 2011 to 13 August 2021.
32. It was held in *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226, and restated in *R (Ocado Retail Limited) v LB Islington* [2021] EWHC 1509 (Admin), that a use can only become lawful if it continues throughout the relevant immunity period. There is no definition of 'continuous' in the 1990 Act, but the judgments in *Thurrock* and *Ocado* held that for a use to be considered to be continuous, a local planning authority must be able to take enforcement action against that use at any time in the relevant immunity period.
33. This does not mean that the use must be active throughout the relevant immunity period: in *Thurrock*, Schiemann LJ. held that:
- "I accept [Counsel for the Appellant's] point that an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on – because it is the weekend or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity".
34. However, there can be no significant cessation in the use or an intervening material change of use of the planning unit.
35. This approach has been confirmed in other cases and is now well established. For example, *R (North Devon DC) v First Secretary of State* [2004] EWHC 578 (Admin), which concerned seasonal conditions, and *Basingstoke and Deane BC v SoSCLG* [2009] EWHC 1012 (Admin), in which Collins J. held that period of

non-occupation of a dwelling, including for refurbishment and when being marketed, did not mean that use in breach of planning control had ceased.

36. The appeal decision considered by the High Court in *Westminster City Council v SoSCLG* [2013] EWHC 23 (Admin) concerned use of an area of footway/pavement outside a restaurant for outdoor eating by customers of that restaurant, including for the siting by the restaurant operators of tables and chairs to facilitate this use. The use of the footway was not continuous in the sense that there were periods of non-use; it did not take place when the restaurant was closed or during holiday periods. The tables and chairs were removed from the footway overnight when the restaurant was closed. The Council had contended that the Inspector was wrong to find continuous use of the pavement during the relevant 10-year enforcement period.
37. In the High Court, HHJ Anthony Thornton QC rejected this submission and held that intermittent overnight storage of pavement furniture was a necessary feature of the type of use in issue in that case. It was also held that the periods relied on by the Council were similar to other periods of inactivity, such as holiday periods and periods of enforced closing or lack of demand which are clearly part of, and incidental to, restaurant use. The appellant draws parallels between the facts and findings in *Westminster* and the current appeals.
38. The overriding principle to be drawn from the above cases is that whether or not a period of non-use amounts to a termination or interruption of a use is a matter of fact and judgement to be considered in the context of how an operation or use of the sort being carried out is expected to operate.
39. It is convenient to consider the evidence in relation to Appeal A against the principles established in case law in relation to distinct periods of time within the immunity period as a whole.

The summer months: April to end of September

40. The photographs provided as part of Mr Dowling's evidence shows that both The Ramp and The Knuckle have been consistently used for the consumption of food and drink ancillary to the use of the Trafalgar Tavern between the months of April and October on each of the 10 years of the immunity period, and even earlier¹¹. The photographs clearly show customers consuming food and drink on The Ramp and The Knuckle that have evidently been purchased at the Trafalgar Tavern¹². The photographic evidence covers most months within that period. The individual images are not always dated, but the index to each exhibit records examples of use on numerous days within each month within the summer period and sometimes on consecutive days¹³.
41. That evidence is supported by extracts from social media provided as part of Mr Blood's evidence¹⁴. The postings on social media cover the period from 1994 to 2021 and include postings from throughout the immunity period. A significant number of the entries, particularly those posted on Tripadvisor, refer to sitting outside in the summer months and are dated between April and October of the respective year. Those entries do not always indicate whether they are

¹¹ For example, the Statutory Declaration of Mr Frank Dowling, Exhibits FD10, FD17, FD22 and FD25, amongst others.

¹² The beer and wine glasses, the plates and the cutlery being used are all consistent with products purchased at a public house, such as the Trafalgar Tavern.

¹³ For example, the Statutory Declaration of Mr Frank Dowling, Exhibits FD22 and FD25.

¹⁴ The Statutory Declaration of Mr Horatio Blood, Exhibit HB2

referring to The Ramp or The Knuckle, or possibly even Trafalgar Square. However, in many cases it is reasonable to conclude from context that they are referring to The Knuckle.

42. The use of both The Ramp and The Knuckle for the consumption of food and drink ancillary to the use of the Trafalgar Tavern between the months of April and October was confirmed by all the witnesses appearing on behalf of the appellant in their Statutory Declarations and oral evidence to the Inquiry.
43. It is not necessary for the appellant to show that the use was taking place on every single day during the immunity period. However, on the balance of probability, I am satisfied that the appellant's evidence shows use of *some parts* of The Ramp and The Knuckle for the consumption of food and drink ancillary to the use of the Trafalgar Tavern to have taken place continuously between the months of April and October of every year throughout the immunity period.
44. The difficulty, in terms of the precision required by the PPG, is that Appeal Map A does not delineate which parts of The Ramp and The Knuckle have been used for the consumption of food and drink ancillary to the use of the Trafalgar Tavern. The photographic evidence clearly points to the area to the sides being so used during the summer months. The photographic evidence also shows that there have been occasions when much, if not all, of the centre of this area is used by customers of the Trafalgar Tavern: for example, during the FIFA World Cup in July 2006¹⁵. But, in normal usage, the photographic evidence shows that the centre generally remains clear and appears to be used as public highway.
45. If an LDC was to be issued on the basis of Appeal Map A for just the summer months, it would apply to the whole of the area shown edged in red on that plan. On the evidence before me, that would not be correct. It is therefore not open to me to grant a LDC for just the summer months on the basis of Appeal Map A.

The winter months: October to March

46. The position in relation to the months between October and March is less clear cut.
47. The extracts from social media provided as part of Mr Blood's evidence that provide compelling evidence of use of The Ramp and The Knuckle in the summer months tell a very different story in relation to the winter months¹⁶. Some of the comments do specifically refer to sitting outside in the winter months; for example, a posting on Tripadvisor referring to a visit in October 2014 describes sitting outside "with a nice view of the river", suggesting that they sat in The Knuckle. A posting on Tripadvisor that same year describes the Trafalgar Tavern as being "great all year round with lots of outdoor seating overlooking the river."
48. But entries referencing use of The Ramp and The Knuckle in the winter months are scarce. Other entries, whilst at first glance appearing to indicative of use of the outdoor space, tell of different experiences. For example, a posting on Yelp dated 1 December 2008 actually refers to a "very pleasant *summers* evening"

¹⁵ Statutory Declaration of Mr Frank Dowling, Exhibit FD10

¹⁶ The Statutory Declaration of Mr Horatio Blood, Exhibit HB2

(emphasis added). A posting on Tripadvisor dated 19 February 2012 actually relates to two visits in September of the previous year, on one of which the author sat inside 'on a cold day'.

49. Looked at in the round, the extracts from social media are not supportive of use of The Ramp and The Knuckle during the winter months. If anything, these extracts point towards the extensive use of the outside space in warm weather and/or clear days in winter, but to a propensity for customers to prefer sitting inside during the winter months.
50. There may have some days on which the weather was so inclement that sitting out on the Ramp or The Knuckle was simply not viable. No doubt the exposed position of The Knuckle was a factor in that.
51. Nonetheless, there would have been many days during the winter months on which weather conditions would have been conducive to customers of the Trafalgar Tavern using and enjoying that outside space. The appellant's witnesses unanimously recall customers of the Trafalgar Tavern using the outside space during the winter months, and I have no doubt that some customers did do that on occasions. But the evidence does not support that use as being widespread or continuous. Indeed, photographs taken by the Council show several occasions when the use was not taking place¹⁷. The Council would have been unable to initiate enforcement action on those dates.
52. This was not a situation where the Trafalgar Tavern was closed for a whole season, either through a condition imposed on a planning permission or any other reason: the public house was operating throughout most of the immunity period. Neither was the Trafalgar Tavern closed for a short period(s) whilst being refurbished. The tables and seating remained in position and available for use throughout most of the immunity period, apart from short periods whilst being refurbished and when required to be removed during the lockdowns associated with the Coronavirus pandemic.

The 'cat and mouse' period

53. The Greenwich Foundation hold a long lease of The Knuckle. The Greenwich Foundation granted a licence to Trafalgar Tavern to use that area. In a letter dated 9 October 2014 from Mr Brendan McCarthy, CEO of the Greenwich Foundation, Mr Dowling was advised that the licence was being brought to an end. The letter required vacant possession by 1 December 2014. An exchange of correspondence followed, but no agreement was reached¹⁸.
54. Between December 2014 and September 2017, the Greenwich Foundation withdrew its licence to allow the Trafalgar Tavern to use that area. Accordingly, from the beginning of December 2014, the furniture placed on The Knuckle was removed. During this period, on business days, Mr Dowling would keep The Knuckle clear of furniture. However, in the evenings and at weekends, and when Mr McCarthy was on holiday, the furniture would be replaced¹⁹. At the Inquiry, the period between December 2014 and September 2017 became known as the 'cat and mouse' period.

¹⁷ For example, Proof of Evidence of Mr Lucas Zoricak, Appendix A, Figure 42.

¹⁸ Statutory Declaration of Mr Frank Dowling, paragraphs 24 to 44 and Exhibits FD18 to FD22.

¹⁹ Statutory Declaration of Mr Frank Dowling, paragraph 38, expanded upon in his oral evidence.

55. During the 'cat and mouse' period, the appellant did not have any right to place tables and chairs on The Knuckle. In his evidence, Mr Zoricak sets out, with reference to the photographic evidence, a large number of dates on which there was an absence of tables and chairs from The Knuckle area²⁰. This photographic evidence is entirely consistent with the removal of furniture from the Knuckle during the cat and mouse period.
56. I recognise that some of the photographs Mr Zoricak's do appear to show tables and chairs in place, and customers of the Trafalgar Tavern consuming purchases there²¹. There are also two photographs showing staff from the Trafalgar Tavern in the process of setting out tables on The Knuckle²². These photographs are consistent with Mr Dowling's evidence that the furniture was replaced when Mr McCarthy was not looking.
57. The evidence produced by Mr Zoricak is to a large extent corroborated by the evidence of Mr Dowling. The photographs appended to Mr Dowling's evidence show extensive use of The Ramp during the cat and mouse period but little evidence of use of The Knuckle. There is one photograph, taken in June 2016, that clearly shows tables in place on The Knuckle being used by customers of the Trafalgar Tavern²³, but this could have been on a weekend when Mr McCarthy was not present. There are other photographs that are purported to relate to same time but which are undated²⁴. Most photographs in Mr Dowling's evidence show no furniture on The Knuckle during this period, and to that extent are consistent with the Council's evidence.
58. Therefore, on balance, the evidence demonstrates that there were extended periods within the cat and mouse period as a whole when no furniture was in place on The Knuckle. It is Mr Dowling's evidence that customers would use The Knuckle notwithstanding the absence of furniture, but that is not supported by the photographic evidence. The Council would not have been in a position to initiate enforcement action during this period. This would have included the summer months. The cat and mouse period itself lasted for nearly three years. The use of The Knuckle was not continuous during that period.
59. The intermittent removal and replacing of the furniture following the denial of the use of The Knuckle by the Greenwich Foundation was not consistent with the expected pattern of operation of the use in question. Neither was it characteristic of the use of that space by the Trafalgar Tavern during the previous and subsequent summer months, during which tables and chairs remained in situ only being removed, if at all, for occasional maintenance. It was, as the Council put it in closing submissions, an ad hoc response in an attempt to evade the watch of Mr McCarthy. For these reasons, as a matter of fact and degree, I also differentiate the pattern of use during the cat and mouse period revealed by the evidence in this case from the facts in *North Devon DC, Basingstoke and Deane BC and Westminster*.

²⁰ Proof of Evidence of Mr Lucas Zoricak, Appendix A. For example, Figure 64, an aerial photograph likely to have been taken in the spring/summer of 2016 and which shows The Knuckle entirely devoid of any furniture.

²¹ For example, Proof of Evidence of Mr Lucas Zoricak, Appendix A, Figure 88.

²² Proof of Evidence of Mr Lucas Zoricak, Appendix A, Figures 59 and 60.

²³ Statutory Declaration of Mr Frank Dowling, Exhibit FD22

²⁴ Statutory Declaration of Mr Frank Dowling, Exhibit FD22

Intensification

60. The Council contends that, following the cat and mouse period, an intensification of use occurred around 2017 which amounted to a material change of use. The Council considers this material change in reset the clock for the purposes of section 171B(3).
61. The intensification of a use may amount to a material change of use if and where that causes the character of the use to change in a fundamental way. It applies when the former and present uses can only be distinguished in terms of scale and effects related to scale. In *Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd* [2012] EWCA Civ 1473, the Court of Appeal held that the Inspector applied the right test: 'What must be determined is whether the increase in the scale of the use has reached the point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in a such a change in the definable character of the use that it amounts to a material change of use'.
62. The photographic evidence shows that on days when certain specific events took place the scale of the use did increase to the extent that there is a change in the definable character of the use. For example, the FIFA World Cup in July 2006²⁵ and the Tall Ships Regatta on the River Thames in September 2014²⁶. Both of those events took place before the cat and mouse period.
63. That change manifested itself in an increase in the number of customers present on The Ramp and The Knuckle, and the amount of space that they occupied. The latter potentially included the blockage of the right of way that passes over the land, with the associated inconvenience to persons wishing to use the right of way.
64. It is also reasonable to conclude that there would have been an attendant and perceptible increase in noise levels generated by those watching the event, particularly during the screening of the World Cup match. The behaviour of use watching the event is likely to have been noticeably different to that of customers eating and drinking in The Ramp and The Knuckle at other times.
65. In her evidence, Mrs Nicola Snook stated that she first became aware of the additional seating outside the pub in May 2019. As a local resident very familiar with the Trafalgar Tavern, the logical inference from Mrs Snook's evidence is that there must have been a change in the definable character of the use in or around 2019, sufficient to bring the use to her attention. That is broadly consistent with the Council's view, albeit somewhat later.
66. However, aside from the above mentioned and similar specific events, and outside of the cat and mouse period and the Coronavirus pandemic, the photographic evidence reveals that the scale of the use during the summer months remained largely unchanged throughout the immunity period. The occasions on which a change in the definable character of the use did occur appear to have been few and far between. Consequently, when looked at in the round, the relatively few occasions on which a change in the definable character of the use did occur were not sufficient to result in a change in the definable character of the use as a whole. Accordingly, as a matter of fact and degree, I conclude that there was no material change of use.

²⁵ Statutory Declaration of Mr Frank Dowling, Exhibit FD10

²⁶ Statutory Declaration of Mr Frank Dowling, Exhibit FD17

The Coronavirus pandemic

67. The Coronavirus pandemic resulted in three national lockdowns. During the first national lockdown (March 2020 to July 2020) and during the third national lockdown (January 2021 to April 2021) public houses were required to close²⁷. There is no dispute that the Trafalgar Tavern fully complied with that requirement.
68. Consistent with the requirements in place at the time, the Trafalgar Tavern ceased operations during the first and the third national lockdowns. The tables and chairs were removed during this time. The use for which the certificate is sought ceased during those two lockdown periods. Both of those lockdowns lasted for a period of around three months. These were therefore not brief periods of non-use; they were extended periods of non-use within the ten-year immunity period. In the terms of *Thurrock* and *Ocado*, the Council could not have taken enforcement action during that period.
69. In response, the Appellant argues that the use only ceased as a result of national restrictions which were in place; every public house in England was in the same position as the Trafalgar Tavern. Tables and chairs in public spaces were required to be removed or made unavailable for use. In that respect, the Trafalgar Tavern was operating in precisely the same way as all public houses. To be closed during lockdown is entirely consistent with how any public house was expected, indeed required, to function during the pandemic. The Trafalgar Tavern reopened for business as soon as restrictions were eased, and it was permitted to do so.
70. On that basis, and applying the approach established through case law, the appellant argues that periods of closure during the national lockdowns should not be taken as a termination or interruption of the use. Rather, the appellant argues, these were periods during which no activity took place in accordance with what was expected of and what occurred in any public house functioning at the time.
71. The issue of enforced cessation of use was considered in *Miles v National Assembly for Wales* [2007] EWHC 10 (Admin). In that case, the court held that the clock had been stopped by an outbreak of foot and mouth disease which prevented use for a period of eighteen months. The court in that case rejected the argument that there was no break because the period of non-use was not a voluntary choice of the developer.
72. In *Miles*, the High Court considered it immaterial that the interruption in the use was not the result of a freely made choice on the part of the Claimant. What matters, the court held, is that the objectionable use actually ceased and there was no longer any need or opportunity for the local planning authority to take enforcement action.
73. I recognise that the periods of national lockdowns in 2020 and 2021 were each considerably shorter than that the eighteen months associated with the foot and mouth outbreak. The use in *Miles* did cease but cessation was not something that was required of all such operations. The position for public houses during the Coronavirus pandemic was very different in the sense that closure was common to and required of all public houses.

²⁷ During the second lockdown, the Trafalgar Tavern operated a takeaway service.

74. However, the principle remains the same: the Council could not have taken enforcement action during either of those two lockdown periods. In the terms of *Thurrock* and *Ocado*, the continuity of the use was interrupted. The section 171B(3) clock was reset. For that reason, whereas *Miles* is distinguishable on its facts, it is not distinguishable in terms of the application of the principles set out in *Thurrock* and *Ocado*.
75. In that context, it matters not that all other public houses had to close during the national lockdowns. For the vast majority of those public houses, the use would have been lawful in planning terms and therefore the lawfulness of the use not affected by the two lockdowns. The Trafalgar Tavern itself was in that position. It is unfortunate for the owner of the Trafalgar Tavern that the use of The Ramp and The Knuckle was not already in that position and, for that matter, for the owner of any other public house the lawfulness of which had not already been established. In that sense, the application of those principles is neither capricious nor unfair. In any event, that does alter the application of the principle established in *Thurrock*, *Ocado* and *Miles*.

Conclusion on Appeal A

76. This is not a situation where the local planning authority has no evidence of its own to contradict that of the appellant or make their version of events less than probable. On the contrary, I find that the appellant's evidence is not sufficiently precise and unambiguous to counter the documentary and photographic evidence produced by the Council. Accordingly, I conclude that, on the balance of probability, the use of the land adjacent to the Trafalgar Tavern known as The Ramp and The Knuckle as an external drinking area, for the consumption of food and for seating, all ancillary to the use of the Trafalgar Tavern, has not been shown to have been lawful on the date on which the application was made. The appellant has therefore not discharged the burden that falls upon them.
77. Overarching all of the above is that Appeal Map A is not sufficiently precise to identify with reasonable certainty the areas of The Ramp and/or The Knuckle where the use for the consumption of food and for seating has taken place. Consequently, the precision required by the PPG for a LDC cannot be achieved. Again, if I had found the use to be lawful in all other respects, I would have reverted to the parties to agree an amended plan. However, in view of my conclusions above, there is no merit in doing so.
78. I further conclude that, on the balance of probability, the use of part of The Ramp and The Knuckle as an external drinking area, for the consumption of food and for seating, all ancillary to the use of the Trafalgar Tavern, was continuous during the summer months outside of the cat and mouse period and the two lockdowns associated with the Coronavirus pandemic. I have therefore considered whether I could amend the description of the certificate sought to cover just the summer months. I am satisfied that neither party would be prejudiced by doing so, should that be possible. Also, in other circumstances, I would have reverted to the parties to agree an amendment to Appeal Map A omitting the centre area of The Ramp and The Knuckle to provide the precision required by the PPG. However, because of the interruptions resulting from first the cat and mouse period and then the Coronavirus pandemic, that is not an option open to me.

Appeal B

79. It is Mr Dowling's evidence that he completed the works required by and in association with the 2004 permission in the summer of 2005²⁸. He explains that Trafalgar Square began to be used for the placement of tables and chairs and for use in association with the Trafalgar Tavern from late July 2005. This is supported by photographic evidence²⁹. It is then Mr Dowling's evidence that he initially attempted to comply with condition 2 attached to the 2004 permission by removing tables and chairs after 22:00 but this quickly proved to be impractical due to, amongst other reasons, a shortage of space in the Trafalgar Tavern to store them³⁰.
80. Similarly, Mr Dowling candidly explains that he did not comply with the seasonal restriction within condition 2. This is supported by the photographic evidence provided as part of Mr Dowling's evidence, which show the occasional presence of tables and chairs in Trafalgar Square outside the months permitted by condition 2³¹.
81. Mr Dowling's evidence in these respects is corroborated by the evidence of other witnesses called for the appellant. For example, Ms Rogers recalls in her Statutory Declaration seeing tables and chairs placed on Trafalgar Square on her arrival for work at the Trafalgar Tavern as early as 07:30 and, more recently, at 09:00³². She also recalls seeing tables and chairs placed on Trafalgar Square after 22:00. It is Ms Roger's evidence that tables and chairs were placed on Trafalgar Square during winter months.
82. Similarly, Ms Harrow recalls in her Statutory Declaration seeing tables and chairs placed on Trafalgar Square throughout the year³³. In her Statutory Declaration, Ms Harrow states categorically that the furniture on Trafalgar Square has never been taken in at night adding that, given her role as Operations Manager and Designated Premises Supervisor at the Trafalgar Tavern, she would have been aware of that had it been the case³⁴. As with the evidence of Ms Rogers, I find the evidence of Ms Harrow to be compelling in this respect, given their knowledge of daily operations at the Trafalgar Tavern through their respective roles there.
83. Taken as a whole, the witness and photographic evidence shows that table and chairs remained in place on Trafalgar Square for the majority of the relevant period. But there were occasions when the photographs show Trafalgar Square without tables and chairs present³⁵. In his Statutory Declaration, Mr Dowling explains that this was when the tables and chair were removed for short periods of time for maintenance/refurbishment, typically between December and February but also on an ad hoc basis at other times of the year³⁶. The issue then becomes whether the periodic removal of that furniture resulted in an interruption of the use.

²⁸ Statutory Declaration of Mr Frank Dowling, paragraph 11 and Exhibit FD7, expanded upon in Evidence in Chief.

²⁹ Statutory Declaration of Mr Frank Dowling, Exhibit FD10.

³⁰ Statutory Declaration of Mr Frank Dowling, paragraph 21, expanded upon in Evidence in Chief.

³¹ For example, Statutory Declaration of Mr Frank Dowling, Exhibits FD25 and FD31

³² Statutory Declaration of Ms Kate Rogers, paragraph 8.

³³ Statutory Declaration of Ms Lorraine Harrow, paragraph 9.

³⁴ Statutory Declaration of Ms Lorraine Harrow, paragraph 10.

³⁵ For example, Proof of Evidence of Mr Lucas Zoricak, Appendix A, Figures 4 and 5, dated November 2011 and January 2012 respectively.

³⁶ Statutory Declaration of Mr Frank Dowling, paragraph 73.

84. The photographs referred to above were taken in November 2011 and January 2012 respectively. There is no evidence before me that tables and chairs were put back in the period between those photographs being taken. Similarly, other photographs taken in January and February 2013 respectively show no tables being present on Trafalgar Square³⁷. Again, there is no evidence before me that the tables and chairs were put back in the period between those photographs being taken. One possibility, therefore, is that the tables and chairs were absent from Trafalgar Square for a period of several weeks or even months.
85. Against that, there is the evidence of Ms Rogers and Ms Harrow referred to above. I can reconcile this evidence by interpreting it to mean that the tables and chairs were not taken in at night when they present at all.
86. There is also the evidence of Mr Board, was contracted by Mr Dowling to carry out various property maintenance work at Trafalgar Tavern between 2008 and 2020. He explains that when furniture was removed for repairs, it could take anywhere between a few hours and a number of weeks before the maintenance was finished and the furniture could be returned to Trafalgar Square³⁸. Mr Board also confirms that there were also occasions on which all of the furniture was removed from Trafalgar Square in order to carry out maintenance works to the furniture or to the outdoor area itself.
87. I recognise that the removal of furniture for maintenance/refurbishment, together with the maintenance/cleaning of the surface on which they are placed, is a necessary feature of this type of use. The judgment in *Westminster* establishes that where a period of non-use accords with the expected pattern of operation of the use in question, as in this case, this would not lead to a discontinuance of use in breach of planning control nor would it have prevented the taking of enforcement action by a local planning authority.
88. Nevertheless, the principle in *Westminster* must be considered on a fact and degree basis. There have been some extended periods during which photographic evidence shows that no tables and chairs were present on Trafalgar Square. For example, photographs taken in January, February, March, April, May, July, November and December 2009 show no tables and chairs being present³⁹. Those photographs cover a period of some eight months in that calendar year, including three of the summer months. Or, to put it another way, two-thirds of that year.
89. I recognise that each of those individual photographs represents a snapshot in time and that is theoretically possible that tables and chairs were present on Trafalgar Square at other times. However, I am mindful of Mr Dowling's evidence that removing tables and chairs proved to be impractical due to the shortage of space in the Trafalgar Tavern. It is even less probable that the tables and chairs were removed and replaced between each of these photographs being taken, such that the photographs happen to have been taken on one of only a few days when tables and chairs were not present. It is therefore more likely than not that no tables or chairs were present on Trafalgar Square during that entire period.

³⁷ Proof of Evidence of Mr Lucas Zoricak, Appendix A Figures 15 and 16.

³⁸ Statutory Declaration of Mr James Board, paragraph 12, and expanded upon in Evidence in Chief.

³⁹ Timeline 2003-2012 for Condition 2, Figures 25-35 inclusive.

90. Similarly, photographs show no tables to be present on Trafalgar Square in February, April, June, September and October 2011⁴⁰. Again, some of these are summer months when it might be expected that Trafalgar Square would have been popular with customers for sitting out, such there was in incentive for the Trafalgar Tavern to have tables and chairs placed there. The added significance of these dates is that they are only some six years after the grant of the 2004 permission but less than ten years prior the obligatory removal of all street furniture required during the two national lockdowns associated by the Coronavirus pandemic.
91. In addition, there are other photographs that show Trafalgar Square devoid of tables and chairs on specific days. For example, 7 January 2006⁴¹; 4 January 2007; 10 March 2007⁴²; 26 May 2007⁴³; 1 December 2007⁴⁴; 6 April 2008⁴⁵; June 2008⁴⁶; 18 January 2014⁴⁷; April 2015⁴⁸; and September 2018⁴⁹. Five of those dates are within the summer months. Although most of these photographs are individually dated, the balance of probability would suggest that is unlikely that the photograph was taken on the only day that tables and chairs were not present. It is more likely than not that there were no tables or chairs present on the days or even weeks either side of the date in which these photographs were taken.
92. There is also a period of some five months between the photographs taken on 4 January 2007 and 26 May 2007, with a photograph taken midway during that period on 10 March 2007. There is no evidence to suggest that the tables and chairs were put back in place after 4 January, then removed by 10 March, reinstated again thereafter only to be removed again by 26 May. The more logical inference is that no tables or chairs were present throughout that entire period. I also note that the months of March and May are both outside of the usual period of time for maintenance/refurbishment between December and February, as stated by Mr Dowling in his evidence.
93. I recognise that the above days could all be those ad hoc occasions when tables and chairs were removed for short periods of time for maintenance/refurbishment outside of the usual period between December and February. The difficulty, both with these ad hoc days but also with the extended periods referred to above when no tables and chairs were present on Trafalgar Square, is that there is no supporting documentary evidence to show that was the case. For example, no invoices, receipts, collection and/or delivery notes have been provided to show the exact dates when the tables and chairs were removed, and for what reason.
94. Mr Dowling and Mr Board both explained that this is a function of the ordering/accounting practices used, and I have no reason to doubt their evidence in that respect. Nevertheless, that is of no assistance to the appellant now in refuting the photographic evidence provided by the Council that shows

⁴⁰ Timeline 2003-2012 for Condition 2, Figures 42, 43,45, 46 and 47.

⁴¹ Timeline 2003-2012 for Condition 2, Figures 5.

⁴² Timeline 2003-2012 for Condition 2, Figures 10

⁴³ Timeline 2003-2012 for Condition 2, Figures 12

⁴⁴ Timeline 2003-2012 for Condition 2, Figures 16

⁴⁵ Timeline 2003-2012 for Condition 2, Figures 17

⁴⁶ Timeline 2003-2012 for Condition 2, Figures 18 -23 inclusive

⁴⁷ Proof of Evidence of Mr Lucas Zoricak, Appendix C Figure 6

⁴⁸ Proof of Evidence of Mr Lucas Zoricak, Appendix C Figures 10 and 11.

⁴⁹ Proof of Evidence of Mr Lucas Zoricak, Appendix C Figures 28 and 29.

- no tables or chairs present on Trafalgar Square over two extended periods of time plus several individual days (including during the summer months).
95. Looked at the round, the evidence points to tables and chairs being placed on Trafalgar Square on a permanent basis for the majority of the relevant immunity period. However, the evidence also suggests that there still were several extended periods of weeks or even months when no tables or chairs were present on Trafalgar Square. Insofar as those extended periods and individual days occurred outside of the period between 15 April and 15 October in any given year, there would have been no breach of condition 2 imposed upon permission 04/1611/F taking place. The Council could not have taken enforcement action during those periods.
96. The timing and spacing of these extended periods is such that at no time were tables and chairs placed on Trafalgar Square in breach of condition 2 imposed upon permission 04/1611/F 'continuously' for a period of at least ten consecutive years. In any event, there is no evidence to suggest that these extended periods when no tables or chairs on Trafalgar Square were characteristic of the use of that space by the Trafalgar Tavern, especially when compared with the intensive use of that space at other times. For these reasons, as a matter of fact and degree, I also differentiate the pattern of the breach of the condition revealed by the evidence in this case from the facts in *North Devon DC, Basingstoke and Deane BC* and *Westminster*.
97. Moreover, even during the periods between 15 April and 15 October, during which Condition 2 imposed on permission ref: 04/1611/F permits tables and chairs to be placed on Trafalgar Square during the daytime, there would be extended periods when there were no tables or chairs present between 22:00 and 10:00 the following morning. During those periods, there would be no breach of condition 2 imposed upon permission 04/1611/F taking place. The Council could not have taken enforcement action during those periods.
98. This is again not a situation where the local planning authority has no evidence of its own to contradict that of the appellant or make their version of events less than probable. I recognise that the appellant's witnesses recalled, under oath, seeing tables and chairs placed on Trafalgar Square throughout the year. That evidence was given to the best of their recollection and I have no reason to doubt the sincerity with which that evidence was given. Nevertheless, the photographic evidence produced by the Council showed that their recollection is misplaced. Consequently, I find that the appellant's evidence is not sufficiently precise and unambiguous to counter the photographic evidence produced by the Council.
99. I am therefore satisfied that, on the balance of probability, the placing of tables and chairs on Trafalgar Square otherwise than in accordance with Condition 2 imposed upon permission 04/1611/F was not carried on continuously and without interruption in excess of the 10 years required to achieve immunity from enforcement action required by section 171B(3) of the 1990 Act.

Conclusions

100. In relation to Appeal A, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of Use of the land adjacent to the Trafalgar Tavern known as The Ramp and The Knuckle as an external drinking area, for the consumption of food and for

seating, all ancillary to the use of the Trafalgar Tavern was well-founded and that the appeal should not succeed. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

101. In relation to Appeal B, for the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of the use for the placing of tables and chairs in connection with the use of the Trafalgar Tavern, otherwise than in compliance with Condition 2 imposed on permission ref: 04/1611/F, which states: the use for the placing of tables and chairs on the public highway shall be from 10:00 am until 22:00 pm Monday to Sunday, during the time period 15th April through to the 15th October only, was well-founded and that the appeal should not succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Formal Decisions

Appeal A Ref: APP/E5330/X/22/3293510

102. The appeal is dismissed.

Appeal B Ref: APP/E5330/X/23/3318421

103. The appeal is dismissed.

Paul Freer

INSPECTOR

APPEARANCES

For the appellant

Mr Douglas Edwards

Of Kings Counsel

He called:

Mr Frank Dowling

Mr Horatio Blood

Mr Paul Russell

Mr David Chapman

Ms Kate Rogers

Mr Ed Spencer

Mr James Board

Mr Dave Guildford

Mr Robert Harrison

Ms Lorraine Harrow

For the Local Planning Authority

Mr Conor Fegan

Of Counsel

He called:

Mr Lucas Zoricak

Interested Persons

Mrs Nicola Snook