



Appeal Decisions

Site Visit made on 5 November 2024

by J Whitfield BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 November 2024

Appeal A Ref: APP/X5990/C/23/3329393

Ground Floor Unit at 54 Wardour Street and 76 Old Compton Street, London W1D 4JF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended) (the Act). The appeal is made by B Bagel Soho Ltd against an enforcement notice issued by City of Westminster Council (the LPA).
- The notice was issued on 21 August 2023 (Notice A).
- The breach of planning control as alleged in the notice is, without the requisite planning permission and within the last 10 years, the use of the public highway at the Wardour Street and Old Compton Street elevations of the Property (shown shaded red in attached Plan 1) for the provision of tables and chairs for customer use ("the Unauthorised Use").
- The requirements of the notice are:
 - 1) Cease the use of the public highway at the Wardour Street and Old Compton Street elevations of the Property (shown shaded red in attached Plan 1) for the provision of tables and chairs; and,
 - 2) Remove all tables, chairs and barriers from the public highway at Wardour Street and Old Compton Street elevations of the Property (shown shaded red in attached Plan 1).
- The period for compliance with the requirements is: 3 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).

Summary of Decision: The appeal is dismissed, and the enforcement notice is upheld with corrections as set out in the Formal Decision below.

Appeal B Ref: APP/X5990/C/23/3329453

Ground Floor Unit at 54 Wardour Street and 76 Old Compton Street, London W1D 4JF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by B Bagel Soho Ltd against an enforcement notice issued by City of Westminster Council.
- The enforcement notice was issued on 11 August 2023 (Notice B).
- The breach of planning control as alleged in the notice is failure to comply with a condition imposed on a planning permission ref 16/10336/FULL granted on 24 February 2017.
- The development to which the permission relates is: Use of part of the ground floor of 76 Old Compton Street as a café (Class A3) as an extension to an existing café (Class A3) at 54 Wardour Street and 76 Old Compton Street, installation of a replacement shopfront.
- The condition in question is no 1 which states that: The development hereby permitted shall be carried out in accordance with the drawings and other documents listed on the decision letter, and any drawings approved subsequently by the City Council as local planning authority pursuant to any conditions in the decision letter.

- The notice alleges that the condition has not been complied with by: The installation of outward opening doors on the Wardour Street and Old Compton Street elevation of the Property.
- The requirements of the notice are to:
 - 1) Remove the door (Door 1), located on the Old Compton Street elevation of the Property at ground floor level (shown and outlined by yellow lines in Photograph 1);
 - 2) Upon completion of Step 1, install inward opening double doors that match the design, materials and detailing of the double doors shown outlined by blue lines in Drawing 1; and,
 - 3) Rehang the door (Door 2), located on the corner of the Property at ground floor level (shown and outlined by green lines in Photograph 2) so that the door opens inwards into the building, instead of outwards over the pavement.
- The period for compliance with the requirement is: 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (g) of the Town and Country Planning Act 1990 (as amended).

Summary of Decision: The appeal is dismissed, and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

Appeal C Ref: APP/X5990/W/23/3332803

54 Ground Floor South, Wardour Street, City of Westminster, London W1D 4JF

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Mr Y Baumgarten, B Bagel Soho Ltd against the decision of City of Westminster Council.
- The application Ref is 23/04842/FUL.
- The development proposed is retention of existing doors, provision of removal benches, provision of mounted heaters.

Summary of Decision: The appeal is dismissed.

Procedural Matters

1. Appeal A was made on grounds (a) and (c) of S174(2) of the Act. However, the appellant was notified by the Planning Inspectorate on 13 September 2023 that, by virtue of S174(2A) of the Act, an appeal on ground (a) was not permitted where an application for planning permission for the development had been made and the period for its determination had not yet expired, as was the case here. As a result, Appeal A proceeds on ground (c) only.
2. Furthermore, Appeal B was made on grounds (a), (c) and (g) of S174(2) of the Act. Whilst the appellant was not informed by letter that Appeal B on ground (a) is barred by S174(2A), that is nevertheless the case having regard to S174(2AA) of the Act, since the application which was not determined when the notice was issued relates to the existing doors which are subject of the notice. Appeal B therefore proceeds on grounds (c) and (g) only.

Appeal A - The Enforcement Notice

3. The notice alleges a breach of planning control comprising the use of the public highway for the provision of tables and chairs for customer use. The use of land is not an act of development. S55 of the Act defines development as, amongst other things, the making of a material change of use. I will therefore correct the notice to refer to the material change of use of the public highway and can do so without injustice to the appellant or the LPA. Moreover, the notice ought to make clear it is customer use in relation to the use of the

appeal property as a café. Again, I can correct the notice accordingly without injustice to the appellant or the LPA.

Appeal A on ground (c)

4. An appeal on ground (c) is brought on the basis that those matters stated in the notice as constituting a breach of planning control, are not a breach of planning control. The onus is on the appellant to make out their case to the standard of the balance of probabilities.
5. The notice, as corrected, alleges the material change of use of the public highway for the provision of tables and chairs for customer use in connection with the adjacent café.
6. The appellant's case is that the land subject of the notice is not public highway but within private ownership. Thus, it is argued that the use of the area for tables and chairs for customer use would be incidental to the primary use of the property.
7. The starting point is to establish the planning unit. Whilst the footpath adjacent to the building may be in the same ownership as the property, it was, prior to the alleged breach taking place, clearly functionally and physically separate from it. It is physically outside of the building and there is nothing which demarcates it as part of the building or indeed separate from the footpath. The LPA indicates that the lawful use of the Land is part of the public highway for the passing of pedestrians. There is nothing from the appellant which demonstrates otherwise.
8. The question is then whether the use of the land for the provision of tables and chairs for customer use is a material change from use of the Land as a footpath.
9. The concept of a material change of use is not defined in statute or statutory instrument. The basic approach is that, for a material change of use to have occurred, there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.
10. As part of the footpath, the Land was used for regular movement of people across it in both directions as they undertake their journeys.
11. In contrast, the alleged breach has resulted in the placement of tables and chairs on the Land. They are not fixed to the Land but are used for people to sit and consume products from the adjacent café. The use means that people are no longer only moving across the Land in a transient fashion. Instead, people are static for extended periods of time, with the purpose of consuming café products.
12. As a result, I find there is a significant difference in the character of the activities undertaken on the Land from what had occurred previously. Consequently, I find that a material change of use has taken place and the use of the Land for tables and chairs for customer use amounts to development under S55 of the Act.
13. The appellant does not submit that planning permission has been granted for the development, either expressly or by virtue of Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015. The

material change of use of the Land is therefore development without planning permission and, in accordance with S171A(1)(a), amounts to a breach of planning control.

14. The appeal on ground (c) therefore fails.

Appeal B on ground (c)

15. The notice alleges the breach of condition 1 of the 2017 planning permission¹ which permitted the use of part of the ground floor of the appeal property as a café, including the installation of a replacement shopfront. Condition 1 specified that the development be carried out in accordance with the approved plans. The notice alleges that outward opening doors in the Wardour Street and Old Compton Street elevations of the property have been installed.
16. Approved plan P-101 Rev A clearly shows that the doors to be installed on both elevations were to be inward opening doors. The installation of outward opening doors is therefore not in accordance with the approved plans and thus a breach of condition 1.
17. The appellant argues that the 2017 permission was not implemented and thus the condition does not bite. S56(2) sets out that development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. S56(4)(e) provides that a material operation means any change in the use of any land which constitutes material development. The development granted by the 2017 permission amounts to material development as defined in S56(5) of the Act. Consequently, the development pursuant to the 2017 permission would have commenced when the change of use was begun to be made.
18. The appellant points out that the 2017 permission did not contain a time limit for commencement condition, in accordance with S91(1) of the Act. However, S91(3) of the Act sets out that, if planning permission is granted without the condition required by S91(1), it shall be deemed to have been granted subject to the condition that the development to which it relates must be begun not later than 3 years. There is no dispute that the property is in use as a café. As a result, I find that the development pursuant to the 2017 permission has commenced.
19. Moreover, there is no dispute that the use commenced consequent to the granting of the 2017 permission and before 24 February 2020. Furthermore, the development carried out is not in breach of any conditions precedent.
20. In addition, it is evident that the shop front which has been installed is broadly the same as that shown on the approved plans, with only some minor differences in the design of the door on the Old Compton Street Elevation.
21. As a consequence, I am satisfied that the 2017 permission has been implemented and thus Condition 1 is engaged. Therefore, the installation of outward opening doors is a failure to comply with a condition subject to which planning permission has been granted. To that end, it is a breach of planning control in the meaning of S171A(1)(b) of the Act.
22. The appeal on ground (c) therefore fails.

¹ LPA Ref: 16/10336/FULL

Appeal C

Preliminary Matters

23. Retention is not an act of a development. I have therefore determined the appeal on the basis that planning permission is sought for the installation of doors, provision of removable benches and provision of mounted heaters.
24. The installation of the doors relates to the same outward opening doors which are subject of Appeal B. The removable benches and mounted heaters are proposed and are not subject of the enforcement notices in either Appeal A or Appeal B.

Main Issues

25. The main issues are:

- the effect of the development on pedestrian and highway safety; and
- whether the development will fail to preserve or enhance the character or appearance of the Soho Conservation Area.

Reasons

Pedestrian and Highway Safety

26. The Westminster Way – Public Realm Strategy Design Principles and Practice Supplementary Planning Document 2011 (the SPD) sets out that the minimum clearance width necessary for a footpath is 2m. The figure is a clear width inside any street furniture by the kerb or objects at the back of the footway.
27. The proposed benches would be 0.4m in depth. The proposed gap between the edge of the benches and the edge of the footway would be between 1.972m and 2.058m on Old Compton Street, and between 2.232m and 2.318m on Wardour Street.
28. However, in respect of Old Compton Street there is an existing lamppost near to the kerb edge. This reduces the available width between the benches and the edge of the footway considerably and below the minimum 2m recommended in the SPD. Indeed, I saw from my site visit that pedestrians had to negotiate a narrow section of footway between the tables and chairs subject of Appeal A and the lamppost when travelling along that part of Old Compton Street.
29. Moreover, the LPA points to the need to provide additional 0.5m to accommodate customers legs and bags. I see no reason to disagree such an allowance would be appropriate. Indeed, at the time of my site visit, customers sitting outside the property had large bags which were placed on the footpath, further reducing the footpath width. To that end, in order to safely accommodate a depth of 0.9m for the benches, the footpath width would be reduced to between 1.558m and 1.472m with a further reduction for the existing lamppost.
30. Furthermore, the width on the Wardour Street frontage would be reduced to between 1.732m and 1.818m. Again, below the recommended 2m minimum in the SPD.

31. In addition, the outwards opening doors would project into the footpath. Whilst the width of the doors has not been provided, the plans show they would project further than the 0.4m depth of the benches. I saw from my site visit that the doors were left open during the operation of the café and pedestrians were required to negotiate around them to safely use the footpath. To that end, the outward opening doors would also reduce the width of available footway.
32. I was able to see from my site visit that the junction of Wardour Street and Old Compton Street is busy with high levels of pedestrian movement. Whilst I appreciate my observations were only a snapshot at a particular time of day, I have no reason to believe they are not representative of typical conditions. To that end, I consider the proposed benches and outward opening doors would harmfully impede the safe, convenient and free flow of pedestrians, to the detriment of pedestrian safety.
33. The heaters would be raised above head height and would not project out into the footpath by any significant degree. Thus, I conclude, that they would not have a harmful effect on pedestrian and highway safety.
34. Nonetheless, I conclude that the proposed benches and the outward opening doors will have a harmful effect on pedestrian and highway safety. As such, the development conflicts with Policy 25 of the City of Westminster City Plan 2019-2040 (2021) (the LP) which states development must prioritise and improve the pedestrian environment. There is also conflict with LP Policy 43 which states that development will contribute to a well-designed, clutter free public realm which is safe, attractive and accessible to all. Moreover, there will be conflict with Policy 24 of the LP which states that development should create safer streets for all.

Conservation Area

35. The appeal site lies within the Soho Conservation Area (the CA). The significance of the CA is derived from its role as one of London's historic, central neighbourhoods with a colourful and vibrant character since its origins in the late 17th century.
36. The built character is one of a historic street pattern of narrow streets and alleyways, occupied by restaurants, cafes, business and shops alongside residential properties. There is a prevalence of both historic and modern shop fronts which contribute towards the vibrancy. The appeal site is a good example of one such attractive shop front. With its continuous plinth, curved frontage and evenly spaced mullions, it makes a positive contribution to the area.
37. The proposed benches would protrude around 0.4m from the front of the property on both the Wardour Street and Old Compton Street elevations. Moreover, they would extend across almost the entire frontage either side of the main door – a length of around 3.6m on Wardour Street and 3.2m on Old Compton Street. In addition, the plans show the benches would be above the top of the plinth at the bottom of the shop front. The benches would be around 0.47m from the floor with small tables attached at a height of 0.82m.
38. Furthermore, electric heaters would be attached to each of the mullions on the shop front with three on the Wardour Street frontage. A single heater would

be placed on the window of the Old Compton Street frontage. As a result, the benches and the heaters would significantly obscure the shop front and the diminish its positive contribution to the character and appearance of the CA.

39. Furthermore, I saw from my site visit that, due to the narrow street pattern, there are limited examples of street furniture such as tables and chairs within the public highway, despite the prevalence of cafes and restaurants. The proposed benches would thus appear at odds to the prevailing character of the area and appear as inappropriate additions within the street scene. Whilst I note they will be removed when the café is closed, they would nevertheless be harmful for a considerable period during the day when the café is open.
40. In addition, there is little evidence of modern, electric outdoor heaters featuring prominently within the CA. To that end, whilst they would be partially obscured by canopies, the proposed electric heaters would appear as an incongruous, modern additions, at odds to the character of the existing property and the wider CA.
41. The doors which have been installed are appropriate in design. They reflect the general appearance of the property with pilasters and framing of appropriate width. The fact the doors open outwards is not something which appears visually discordant with the area.
42. I conclude nevertheless that, whilst the installation of the doors will preserve the character and appearance of the CA, the proposed removable benches and mounted heaters would fail to preserve or enhance the character or appearance of the CA. As a result, the development conflicts with LP Policies 38, 39 and 40 which state that development will have regard to heritage assets, that heritage assets are to be conserved and enhanced, and that development will be sensitively designed.

Conclusions

43. Whilst I have found the proposed heaters would not harm pedestrian and highway safety, I have found that they would fail to preserve or enhance the character or appearance of the CA. Likewise, I have found the doors and the benches would result in harm to pedestrian and highway safety. Whilst the doors will not result in harm to the CA, the benches would. As a result, I find that the overall development conflicts with the development plan taken as a whole.
44. For the reasons given above, the appeal should be dismissed.

Appeal B on ground (g)

45. An appeal on ground (g) is brought on the basis that the time period for compliance with the notice is too short.
46. The notice provides for a three-month compliance period. The appellant seeks a period of four months to source appropriate fitters to install the doors in accordance with the 2017 permission. The LPA does not raise issue with the additional month, and I am satisfied it allows the appellant sufficient time to undertake the works whilst also ensuring the planning harm is overcome with necessary expediency.
47. The appeal on ground (g) therefore succeeds.

FORMAL DECISIONS

Appeal A

48. It is directed that the enforcement notice is corrected by:

- the insertion of the words, "material change of", between the words "the" and "use" in section 3 of the enforcement notice; and,
- the insertion of the words, "in connection with the adjacent café", after the word "use" and before the words "(the Unauthorised Use)" in section 3 of the enforcement notice.

49. Subject to the corrections, the appeal is dismissed, and the enforcement notice is upheld.

Appeal B

50. It is directed that the enforcement notice is varied by:

- the deletion of the words "3 months" and their substitution with the words "4 months" as the time for compliance in section 5 of the notice.

51. Subject to the variation, the appeal is dismissed, and the enforcement notice is upheld.

Appeal C

52. The appeal is dismissed.

J Whitfield

INSPECTOR