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# Appeal Decisions

Site visit made on 16 May 2013

**by Andrew Dale BA (Hons) MA MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 29 May 2013**

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## **Appeal A: Ref. APP/X5210/C/12/2185635** **Land at 49 Endell Street, London WC2H 9AJ**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr A Ziyaeddin against an enforcement notice issued by the Council of the London Borough of Camden.
- The Council's reference is EN12/0698.
- The notice was issued on 5 September 2012.
- The breach of planning control as alleged in the notice is without planning permission, the unauthorized change of use of the basement and ground floors from retail (Class A1) to ancillary restaurant use (Class A3).
- The requirements of the notice are to cease the unauthorized use and permanently remove all fixtures, fittings and equipment associated with the restaurant use at number 47 Endell Street.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2) (a) of the Town and Country Planning Act 1990 as amended. Since the development is exempt from the payment of fees, the application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.

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## **Appeal B: Ref. APP/X5210/A/12/2185642** **49 Endell Street, London WC2H 9AJ**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr A Ziyaeddin against the decision of the Council of the London Borough of Camden.
- The application ref. 2012/1020/P, dated 6 February 2012, was refused by notice dated 27 July 2012.
- The development proposed is described as "Retention of front A1 retail unit and change of use of rear area of ground floor and basement storage area to provide A3 restaurant use, in relation to the adjoining property at 47 Endell Street, plus introduction of a new shopfront".

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## **Decisions**

### **Appeal A: Ref. APP/X5210/C/12/2185635**

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

**Appeal B: Ref. APP/X5210/A/12/2185642**

2. The appeal is dismissed.

**Preliminary matters**

3. I have disregarded the postcode for the site address in section 4 of the planning application form in Appeal B. The correct postcode is WC2H 9AJ.
4. The revised ground floor plan (numbered L\_02 and titled Indicative Shop Layout) was considered by the Council before it took its decision to refuse planning permission. The plan is listed in the drawing numbers on page 1 of the decision notice. I have therefore had regard to this plan in my consideration of Appeal B.
5. No appeal has been lodged against the enforcement notice on grounds (b) or (c). I am satisfied from the evidence before me and from what I saw at the site visit that the basement and ground floors of no. 49 are being used for purposes that are ancillary to the neighbouring established fish-and-chip restaurant (Rock and Sole Plaiçe) at no. 47. Such usage has been facilitated by the removal of part of the dividing wall between the properties at basement level. Consequently, the ground (a) appeal and the deemed application in Appeal A is for that ancillary restaurant use (Class A3) over the full extent of both floors in no. 49.
6. Appeal B arises primarily from the Council's refusal to grant permission for change of use of the whole basement and part of the ground floor at no. 49 from retail use (Class A1) to restaurant use (Class A3, not Class C3 as indicated in the decision notice). The Council had no objections to the replacement shopfront. According to the Seven Dials (Covent Garden) Conservation Area Statement, the host building is not identified as one of the buildings that make a positive contribution to the character and appearance of the conservation area and the existing shopfront is not identified as one of the shopfronts of merit. This added to the obviously better design of the proposed shopfront leads me to share the Council's view on this matter. The replacement shopfront would thereby preserve the character and appearance of the conservation area.

**Appeal B, the section 78 appeal**

7. I consider the main issue is whether the proposed use of the property at no. 49 would be suitable having regard to the special retail character, function, vitality and viability of the Covent Garden area and the residential amenities of neighbouring occupiers.
8. The planning system is plan-led. The development plan includes the Camden Core Strategy 2010-2025 (CS) and the Camden Development Policies 2010-2025 (CDP). The decision notice refers to Policies CS5 and CS7 from the CS and Policies DP10, DP12 and DP26 from the CDP. There has been no suggestion that any of these policies are inconsistent with the National Planning Policy Framework.
9. The CS and the CDP refer to a series of area planning documents which give more detailed guidance on how the Council will treat planning applications for shops, food, drink and entertainment uses in particular centres, taking into

account their specific circumstances. The appeal site falls within the defined Central London area. The Supplementary Planning Document, Revised Planning Guidance for Central London – Food, Drink and Entertainment, Specialist and Retail Uses (SPD) is therefore of particular relevance.

10. The SPD indicates that the appeal property falls within the Covent Garden area where there is a compact historic built environment and an intricate mix of uses, including food, drink and entertainment uses, a significant residential population mainly on the upper floors of the frontages (as at nos 47 and 49), and specialist retail uses, many of which relate to the independent fashion business. The appeal property falls within a designated commercial frontage/protected retail frontage - nos 47 to 69 (inclusive) Endell Street. This covers 11 commercial units.
11. My reading of the development plan policies and the SPD indicates to me that managing the impact of growth and development of restaurant uses in this area of Camden involves a careful balancing act to ensure that the special retail function of the area is not harmed and that the quality of life of residential occupiers is protected. The SPD contains useful detailed guidance in pursuit of these outcomes and warns that there is only limited potential for growth in food, drink and entertainment activities in this area.
12. Thus, in the Covent Garden area permission for food, drink and entertainment uses may be granted normally to a maximum of 25% of the total units in each commercial frontage and then only if no more than two such uses are located consecutively in the frontage. Such uses (new or expanded ones) should be small scale, generally with a maximum gross floor area of 100 sq. m. In addition, the Council will not grant planning permission for development which results in the number of ground floor premises in retail use falling below 80% of the total units in each protected retail frontage.
13. There are also the tests in CDP Policy DP10 whereby development involving a net loss of shop floor space outside designated centres will only be given permission provided that: alternative provision is available within close walking distance (5-10 minutes); there is clear evidence that the current use is not viable; and within the Central London area, the development positively contributes to local character, function, viability and amenity.
14. It is proposed to create a self-contained A1 retail unit at ground floor level in the front of no. 49. It would have a gross floor space of about only 16 sq. m, extending back to just under half the depth of the overall property. The whole of the basement and the remainder of the ground floor would become part of the restaurant at no. 47.
15. I accept up to a point that the scheme is primarily aimed at improving the layout of the existing restaurant operation and facilities. In particular, I noted the rather cramped arrangement where customers wishing to take seats in the basement have to squeeze through the servery/kitchen area to get to the stairs. Nonetheless, the Council is correct to point out also that some of the floor space is likely to be used for extra covers e.g. in the existing servery/kitchen area after the kitchen is relocated to the basement and in the rear ground floor area at no. 49. In any event, in my judgement it would be

- very difficult and unreasonable to seek to impose restrictions on how the existing or a future restaurant operator arranged any permitted A3 floor space.
16. On the matter of residential amenities, I saw that of the 11 commercial units in this defined Endell Street frontage, there are already three A3 units. There is also another property that appears to be operated as a mixed A1/A3 use. Thus, the maximum 25% figure has already been exceeded. Of more significance is the fact that the expanded A3 use as proposed could not be described as small in scale. The overall gross floor area of the restaurant as extended would comfortably exceed 100 sq. m.
  17. The SPD says that exceptions to a limit of 100 sq. m will only be made where it can be demonstrated that larger uses will not create harmful impacts or undermine the character of the area. I find no sound basis to make an exception here. There were objections to the planning application from the owners/occupiers of four flats above or very close to the subject premises and one from the Covent Garden Community Association. Various negative amenity impacts are identified with regard to the operation of the existing restaurant, including noise, disturbance and fumes. I agree with the Council and those objectors that the extended restaurant use would only further intensify the negative amenity impacts.
  18. In addition, I note the submitted plans show the creation of a large new kitchen at basement level. The appellant says that there is currently plant operating at the site to accommodate the kitchen requirements and that if further plant was necessary this could be controlled via a further planning permission or through a planning condition. However, given the close proximity of residential accommodation and the location of the site in a conservation area, I consider it essential to have full and clear information at this stage about the extraction system for the enlarged restaurant use. The Council's delegated report at paragraph 4.2 expressed similar concerns. This serves to add weight to my concerns about the negative amenity impacts.
  19. I have noted that the appellant has an associated production unit in Tottenham. It is claimed that this has resulted in a reduction in the number of deliveries to Endell Street and a reduction in waste at the site. This does not however overcome the concerns I have about the size of the restaurant proposed, the intensification of negative amenity impacts and the lack of a detailed, fully workable scheme for the extraction of fumes.
  20. On the matter of the special retail character, function, vitality and viability of the Covent Garden area, whilst the proposal seeks to retain a self-contained retail unit in the front of the ground floor of no. 49, there can be no dispute that the existing retail unit would be lost and there would be a notable net loss of shop floor space. I have no clear evidence that the current retail unit is not viable although the Council adopted a relaxed attitude to that consideration when it granted planning permission for an A2 use at 53 Endell Street in September 2011 (ref. 2011/3424/P) and a Class D1 use (health clinic) at 65 Endell Street in December 2010 (ref. 2010/5936/P). Both properties are in the same protected frontage as no. 49. The permissions have been implemented and were granted under the same local planning policy and guidance. They now provide a strong precedent for decision-making along this parade.

21. The key test at both nos 53 and 65 was found to be whether, within this Central London area, the new uses would positively contribute to local character, function, viability and amenity. In paragraph 10.8 of the CDP appropriate alternative uses are considered to be housing and uses providing essential services such as professional and financial services, community facilities and launderettes. The Council considered that an A2 office and D1 health clinic would be beneficial uses without any detrimental amenity impacts.
22. It seems to me that using no. 49 for part restaurant and part retail would not be so favourable. I have already indicated my concerns about how the enlarged restaurant would have a negative impact on amenity. Moreover, I share the Council's concerns about the small size of the ground floor retail unit being proposed. In addition, there is no provision made for any ancillary storage, office or staff facilities. The appellant's suggestion that a smaller refurbished retail unit would have more success with attracting an occupier in comparison to the current situation is not borne out by any evidence. I am not aware of any recent attempts to market the existing basement and ground floors for retail use. It has not been demonstrated that there would be demand for a retail unit of such limited size devoid of any ancillary facilities. Rather, in my view it could be an unattractive proposition for potential A1 operators.
23. I cannot therefore foresee how the proposal would positively contribute to local character, function, viability and amenity. The notable net loss of shop floor space added to the use format proposed is likely to detract from the special retail character, function, vitality and viability of the Covent Garden area.
24. Drawing together my findings on residential amenities and the special retail character, function, vitality and viability of the Covent Garden area, I conclude on the main issue that the proposed use of the property at no. 49 would be unsuitable and conflict with the aims of CS Policies CS5 and CS7 and CDP Policies DP10, DP12 and DP26.
25. I have taken into account all other matters raised including the popularity of this long-established fish-and-chip restaurant and its contribution to the local economy, tourism and the evening economy. These are positive factors which lend support to the proposal but they do not outweigh my conclusion on the main issue in this appeal.

### **Appeal A, the appeal on ground (a) and the deemed planning application**

26. Under this appeal planning permission could only be granted for the matters in the breach of planning control alleged in the notice — the use of the basement and ground floors for ancillary restaurant use (Class A3).
27. However, virtually all the written representations put before me largely concentrate on the planning merits of the particular proposal the subject of Appeal B and indeed the appellant confirms that there is no intention to utilize the whole of the ground floor of no. 49 for restaurant use. Even so, the appeal on ground (a) and the deemed planning application remains before me and the main issue is the same as that set out in paragraph 7 above.
28. Changing the use of both floors to ancillary restaurant use creates an even larger overall floor space in restaurant use and leads to the wholesale loss of a

retail unit. The introduction of an ancillary restaurant use in no. 49 is not a replacement use that contributes positively to the local area.

29. As such, I have no reason to reach a conclusion on the main issue which is different to the one I reached under Appeal B. The development conflicts with the objectives of the relevant development plan policies that I have addressed in relation to Appeal B.

### **Conclusions**

30. For the reasons given above and having taken into account all other matters raised, including the planning history for 47 and 49 Endell Street and the previous dismissed appeal from 2010, I conclude that both Appeal A and Appeal B should be dismissed. In respect of Appeal A, the enforcement notice is upheld and the deemed planning application is refused permission.

*Andrew Dale*

INSPECTOR