The Planning Inspectorate

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Council Ref:
FCA/22194
Our Refs:
APP/H5390/C/96/645558
APP/H5390/C/98/650165
APP/H5390/C/98/650243

Date: 23 MAR 1999

Dear Sir

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 174 AND SCHEDULE 6, AS AMENDED BY THE PLANNING AND COMPENSATION ACT 1991
APPEALS BY PREMIER CATERING LTD, MR B K MASON AND MRS P GALLAGHER-MASON
658 FULHAM ROAD, LONDON SW6

1. I have been appointed by the Secretary of State for the Environment, Transport & the Regions to determine your clients' appeals against 2 enforcement notices issued by the London Borough of Hammersmith and Fulham, concerning the above-mentioned premises. As you know, I held an inquiry into the appeals on 2-4 March 1999.

Details of the Enforcement Notices

Notice A

2. (1) The notice was issued on 13 November 1996.

(2) The breach of planning control as alleged in the notice is: without planning permission, the use of the ground floor and forecourt of the premises as a cafe (Class A3).

(3) The requirements of the notice are:

(a) Cease the unauthorised use.

(b) Remove the interconnecting door at ground floor level between 658 and 660 Fulham Road. Brick up the resulting void.

(c) Remove from the land all seating and all other furniture and equipment arising from the unauthorised use.

(4) The period for compliance with these requirements is: two months.

(5) The appeal against this notice has been lodged by Mr Mason. His appeal is now proceeding on the grounds (a), (b), (f) and (g), set out in section 174(2) of the 1990 Act, as amended by the Planning and Compensation Act 1991.

Notice B

3. (1) The notice was issued on 31 December 1997.

(2) The breach of planning control as alleged in the notice is: without planning permission, a material change of use of the ground floor and basement of the building to a use within Class A3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987.

(3) The requirements of the notice are:

(i) Cease the use of the ground floor and basement at 658 Fulham Road for Class A3 purposes.

(ii) Remove the interconnecting door at ground floor level between 658 and 660 Fulham Road. Close up the resulting void.

(iii) Close the voids in the partition wall at basement level between 658 and 660 Fulham Road and restore the said partition wall to the same condition as existed prior to the breach of planning control.

(iv) Remove from the land all equipment and furniture relating to the unauthorised Class A3 use.

(4) The period for compliance with these requirements is: two months.

(5) The appeals against this notice have been lodged by Premier Catering Ltd (now no longer in existence) and Mrs Gallagher-Mason. The appeals are now proceeding on the grounds (a), (b), (f) and (g), set out in section 174(2) of the 1990 Act, as amended by the Planning and Compensation Act 1991.

Preliminary matters

4. Although the appeals relate solely to No 658, it is necessary to have regard to the use of Nos 660 and 662. Mr Mason has owned No 660 since 1988; the ground floor of that property is used as a wine bar/brasserie ('Maison Crocs'), and there is no dispute that that is a lawful use. The basement of No 660 is used as part of Maison Crocs, as is (for storage purposes) the basement of No 662 (leased by Mr Mason); this latter use has apparently existed for some 11 years. No 658 was acquired by Mr & Mrs Mason in 1995; the ground floor is known as 'Maison Mason', whilst the basement is joined with the basement of No 660.

5. Notice A was the first notice issued; notice B being issued when it came to the notice of the Council that, as well as the ground floor, the basement of No 658 also appeared to be in a Class A3 use. The 2 notices are not the same, but there is inevitably some overlap. The appeals on ground (b) relate solely to the ground floor.

6. Part of the Council's concerns regarding the ground floor of No 658 relates to an evening use as a Thai restaurant. However, it is clear that this was a short-term use which has now ceased. The only current use of the ground floor is for the purpose described as a boulangerie/patisserie, which only operates until 1900 hrs daily, and your clients have agreed that, if permission is granted, it should be subject to a restriction to the effect that it should not be continued beyond 1900 hrs each day. I have considered the appeals on that basis.

The appeals on ground (b)

7. Your argument in respect of the ground floor is that Maison Mason is not an A3 use, but an A1 use. The Council takes a contrary view, and also says that, because of the nature of the links to Maison Crocs, the whole of these premises should be regarded as one planning unit, with an A3 use.

8. I shall deal with the latter point first. Clearly, Maison Mason and Maison Crocs are immediately adjoining properties, in the same ownership. From the street, there are similarities in the style of the properties and advertising which lead one readily to the assumption that they are connected with each other, and there may be linkages in terms of staff, although that is by no means certain. To my mind, these aspects are probably inevitable from a unified ownership, and do not necessarily lead to the conclusion that this is one unit in planning terms. But the factors particularly relied upon by the Council are: the existence of a door between the properties; the fact that the only toilets serving the 2 premises are in No 658; and the use by No 658 of food storage/preparation and washing-up facilities in No 660.

9. The interconnecting door is in the rear wing of the property, and it is not apparent from within the main public area of Maison Mason that it exists. Indeed, the whole of the rear wing, which also contains the toilets, is separated from the public area by an additional door. Certainly, the toilets are shared with No 660, but that appears to be the sole public use of this rear wing. Otherwise, it is used by staff of Maison Mason making use of the facilities in No 660. So, whilst, in reality, there are these linkages between Maison Mason and Maison Crocs, the public perception is likely to be that No 658 is an entity, with a separate function from No 660. My conclusion is that there is insufficient justification for regarding the 2 properties as one unit, and I shall deal with the ground floor of No 658 on the basis of it being a separate entity.

10. So, what is the use to which the ground floor of No 658 is put? Certainly, on my visit to the property during the inquiry, some loaves of bread and pastries/cakes were there for sale, as well as prepared items like filled baguettes, although I am mindful of Mrs Barnard's claim that, on her earlier visits, loaves of bread were either not there, or were less prominently displayed. However, the serving area lies at the rear of the main 'shop' area, and the front part is dominated by tables for use by customers (7 in number, each with 2 seats). There were a further 2 tables on the covered forecourt at the front of the property,

but presumably their presence depends on the weather. There is no window display of goods for sale.

11. Whilst any visit to the premises can only be a 'snapshot' as to the use prevailing at that time, it seemed apparent to me that the primary attraction of the premises is as a place to have a coffee, perhaps with a pastry or cake, rather than as place to which one makes a special visit to buy a loaf of bread or some cakes, although I would accept that, perhaps, at lunchtimes there will be more in the way of take-away sales, for example of the filled baguettes. I know that till-record evidence was given to the effect that much more expenditure occurs in respect of take-out items than in respect of eat-in items, but it was not made clear how this differentiation was actually made by staff. In any event, it is my view that the main impression given by these premises is that of an A3 use, bearing in mind that the definition of an A3 use is 'use for the sale of food and drink for consumption on the premises ...'.

12. I know that Circular 13/87 talks of circumstances where a sandwich bar could be an A1 use even though 'a few customers eat on the premises', and I appreciate that appeal decisions to which you referred me have considered the question of the number of seats within particular premises. You particularly compared this operation to that of Seattle Coffee Company on the other side of the road. However, the Circular also says that it is the main purpose of the use that is to be considered, and that is a matter for determination in each individual case as a matter of fact and degree. My remit only extends to No 658, and, to my mind, the primary purpose of Maison Mason is as an A3 use. Therefore, the appeals on ground (b) fail.

The appeals on ground (a)

The use of the ground floor

13. For the purposes of section 54A of the 1990 Act, the development plan comprises the Hammersmith and Fulham UDP (1994). In this Plan, this part of Fulham Road is designated as a Key Local Shopping Centre, and policy SH3 states that uses within Class A2 or A3 will be permitted in such areas on the basis that (amongst other things, which are not at issue here) 'no more than one third of the length of frontage in an individual street block should be occupied by non-Class A1 uses'. The purpose of this policy is clearly to retain the primary retail function of such centres. Thus, I consider that the main issue to be decided is whether the current use of No 658 is in conflict with this aim.

14. The street block containing the appeal premises comprises Nos 656-674. One of these properties is vacant, but evidently has an A2 use. In terms of length of frontage, as stipulated in the policy, and regarding No 658 as not being an A1 use, the proportion of non-retail use in this particular parade is about 40%. The use of No 658 for non-A1 purposes does not therefore comply with the terms of policy SH3.

15. However, I do not believe that consideration of the appeal must stop there. You made the point that the vacant A2 property (at No 664) may eventually be occupied for A1 purposes - that would not require planning permission. But that is only speculation, and I attach very little weight to that. More cogent is your view that success or failure should not

be determined by a strict mathematical approach to the matter, ie that anything more than 33⅓% of the block in non-A1 use must mean failure. I appreciate that the policy has to settle on a figure, as otherwise it could be criticized for being vague, and a figure of more than a third will lead to a presumption against granting permission. Certainly, that presumption would be very strong if the policy figure is substantially exceeded (for example, the 50% in the cited appeal in respect of 684 Fulham Road), but the percentage figure in the present case does not, in my view, quite fall in that category - I bear in mind that the explanatory text to the policy says 'more than *about* one third is considered unacceptable'. I believe that the question to be asked here is: does the use under consideration conflict with the aim of the policy, which is to protect the retail function of the shopping centre?

16. In this case, the nature of the use of No 658 is of particular significance. Whilst I have determined that it is not primarily an A1 use, it does undeniably have a distinct retail element, in terms of sale of some bread and cakes, and filled baguettes. Even the cafe use that I have found to be the main use is one which probably provides a service to shoppers (hence its closing time of 1900 hrs), and the use as a whole is, to my mind, not an inappropriate use for a cosmopolitan shopping area such as this. To my mind, this is still, as the Council describe it, a 'vibrant' shopping centre, and I do not consider that this particular use so seriously threatens that as to warrant refusal of permission.

17. Accordingly, I conclude that planning permission should be granted in respect of the ground floor use. The Council suggested that, in such an event, certain conditions should be imposed, and these were discussed at the inquiry. It was suggested that a condition be imposed to prevent any 'primary cooking' on the premises; the reason being to prevent the emission of cooking smells, and also to ensure that a retail element is kept. Some control over cooking smells could be obtained by the use of properly designed and maintained fume extraction ducting, and I would be reluctant to assume that a satisfactory scheme could not be designed. But what particularly concerns me is the definition of 'primary cooking' - there does seem to me to be an element of cooking involved in the processes gone through here in respect of the baguettes, croissants etc. In view of this, I think it would be unreasonable to impose such a condition. But I agree that, since acceptance of this cafe use depends very largely on the nature of the present use, there is merit in preventing a use quite different in character developing in the future. For this reason, I agree that limitations of the hours of operation and of the number of covers in the premises (limited to that number present within the premises on my inspection) are required; in addition, I have decided that there is justification for a further condition to ensure that the retail element of this use (the sale of bread, pastries and cakes) continues within the overall use of the premises. Finally, I accept that it is necessary in terms of the amenity of nearby residents to ensure that refuse arrangements are satisfactory, particularly since food is involved. I have dealt in paragraph 9 above with the matter of the existence of the interconnecting door between Nos 658 and 660, and I do not see any need to permanently close that connection.

<u>The use of the basement</u>

18. In respect of the basement, the Council said that the same policy issues arise, so I need to address those. In addition, I have to examine the concerns relating to parking, and noise and disturbance to residents.

19. The basements of Nos 658 and 660 have been combined, and evidently the basement of No 658 is brought into use as an extension to No 660 on Fridays and Saturdays, when live jazz is played; otherwise, the evidence is that it remains partitioned-off. Apparently, the basement area is liable to be used on other days during December, for private parties. There is a small stage area, a bar and cloakrooms within No 658. The use of this basement area is undeniably part of the A3 use of no 660.

20. The Council said that policy SH3 applies also to the basement, because this is a part of the building which would normally be used for storage and other uses ancillary to a ground floor shop use, and, as such, helps to sustain that shop use. I accept this; indeed, this may be partly why the present ground floor use of No 658 relies to some extent on facilities, such as storage and washing-up, in No 660. That works as long as the 2 premises are in the same ownership, but would not if that should change. It is not sufficient to argue that the basement is not needed for the current ground floor use. I have to consider the possibility that, in the future, ownership of No 658 could become separate from that of No 660. Then, the lack of a basement area could jeopardise the possibility of an A1 use being viable, and put pressure on the Council to allow a non-A1 use which would otherwise have been deemed unsuitable. Thus, I find that there are good policy reasons for not allowing this use.

21. On the matter of noise/disturbance, evidence was given by Mrs Barnard for the Council on the scenes which she saw as people were leaving these premises on two occasions in February; in each case, she stayed on observation for several hours (until 0125 and 0150 hrs). She witnessed boisterous and unseemly behaviour, traffic 'mayhem' as taxis touted for and/or collected customers, and general noise and disturbance. Your side sought to cast some doubt on this evidence (and, of course, it has to be said that it was only a 'snapshot' of 2 particular days), but her testimony was unshaken, and I give it considerable weight.

22. There are also the previous accounts given by some residents, mostly in connection with the licensing application, which are very much in accord with Mrs Barnard's observations. I do not agree that objections to a licensing application can be simply ignored because they have not been specifically lodged in relation to these appeals, but they do carry limited weight because there was no opportunity for them to be tested under cross-examination. The same, however, applies to the letters from residents in support of your clients (not received by me until after the inquiry); moreover, with one possible exception, the writers are also customers of these premises, and had also signed the petition presented to the inquiry. Despite these expressions of support for your clients, I find it difficult to escape the conclusion that serious problems in terms of noise and disturbance are caused by the late closing of these premises.

23. I am less convinced on the matter of customers parking in nearby streets and thereby adding to the parking stress for residents in this area. I do not doubt that problems can be caused, but the evidence does seem to point to, firstly, there generally being some (albeit very limited) space available in the evenings in residential streets, as well on the de-restricted (at that time of day) Fulham Road, and, secondly, to few customers of these premises travelling by private car, and needing to park in the immediate area. There is also, apparently, some off-street parking available for use by customers.

24. However, even discounting the parking issue, there are the problems of noise and disturbance for residents. What I must do, of course, is determine what part is played in this by the fact that the basement of No 658 is used, as well as No 660 (over which there is no control available under planning powers). In this respect, it is clear that the addition of No 658 is of benefit to the overall operation. After all, it was added specifically because space was so limited in the basement of No 660, and it has greatly increased the available floor area. It has enabled a stage area (where the band plays) and a bar to be provided, as well as other facilities. Without No 658, it is inevitable that considerably fewer customers would be attracted to the premises. That would be likely to lead to a significant reduction in the problems of the sort described by Mrs Barnard, and local objectors. Therefore, my view is that the use of No 658 has contributed materially to the harm to residential amenity caused by this overall use. I must add to that the shopping policy objections.

25. You said that, if the use of No 658 were to be denied, your clients would simply convert the basement of No 662 to provide a similar extension of the floorspace of No 660. You pointed out that, in that event, there would not exist any planning powers to prevent multi-day usage, whereas your clients were prepared to agree to the use of No 658 being restricted to Fridays and Saturdays, and to a restriction being placed on A3 use of the basement of No 662. That is a consideration to bear in mind, although I am mindful that Mr Mason's control over No 662 is less complete (because he merely leases it, with only 7 years to run) than in the case of Nos 658 and 660 (which he owns). Moreover, the fact that Mr Mason is content to restrict the use to Friday and Saturdays, as has been the case in the past, leads me to question whether there is, in fact, much of a demand for all-week operation.

26. Overall, I am not persuaded that what you called the fall-back situation would be either so likely to happen or so damaging to residential amenity as to justify granting permission for a use which is itself so harmful that it would not normally be permitted. That leads me to conclude that planning permission should not be granted for this A3 use of the basement of No 658.

Conclusions on the ground (a) appeals

27. Thus, the situation arises where I can grant permission for the ground floor use, but not for the basement use. I intend therefore to quash Notice A, and grant permission on the deemed application, and uphold Notice B, having first amended it so that it relates solely to the basement. Now, I can consider the appeals on grounds (f) and (g), insofar as they relate to the basement.

The appeal on ground (f)

28. You said that the works required in respect of the basement are excessive; in particular, those stipulating the closure of the link between the 2 properties. You claimed that there has been a connection between the properties for many years, and you pointed out that there is now a lockable partition between the 2 areas. However, in my view, there is a strong case for closing the connection in a more permanent way, so that there will be no temptation (not just for Mr Mason but for any future occupiers/operators) to open the partition doors to give more space for the activities in No 660, thereby defeating the object of the enforcement notice. It is essential that this basement area remain available for use in

connection with the lawful use of the ground floor of No 658. Thus, the appeal on ground (f) fails.

The appeal on ground (g)

29. It is claimed that the 2 month period to comply with the basement requirements is too short, and would cause hardship to your client who would have to adjust his business operation. It is necessary to cease the unauthorised use, but I accept that closure of No 658 would bring about a need for some reorganization of the remainder (if only to increase the toilet provision). In view of this, I consider that increasing the period for compliance to 6 months is justified. To that extent, the appeal succeeds.

Other matters

30. I have taken into account all other points raised in these appeals, but none outweigh the considerations set out above which have led to my conclusions in this matter.

FORMAL DECISIONS

31. For the reasons set out above, and in exercise of the powers transferred to me, I determine these appeals as follows:

NOTICE A (Ref: APP/H5390/C/96/645558)

32. I allow your client's appeal, and direct that the notice be quashed. I hereby grant planning permission on the application deemed to have been made under section 177(5) of the amended Act for the development already carried out, namely the use of the ground floor and forecourt of 658 Fulham Road, London SW6, as shown on the plan attached to the notice, as a cafe (Class A3), subject to the following conditions:

(1) the use of the premises shall continue to include, as a material component of the overall use, the retail sale of bread, pastries and cakes;

(2) no customers shall be on the premises between the hours of 1900 and 0800 on the following day (this does not apply to customers of No 660 when using the toilets in No 658);

(3) in respect of the sale of food and drinks for consumption on the premises, the number of covers within the premises (in addition to any on the forecourt terrace) shall not exceed 14;

(4) within 3 months of this decision, details identifying a refuse compound area at these premises shall be submitted for approval to the local planning authority; such an area will be provided within a period of 2 months of the date of approval of the details; and from then on, all refuse generated by the use hereby permitted shall be stored within closed containers within that identified area.

33. Attention is drawn to the fact that an applicant for any approval required by a condition of this permission has a statutory right of appeal to the Secretary of State if approval is refused, or granted conditionally or if the authority fail to give notice of their decision within the prescribed period.

34. Your attention is drawn to the enclosed note relating to the requirements of the Buildings Regulations 1991 with respect to access for disabled people.

35. This decision does not convey any approval or consent required under any enactment, byelaw, order or regulation other than Section 57 of the Town and Country Planning Act 1990.

NOTICE B (Refs: APP/H5390/C/98/650165 & 650243)

36. I direct that the enforcement notice be varied by:

(a) the deletion of the words 'ground floor and' in section 3 of the Notice;

(b) deletion in its entirety of the contents of section 5 of the Notice, and the substitution of the following requirements and time limit:

(i) Cease the use of the basement at No 658 for Class A3 purposes.

(ii) Close the voids in the wall at basement level between Nos 658 and 660 and restore the wall to the same condition as existed prior to the breach of planning control.

(ii) Remove from the basement all equipment and furniture relating to the unauthorised Class A3 use.

Time for compliance: six months.

Subject thereto, I dismiss your clients' appeals, uphold the notice as varied, and refuse to grant planning permission on the applications deemed to have been made under section 177(5) of the amended Act.

Rights of appeal against decisions

37. This letter is issued as the determination of the appeals before me. Particulars of the rights of appeal against my decisions to the High Court are enclosed for those concerned.

Yours faithfully

C F TREWICK ARICS
Inspector

Appendix to Decision Letter (Ref Nos: APP/H5390/C/96/654558 etc)

APPEARANCES AT THE INQUIRY

FOR THE APPELLANTS

Mr S McNaught	- Solicitor, of Garretts, Solicitors, 180 Strand, London WC2R 2NN

He called:

Mr B K Mason	- the appellant
Mr D Croft	- Security & Safety Consultant
Mr P Koscien BSc MCD MRTPI	- Planning Consultant

FOR THE COUNCIL

Mr A G Beresford	- Solicitor, with LB of Hammersmith & Fulham

He called:

Mrs L Barnard BSc DipTP MRTPI	- Planning Consultant

DOCUMENTS AT THE INQUIRY

Document 1 - Attendance lists

Documents from the appellants

Document 2 - Appendices 1-4 to Mr Mason's proof (ground floor)

Document 3 - Appendices 1-3 to Mr Mason's proof (basement)

Document 4 - Mr Mason's further appendices BM1-BM6

Document 5 - Appendices 4-12 to Mr Koscien's proof (ground floor)

Document 6 - Appendices 1-9 to Mr Koscien's proof (basement)

Document 7 - Mr Koscien's further appendices PK1-PK3

Document 8 - Letter to Ms Abbott dated 18/11/96

Document 9 - Coloured land use plan

Document 10 - Planning history

Document 11 - Letters from suppliers

Document 12 - Letter from The Comedy Store

Document 13 - 3 plans illustrating 'fall-back' position

Document 14 - Letter to Mr Kirby dated 26/11/98

Document 15 - Further copy of unilateral undertaking

Document 16 - Letter from Richard Dunwoody MBE

Document 17 - Petition

Documents from the Council

Document 18 - Appendices LPA1 - LPA25 to Mrs Barnard's proof

Document 19 - Council's exhibits A & B

Document 20 - Note of Mrs Barnard's visit on 22/2/99

Document 21 - Copies of UDP's transportation policies

Document 22 - Traffic and parking information ('LPA25')

Document 23 - Suggested conditions

Document 24 - Council's licensing policy

Document 25 - GLC Regulations on Places of Public Entertainment

Document 26 - Further traffic and parking documents

Document 27 - Extract from Licensing Act

Post-inquiry documents

Document 28 - Letters from residents and from Metropolitan Police

- end of appendix -