The Planning Inspectorate

Appeal Decision

Site visit made on 11 June 2012

by Colin A Thompson DiplArch DipTP RegArch RIBA MRTPI IHBC

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

Decision date: 29 June 2012

Appeal Ref: APP/X5990/X/12/2172209
The Mandeville Hotel, 8 Mandeville Place, London W1U 2BE

- The appeal is under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Vinu Bhatessa against City of Westminster Council.
- The application (reference 11/11226/CLOPUD0 is dated 22 November 2011.
- The application was made under section 192 of the Town and Country Planning Act 1990 as amended.
- The development for which a certificate of lawful use or development is sought is temporary seating /terrace area within light well at front of building. See: drawings 0394_FE_1001_rev_A & 0340 - Design report 2011.11.22 & Structural outline scheme report.

Decision

1. The appeal is dismissed.

General Considerations

2. The application and appeal forms refer just to section 192 of the Act. But from the appeal representations it is obvious that the appellant wishes to ascertain that certain operations, rather that a change of use, would be lawful. I shall deal with the appeal as relating to the issue of an LDC under section 192(1)(b) of the Act.

3. An LDC application is just a snap-shot in time. It is simply concerned with whether what is applied for is lawful. Such matters as: the obvious ingenuity of this appeal design; the probability that minimal harm might be caused to the openness of the existing hotel light wells with the implementation of the proposed works or; the content of planning policy; are not relevant. This decision is concerned only with the interpretation of planning law set against matters of fact and degree.

My Reasoning

Background

4. Section 55(1) of the Act identifies *development*, and *new development*, as including …"*the carrying out of building, engineering…or other operations in, on, over or under land*"… (This quotation is curtailed to omit *uses* because there is no material change of use involved in this instance.)

5. Section 55(1A) states that …"*for the purposes of the Act "building operations" include -*

(a) demolition of buildings;

(b) rebuilding;

(c) structural alterations or additions to buildings; and

(d) other operations normally undertaken by a person carrying on a business as a builder"…

The recurring theme refers to *building(s)*. So the definition of this term, and whether it applies to the appeal works, is at the nub of this appeal.

6. Section 55(2) sets out some operations, or uses, of land which shall not be taken for the purposes of the Act to involve development. None are relevant to this case. No pertinent permitted development categories, as identified by the Town and Country Planning (General Permitted Development) Order 1995, are known to me or have been claimed.

Case Law and Assessment

7. In *Barvis*[1] the Divisional Court placed reliance upon a passage in the Judgement in *Cardiff Rating*[2] which identified 3 primary factors as being relevant to the question of what was a *building* under the Act. These were: *size*; *permanence*, and; *physical attachment*.

8. Under *size*, it was recognised that a *building* would normally be something that was constructed on site as being opposed to be brought to it ready made. In this case the 3 proposed terraces /seating areas, and their supports are big enough to need to be brought to the site in pieces (as a kit of parts which I am told would be manufactured and store elsewhere) and erected and disassembled, by hand, in place. The materials proposed are mainly steel and timber.

9. Under *permanence*, the terraces /seating areas would be brought to the site and erected during April. They are intended to remain in place until October when they would be broken down, back into their constituent kit of parts, and removed from the site for storage until needed again in the following April. What apparently is being proposed is an annual, cyclical, process of arrival; erection; use; dismantling, and; removal.

10. Under *physical attachment*, the temporary seating /terraced areas would be free standing on their own metal legs, with base plates, held down by their own weight. They could not be said to be fixed to the existing *building*, in the normal understanding of the term, but would be wedged in place for lateral stability. Additionally, connections would be needed for electrical power for lighting - the fittings of which are an integral part of the design.

11. As indicated in *Cheshire CC*[3] none of these matters can be taken, individually on their own, to indicate whether particular works would result in the formulation of a *building* or constitute *development*, under the Act. So …"*there*

[1] *Barvis Ltd v SSE (1971) 22 P&CR 710 at 715*
[2] *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd [1949] 1KB 385 (subsequently endorsed by the Court of Appeal in Skerritts of Nottingham Ltd v SSETR (No 2) [2000] 2 PLR 102)*
[3] *Cheshire CC v Woodward [1962] 2 QB 126*

is no one (definitive) *test; you look at the erection, equipment, plant, whatever it is , and ask: in all the circumstances is it to be treated as part of the realty?* (and) *… one must look at the whole circumstances…in order to see whether the operation has been such as to constitute development*"...

12. Although, intrinsically not very large, the appeals works are individually big enough to need to be delivered to the site in bits, and erected, and dismantled thereon. They would, when in place, be part of the realty. This seems to me to satisfy the *size* test required for the resulting structures to be considered to be *buildings* under the Act. In this regard it is pertinent that the materials used, mainly steel and timber, are typical *building* materials. The probability that a person, carrying on a business as a builder, would not be used in any erection, or dismantling, process is not determinative under this test.

13. The structures would be in place and used for about 7, in every 12, month period (that is some 58% of each year). This level of use, whilst not being everlasting, would be a regular one, not dissimilar to the degree of *permanence* found in *Skerritts*[4]. Such a presence would certainly not be fleeting or ephemeral and would appear to me to be sufficiently enduring to comply with the relevant concept of *permanence* in regard to the terms *buildings* and *development* under the Act.

14. *Physical attachment* would be limited to wedging the completed structures against the hotel's existing façade and, presumably, the light well retaining wall on the back edge of the public highway footway. In addition electrical power cable connections from the hotel would also be needed.

15. Although there would minimal *physical attachment*, taking the scheme in the round, as required by the *Cheshire CC* judgement, as matters of fact and degree, the works to my mind would result in a *building* and /or constitute *building operations* as set out in section 55(1) and (1A) of the Act. It would therefore be *development* requiring planning permission where none has been granted. The LDC appeal must fail.

Colin A Thompson

[4] *Skerritts of Nottingham Ltd v SSETR (No 2) [2000] 2 PLR 102*