
Appeal Decision

Site visit made on 23 November 2016

by Simon N Hand MA

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

Decision date: 7 December 2016

Appeal Ref: APP/W2465/C/16/3150830

Land at 10 Friar Lane, Leicester, LE1 5RA

- 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 Fernandez Grillhouse against an enforcement notice issued by Leicester City Council.
 - The enforcement notice was issued on 22 April 2016.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a flue to the rear of the property.
 - The requirements of the notice are remove the ventilation flue and all associated materials from the property.
 - The period for compliance with the requirements is 28 days.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The enforcement notice is varied by deleting "28 days" from the Time for Compliance and replacing it with "3 months". Subject to this variation the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Background to the Appeal

2. No 10 stands on Friar Lane with an entirely enclosed courtyard to the rear. It is on the ground floor of Phoenix House, the upper floors of which comprise residential flats, some of which overlook the courtyard as do other residential properties.
3. In 2000 planning permission was granted for the change of use of the ground floor to a restaurant and bar with flats above. A ventilation flue was shown, using the existing chimney and venting above roof height. In 2005 another planning permission was granted, this time just for the ground floor to change to an Indian restaurant. I assume the 2000 permission was not implemented for the ground floor use. The ventilation flue was shown on the rear wall, again venting above ridge height.
4. The existing flue, the subject of this notice, is a short metal chimney that extends only a few metres above the rear flat roof of the restaurant and so vents into the courtyard. Following complaints from neighbours who overlook the courtyard the Council issued the notice subject to this appeal.

The Appeal on Ground (d)

5. This ground is that the development is immune from enforcement because, in this instance, it was carried out more than 4 years before the date of the issue of the notice, that is before 22 April 2012. As the brief history above shows the original planning permission for the restaurant does not seem to have been implemented, and certainly the flue utilising the chimney or fastened to the wall was not constructed. The 2005 permission also does not seem to have been implemented immediately as in January 2013 an application was made to discharge one of the conditions attached to the 2005 permission concerning a fire door. When the officer visited the premises he noted that "the ground floor is currently being fitted out as a restaurant", which suggests that is when the restaurant use began and presumably when the flue was first fitted.
6. The appellant argues this took place earlier and provides a letter from Alex Maher, who was the agent at the time of the 2005 application and who project managed the conversion of Phoenix House. His recollection is that the Indian restaurant became insolvent in December 2011 but had installed the flue before then. His letter is uncertain as to when the restaurant opened, or indeed if it ever did and it is also not clear whether it was the same flue that was installed as is in place now.
7. The Council provide aerial photographs of the site; the key one is dated after August 2012 and does not show the flue. I agree the date has to be after August 2012 as it clearly shows excavations in the car park which are part of the search for the remains of Richard III, and these excavations did not begin until August. The flue certainly cannot be seen but there is considerable shadow on the back of the building and it is just possible it is hidden.
8. I agree with the Council that the design of the flue has changed recently, photographs taken before the issue of the notice in March 2016 show a different cowl to those in photographs from July 2016, but that is not evidence the flue changed in the four year period prior to April 2016. It is however consistent with third parties who say the appellants have changed the flue several times in order to try and overcome the problems it has been causing. A third party who lives at 22 Friar Lane and has, as I saw on my site visit, a clear view of the back of the restaurant from his roof terrace, says the flue was first installed in January 2013 when the 'Bankers Club' opened on the site. He and his wife witnessed the flue being installed sometime around that date. He attaches an e-mail from another person whose offices overlook the courtyard who confirms that the flue was installed when the 'Bankers Club' opened late 2012 to early 2013.
9. In my view it is entirely uncertain as to when the flue, that was in place at the time the enforcement notice was issued, was installed. It may be the same flue that was installed before December 2011 or it may not. That flue may have been removed and reinstalled later as suggested by the aerial photograph of August 2012 and the third party letters. On ground (d) it is up to the appellant to show on the balance of probability that the development took place more than 4 years ago and I do not think the evidence supports such a conclusion. The appeal on ground (d) fails.

The Appeal on Ground (a)

10. Policy PS10 of the City of Leicester Local Plan (2006) seeks to protect residential amenity from, amongst other things smell, noise and air pollution. There is considerable and detailed evidence from neighbours who overlook the courtyard that the flue causes noise and smells. I was able to see the flue from two apartments, one in Pheonix House has a balcony directly above the flue outlet and others that I didn't visit have balconies that are even closer. The Council have issued both noise and smell abatement notices, so I have no doubt the problems caused by the flue are both serious and on-going. Indeed it would be obvious to even a casual observer that it is not sensible to have a flue venting directly below residential balconies into a courtyard surrounded by taller buildings.
11. The appellant says the noise problem can be overcome by a scheme to soundproof the flue and the smell issue has been solved by a new carbon filter. I have no evidence to suggest this is the case, or that a long term solution is possible. Because the Council have issued a noise abatement notice requiring the noise to be reduced to 55db does not to my mind imply the existing flue can simply be modified. It could be that much more extensive changes are required; the abatement order does not offer a solution, that is the responsibility of the appellant. The Council were clearly of the opinion when they granted both the original planning permissions that to be effective the flue should vent above the ridgeline of the building, and I have no doubt that would solve the problem permanently.
12. The appellant argues the business will close if he cannot use the kitchen, but all the notice requires is that the existing flue is removed. There should be no impediment, as far as the Council are concerned, to replacing it with one as envisaged when the 2005 planning permission was granted, so I give little weight to this argument. Consequently, I find the continued operation of the flue would be likely to harm the amenities of residents contrary to policy PS10 and there are no other matters to outweigh this harm. The appeal on ground (a) fails.

The Appeal on Ground (f)

13. This is essentially the same argument as for the ground (a) appeal which is dealt with above. There are no lesser steps that would satisfactorily solve the problem other than to remove the flue which is clearly not operating properly. The appeal on ground (f) fails.

The Appeal on Ground (g)

14. The notice requires the works to be carried out within 28 days. I accept that without the flue the restaurant cannot operate and to design, procure and replace the flue with one that vents above the ridgeline may well take longer than 28 days. The appellant suggests extending the period to the end of October, the date in the noise abatement notice, but this has already passed. I shall therefore extend the compliance period to 3 months from the date of the decision letter.

Simon Hand

Inspector