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## Appeal Decision

Site visit made on 29 November 2016

**by Chris Preston BA(Hons) BPI MRTPI**

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

**Decision date: 12 December 2016**

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**Appeal Ref: APP/Y0435/C/16/3156147**

**37 High Street, Woburn Sands, Milton Keynes, MK17 8RD**

- 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 Ali Etker against an enforcement notice issued by Milton Keynes Council.
  - The enforcement notice, numbered E850, was issued on 20 July 2016.
  - The breach of planning control as alleged in the notice is: Without planning permission the material change of use from mixed use class A1 shop/ C3 dwelling to A5 hot food takeaway/C3 dwelling and the unauthorised development of a large galvanised erection flue attached to the chimney.
  - The requirements of the notice are: (i) Permanently remove the galvanised flue installed and attached to the chimney above the shop; and (ii) Cease the unauthorised C5 use of the premises.
  - The period for compliance with the requirements is two months from the effective date of the notice.
  - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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### Decision

1. The enforcement notice is corrected and varied by:
    - i) The deletion of the words "4 years" from the reason for issuing the notice at section 4(v) and the substitution with the words "ten years";
    - ii) The deletion of the description of the breach at section 3 and the insertion of the following description; "Without planning permission, the use of the premises as a hot food take-away and dwellinghouse and the erection of an extraction flue and associated cladding attached to the chimney";
    - iii) The deletion of the words "galvanised flue" from section 5(i) and the substitution with the words "extraction flue and associated cladding"; and
    - iv) The deletion of the words "2 months" as the period of compliance with paragraph 5(i), as specified at section 6 and the substitution with the following words "6 months".
  2. Subject to those corrections and variations, the appeal is allowed insofar as it relates to the use of the premises as a hot food take-away and dwellinghouse and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the use of the
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premises as a hot food take-away and dwellinghouse subject to the following conditions:

- 1) The premises shall only be open for customers between the following hours:  
0900hrs to 2300hrs: Mondays to Thursdays  
0900hrs to 2400hrs (midnight): Friday and Saturday  
0900hrs to 2200hrs on Sundays.
3. The appeal is dismissed and the enforcement notice is upheld, as corrected, insofar as it relates to the erection of an extraction flue and associated cladding attached to the chimney and planning permission is refused in respect of the erection of an extraction flue and associated cladding attached to the chimney, on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

### **Procedural Matters**

4. The enforcement notice relates to an alleged material change of use and operational development. Having regard to the time limits for taking enforcement action, as prescribed by section 171B of the Town and Country Planning Act 1990 (the Act), the period within which an enforcement notice must be served against an alleged breach of planning control relating to a material change of use is 10 years, beginning with the date of the breach. In this case, one of the stated reasons for issuing the notice, at section 4(v), states that the Council consider that the alleged breach has occurred within the last four years. Having regard to the Act, it is clear that the period should be 10 years in relation to the alleged change of use.
5. Where an alleged breach relates to operational development, the correct time period is normally four years, as specified in s171B(1). However, where operational development has been undertaken to facilitate a change of use, the Courts have held that enforcement action may be taken within the ten year period beginning with the date of the breach. The evidence before me indicates that the flue was installed to facilitate the use of the building as a hot food take-away and, as such, it appears to me that the notice should specify ten years as being the relevant period. I have amended the terms of the notice accordingly and, having regard to the submissions before me, am satisfied that no party will be prejudiced by my decision to do so.

### **The Appeal on Ground (b)**

6. An appeal on ground (b) is made on the basis that the matters specified in the notice have not occurred. The appellant does not dispute that the property is in use as a hot food take-away with residential accommodation above, or that a flue has been erected at the property.
7. With regard to the flue, the notice describes the alleged breach as 'a large galvanised erection flue attached to the chimney'. As witnessed at my unaccompanied site visit, the majority of the flue, save for the cowl, has been clad in a material in an attempt to give the impression of red bricks. It would appear that the flue was in that condition prior to the service of the notice; the officer report that recommended the notice be served acknowledged as much. Consequently, it appears to me that the description of the flue within the alleged breach should have regard to the external cladding and I have corrected the notice accordingly. I am satisfied that no prejudice will result

because both parties are aware of, and have commented on, the appearance of the flue in its present state.

8. In terms of the use of the property, the main thrust of the ground (b) appeal is that the appellant disputes that the property was in use as a mixed use as a shop and dwelling prior to the current use being implemented. In his view, the ground floor of the property had been used since 2003 as a café, which also sold hot food to take-away, with associated residential accommodation at first floor level. Accordingly, he considers that the previous use had become lawful prior to the change to a hot food take-away and residential. The appeal on ground (b) is therefore made on the basis that the description of the previous use is incorrect.
9. There is no dispute that the property was in use as a café, with residential accommodation above, immediately prior to the change to a hot food take-away, with residential accommodation above. Whether that use was lawful is less clear. Planning permission was granted in 1993 for the change of use of 'part of ground floor from retail to tea room and first floor from residential to retail'. Condition 2 of that permission restricted the tea room use to a small area at the rear of the ground floor, with the specified reason being to ensure that the tea room remained ancillary to the retail use. Whilst that permission was granted, there is no indication, from the information before me, as to whether it was implemented within the five year time limit specified in condition 1.
10. A further permission was granted in 2002 for the change of use of part of the premises from retail to residential accommodation although the details of that permission have apparently been mislaid by the Council and the exact nature of that scheme is not clear from the information before me.
11. Thus, the planning permissions referred to do little to shed light on how the premises was actually used from 1993 onwards. A letter from Mrs Tracoshas, the freeholder of the property, suggests that the ground floor was in use as a 'coffee shop and take-away premises' since January 2003 and that it has been let to various tenants over that period. Whilst that would indicate a history of food and drink related uses, it does not highlight the exact nature of the use by specific tenants or the balance between the extent to which food was consumed on or off the premises i.e. whether the property was in use as a café or take-away or a mix of the two. It may be that the way in which various tenants used the property varied such that more than one change of use took place. The evidence before me does not paint a clear picture.
12. That distinction is important, given the amendment to the Town and Country Planning (Use Classes) Order 1987 (the UCO) in 2005 which introduced a specific 'A5' use class for hot food take-aways. I would not expect a lay person to have a full grasp of the distinction between the different classes in the UCO and it is not possible to understand how various tenants used the property over the period specified.
13. Thus, the evidence before me does not demonstrate, on the balance of probability that the property had been used continuously as a café, with residential accommodation above, for a period of ten years prior to the service of the enforcement notice. The Council does accept the possibility that the property may have acquired a lawful use as a café, with residential accommodation above, due to the passage of time but the evidence presented

to the appeal is not conclusive. In other words, from the information before me, I cannot determine what the lawful use of the premises was immediately prior to the change to a hot food take-away, with residential accommodation above.

14. It is open to me to vary the terms of the enforcement notice to remove reference to the previous use in the description of the alleged breach. I think that is an appropriate course of action where there is uncertainty, as in the present case. As noted above, the appellant does not dispute that a breach has taken place and the respective parties have made submissions as to whether planning permission should be granted for the use under the ground (a) appeal. Therefore, I am satisfied that no prejudice will result from my decision to remove reference to the previous use in the alleged breach.
15. In view of the above, I will amend the notice to describe the breach as; 'without planning permission, the use of the premises as a hot food take-away and dwellinghouse and the erection of an extraction flue and associated cladding attached to the chimney'. I have removed reference to the 'use classes' C3 and A5 because, where a property is in mixed use, it does not fall within one class or the other and reference to the Classes is superfluous.

### **The Appeal on ground (a)**

16. The Council has not submitted a statement to amplify its reasons for issuing the notice. However, from the notice itself and the content of the delegated officer report, dated 12 June 2016, which sought approval to take enforcement action, I consider that the main issues in the determination of the appeal on ground (a) are:
  - i) The effect of the extraction flue and its casing on the character and appearance of the area and the Woburn Sands Conservation Area;
  - ii) The effect of the hot food take-away on the vitality and viability of Woburn Sands town centre; and
  - iii) The effect of the hot food take-away on the living conditions of neighbouring residents

#### *The effect of the extraction flue and its casing on the character and appearance of the Woburn Sands Conservation Area*

17. The appeal site is situated on the High Street within Woburn Sands town centre. The main retail and commercial uses within the town centre are spread out in a linear fashion along the High Street and Station Road, with residential areas branching off the main thoroughfare. The town centre is vibrant and attractive with a good range of uses and little evidence of vacant units. The buildings themselves are mainly from the Victorian and Edwardian period, with shop-fronts facing the street at ground floor level and other uses above. Brick is the main building material, although render is used occasionally, and timber is predominantly used for shop fronts and window details. The Conservation Area boundary encompasses the main shopping area and a number of primarily Victorian residential streets branching off it.
18. The unit in question is part single storey and part two storey, having a projecting single storey element to the front containing the shop frontage, with a traditional recessed door entrance. The frontage and signage attached to the

frontage are not referred to within the enforcement notice and my decision relates purely to the use of the unit and the installation of the extraction flue. The flue is set back from the High Street and is attached to the side of the chimney stack of the two storey section of the building. The fact that the two storey element is set back from the street does help to reduce the visual impact of the flue, particularly when approaching from either the north or the south when views are restricted by adjacent two storey buildings until one is in close proximity to the flue.

19. Nonetheless, when viewed in the immediate context I find that the materials and external finish are incongruous when set against the more traditional palette of materials of adjacent buildings. I have no doubt that a galvanised flue would have been completely at odds with the established character of the area and would have looked out of place against the brick chimney to which it was attached and the rendered façade of the adjacent building. The attempt to box-in the flue and clad it in brick slips or mathematical tiles has been less than successful. The finish is of a bright red appearance which stands out against the softer tones of the adjacent chimney and, to my mind, actually draws attention to the structure. The cowl which extends sideways at 90 degrees from the top of the flue has not been clad but appears to have been painted in a colour to match the cladding, including an attempt to draw lines to replicate the appearance of various courses of bricks. That gives a less than professional finish and creates a strange and somewhat garish outward appearance. Moreover, the flue has not been clad on all sides such that the galvanised finish remains visible from the rear.
20. The result is that the attempt to clad the structure has been undertaken in an ad-hoc manner and the external finish contrasts awkwardly with the materials used on surrounding buildings. Whilst the concept of seeking to encase the flue such that it has the appearance of a chimney would appear logical, the execution in this case has been unsuccessful due to the choice of materials and the rather piecemeal way in which the work has been undertaken. Therefore, I conclude that the flue has caused harm to the character and appearance of the area and harm to the character and appearance of the Woburn Sands Conservation Area.
21. Given that the impact of the flue is relatively localised, the harm to the Conservation Area, taken as a whole, is less than substantial. Where harm to a heritage asset would be less than substantial, paragraph 134 of the National Planning Policy Framework (the Framework) requires that harm to be weighed against the public benefits of the proposal. However, the fact that harm to the significance of the Conservation Area is less than substantial does not dictate that limited weight should be attached to that harm. Having regard to section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the LB&CA Act), I am required to give special attention to the desirability of preserving or enhancing the character and appearance of the area. The flue achieves neither of those objectives and, in line with the statutory duty, I attach significant weight to the harm that I have identified.
22. Clearly, the flue is designed to ensure that cooking odours are extracted and dispersed. In that sense, it could be said to have a public benefit in ameliorating the potential harm to amenity caused by cooking odours. However, that does not amount to a sufficient benefit to justify the erection of a flue that causes harm to the character and appearance of the Conservation

Area. It seems to me that a more appropriate solution could be designed, by using appropriate materials to reflect surrounding structures and/or relocating the structure to a less prominent position in order to respect the character and appearance of the area, whilst fulfilling the same function. Consequently, I am not satisfied that any public benefits have been put forward that would outweigh the harm to the Conservation Area.

23. Neither am I satisfied that I could impose conditions to mitigate the effect of the flue. No alternative cladding or design solution has been suggested and it would be difficult to clad the current flue in a convincing manner, even if a more appropriate materials was used, due to the way in which the cowl projects to the side, as opposed to a traditional chimney where the chimney pot or cowl would project upwards. It appears to me that an alternative solution may require a revised design that would be outside the scope of what could reasonably be required by condition. In effect, it would be a different scheme.
24. In view of the above, the flue has caused harm to the character and appearance of the area and the Conservation Area, contrary to the aims of policies D1(iii) and H6 of the Milton Keynes Local Plan (2005) and the aims of section 12 the Framework and section 79(1) of the LB&CA Act.

*The effect of the hot food take-away on the vitality and viability of Woburn Sands town centre*

25. As set out above, the town centre has an attractive and vibrant feel and, at the time of my visit, there were no apparent vacancies within the retail and shopping centre. There was a regular turn over of cars parking along the High Street and Station Road to give customers access to the various shops and services. There was a good range of retail units, banking and financial services, and food outlets and there did not appear to be a particular concentration of hot food take-aways in the area. No figures have been presented to suggest otherwise and, it appears to me that the use of the ground floor for that purpose has not had an unduly negative effect on the range of services available within the centre. No other hot food take-aways are situated in the row of properties within which the site is located which retains a post-office, pharmacy, restaurant, florist, dry cleaners, hairdressers/ barbers, dry cleaners and other retail units. In that context, I consider that the use has added to the mix of uses in the area and provides a facility that one would normally expect to find within a town centre.
26. Consequently, no evidence has been presented to indicate that the use has had a negative effect on the vitality or viability of the town centre. As such, I can find no conflict with the aims of section 2 of the Framework, which seeks to ensure the vitality of town centres, or with policies TC5 and TC6 of the Local Plan or policy WS9 of the Woburn Sands Neighbourhood Plan (2014).

*The effect of the hot food take-away on the living conditions of neighbouring residents*

27. The reasons for issuing the enforcement notice suggest that the use 'would adversely affect the amenities of adjacent residents'. The use is already in operation and no objections from neighbouring residents are before me. The notice does not specify which residents or properties are considered to be affected and no further information on that point is found within the delegated

officer report. The residential use immediately above the hot food take-away is linked to the unit and apparently used by staff associated with the business. Given that link, it is likely that staff would be working within the take-away during opening hours such that it will not affect their living conditions.

28. In the absence of more specific information as to which properties are considered to be affected, it is difficult to give much weight to the Council's objection. I note that Woburn Sands Town Council has raised specific concerns about the opening hours of the take-away and has noted that a number of units along the High Street have living accommodation above the ground floor shops. It also noted that opening hours are advertised as being open until 2300hrs Monday to Thursday, 2400hrs Friday and Saturday and 1000hrs on a Sunday. The appellant maintains that those hours are acceptable, given the location of the premises within the town centre.
29. No operating hours restriction was placed on the previous use as a café but, for the reasons given, I cannot conclude that the use was lawful. In any event, a hot food take-away has different characteristics to a café or restaurant, hence the creation of the separate 'A5' use class. Such a use will involve a greater turn over of customers, more comings and goings and an increased likelihood of eating outside the premises on the street. If uncontrolled, such uses undoubtedly have the potential to cause harm to the living conditions of residents within the area.
30. However, it seems to me that the operating hours as advertised are not unreasonable, given the location of the site within the High Street. The hours are similar to those likely to be used by pubs and restaurants meaning that there is likely to be an ambient level of activity within the area within those hours. When coupled with the fact that there does not appear to be an over concentration of hot food take-aways in the area, I am satisfied that the opening hours are appropriate. The appellant has indicated a willingness to accept a condition that would limit the hours to those specified and, subject to the imposition of such a condition I consider that the effect on the use on the living conditions of residents within the area will be within acceptable limits.
31. In view of the above, the use complies with the aims of policy D1(iv) of the Local Plan and one of the core principles set out at paragraph 17 of the Framework which is that planning should seek to secure a good standard of amenity for all existing and future occupiers of land and buildings.

*Overall Conclusions on Ground (a)*

32. For the reasons given, the flue has caused harm to the character and appearance of the Conservation Area; harm that is not outweighed by any public benefit. However, I am satisfied that the use of the premises is acceptable in terms of the effect on the vitality of the town centre and the effect on the living conditions of adjacent residents. Accordingly, I conclude that the appeal should succeed in part only, and I will grant planning permission for one part of the matter the subject of the notice and refuse to grant planning permission on the other part. Otherwise, I will uphold the notice but the requirements of the upheld notice will cease to have effect so far as they are inconsistent with the permission that I shall grant by virtue of the terms section 180 of the Act.

### **The Appeal on Ground (f)**

33. The appeal on ground (f) is made on the grounds that an appropriate lesser step would be to allow the use to continue but to uphold the notice to require the removal of the flue, if I considered that was necessary. For the reasons set out in ground (a) I agree with that course of action and the ground (f) appeal succeeds to that extent.

### **The Appeal on Ground (g)**

34. Given that I shall grant planning permission for the use of the property, it is unnecessary for me to consider the time limit given within the notice for the cessation of the use. With regard to the flue, I am satisfied that there is no over-riding reason why a revised scheme proposing a suitable design solution cannot be agreed with the Local Planning Authority. Such a scheme would require planning permission and I consider it reasonable to extend the period of compliance for the removal of the flue to enable such an application to be made and considered. The appellant has requested that a period of six months is given to enable that process to take place and I find that to be a reasonable period, given the likely timescales involved. Accordingly, the ground (g) appeal succeeds to that extent and I shall extend the time period for compliance to six months.

*Chris Preston*

INSPECTOR