

Appeal Decision

Site visit made on 29 December 2016

by Andrew Dale BA (Hons) MA MRTPI

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

Decision date: 26 January 2017

Appeal Ref: APP/Y5420/C/16/3151869

232 Archway Road, London N6 5AX

- 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 Ms Hideko Suzui against an enforcement notice issued by the Council of the London Borough of Haringey.
 - The enforcement notice was issued on 3 May 2016 under ref. UNW/2015/00613.
 - The breach of planning control as alleged in the notice is: "*The installation of a flue/extract/ventilation duct without planning permission*".
 - The requirement of the notice is to remove the flue/extract/ventilation duct including its fixtures and fittings.
 - The period for compliance with the requirement is three months.
 - The appeal is proceeding on the ground set out in section 174(2) (c) of the Town and Country Planning Act 1990 as amended.
-

Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Background

2. The appeal concerns the premises of Cocoro which trades as a sushi and Japanese delicatessen. Part of the business involves the preparation and sale of hot food for consumption off the premises (Use Class A5). Cocoro occupies the ground and lower ground floors of the property. Part of the ground floor of the unit projects in advance of the upper floors of the building, a built form that is typical in this part of the Archway Road Local Shopping Centre. There are residential uses on the upper floors.
 3. It would appear that the commercial part of the property was vacant for some time before Cocoro started to trade in June 2015. The enforcement notice relates to a single flue/extract/ventilation duct attached to the building's rear elevation which was installed before Cocoro started to trade. The notice does not relate to the smaller external piping, fitted on the same rear wall, which is used to deliver fresh air to the building.
 4. I have studied the site's planning history as supplied by the parties. Two planning permissions are of particular relevance. In August 2010 under ref. HGY/2010/1057 conditional planning permission was granted for "*Change of use from (A1) to (A3) restaurant*". In June 2013 under ref. HGY/2013/0764
-

conditional planning permission was granted for "*Change of use from A3 (restaurant/cafe) to A5 (Hot food takeaway)*".

The appeal on ground (c)

5. This ground of appeal is that there has not been a breach of planning control. This might be because no development was involved or because planning permission has already been granted on application to the Council or because the development is permitted by a development order.
6. The appellant's case is made on the basis that "...*the extractor duct installed to the rear of property has been installed according to approved drawings and planning permission granted in June 2013.*" I shall focus on that planning permission accordingly. Moreover, it would appear to be the planning permission that has been implemented to cover the A5 use. The planning officer's report from 2013 notes that while the permitted A3 use never actually operated, an extraction system had been installed in the building exiting at the rear. This does not appear to have included a tall, vertical external flue pipe at that stage. The existing internal ducting I saw at my site visit leads from a kitchen canopy in the rearmost part of the premises.
7. The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions. This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. If there is any ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity. A full planning permission for building operations must be read with regard to the approved plans, even where they are not expressly incorporated by the decision notice.
8. These principles are established by reading: *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196; *Slough Estates Limited v Slough Borough Council* [1971] AC 958; *Slough Borough Council v Secretary of State for the Environment* (1995) JPL 1128; *R v Ashford Borough Council ex parte Shepway District Council* [1999] PLCR 12; and *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476.
9. The subject planning permission ref. HGY/2013/0764 is clear, unambiguous and valid on its face. The decision notice describes the proposal permitted as a change of use only. It does not list any approved building operations.
10. That said, the terms of the application dated 24 April 2013 and five drawings are clearly incorporated into the planning permission underneath the description of the proposal.
11. I am led to believe by the Council that the description of the proposal on the original application form made reference to "... *the installation of outdoor units for a cooler room and freezer room*". The appellant confirms that the "*proposed condenser units*" were subsequently excluded. There is no reference to a flue/extract/ventilation duct ever appearing in the application description

and detailed specifications for such a construction do not appear to have been included with the application documents.

12. Insofar as the five approved plans are concerned, condition 2 required the development permitted to be carried out in accordance with them. One key rider to that followed in condition 3 which states (with its associated reason):

*"Notwithstanding the details shown on the approved drawings the use hereby permitted shall not commence until the extract duct, filters and silencers are installed and thereafter retained to minimise odour and nuisance. The ducting shall also include anti-vibration mountings to minimise vibration.
Reason: In order to ensure that the proposal does not prejudice the enjoyment of neighbouring occupiers of their properties."*

So, in spite of or without being affected by the details shown on the approved drawings, the use could not commence until the extract duct, filters and silencers had been installed, with the ducting having to include anti-vibration mountings. I can only interpret this objectively as a condition that rendered the plan details of the extraction system submitted with the application to serve no practical purpose. Such plan details as existed were treated as being indicative. Work to construct the extraction system would be development in its own right. It was not part of the relevant planning permission or the planning application. Planning permission ref. HGY/2013/0764 did not therefore approve the flue/extract/ventilation duct that has been installed.

13. In any event, the approved plans I have been provided with (nos 002 and 007) would not have enabled a builder or a specialist commercial kitchen fitter to know exactly what should be built. They were plainly indicative. The whole of the external flue is not shown and the short section coming out of the rear of the building is annotated with the words *"External Vent with Insect Screen External Vent is running up side of the external wall and extended beyond the roof at least 1500 mm"*. The plans do not make clear: which part of the roof is being referred to; where the top end of the flue would be directed towards; the materials of construction and finish; or important specifications concerning filters, silencers and anti-vibration mountings. The existing internal route of the extraction system is also different from that depicted on plan no. 002.
14. I realise that the appellant appears to have submitted drawings of the duct and photographic evidence of the extractor fan, silencer, filter and anti-vibration mounts, as constructed on site, to the Council in 2015 but there is no provision in condition 3 for those items to be submitted to or approved by the Council. Reading the officer's delegated report for ref. HGY/2013/0764, it is clear that the Council's intended approach was to impose a planning condition *"...requiring details of the flue before construction."* The Council's statement does not make it clear but it may have been the intention to include a phrase in condition 3 after the word *"installed"* along the lines of *"in accordance with a specific scheme which shall have been submitted to and approved in writing by the local planning authority"*. For whatever reason, that did not occur.
15. This left the appellant with the need to submit a further planning application for this operational development and in these circumstances the *"INFORMATIVE"* in the decision notice could have helpfully provided the appellant with a reminder,

just as it does for any proposed changes to the shop frontage. It is regrettable that it did not do so.

16. In *Kane Construction v Secretary of State for Communities and Local Government and Nottinghamshire County Council* [2010] EWHC 2227 (Admin), planning permission was granted for the "Use of land as lakes for breeding fish and fishing." Layout plans submitted with the application showed a proposed nursery pond and ten proposed breeding ponds, a car park and access details. The permission was subject to conditions which, amongst other things, addressed the layout of the car park, the carrying out of highway and access improvements and details of the ponds. The judgment concerned an appeal decision in which an Inspector found that the permission covered only the use of the land and did not extend to any related operational development, including the creation of the lakes. In dismissing the appeal, Stewart QC refers, at paragraph 27, to the effect of section 336(1) of the 1990 Act as amended and says that "*Planning permission for change of use and a grant for 'use of land as lakes for breeding fish and fishing' does not therefore give permission to carry out works incidental to the change of use.*" He goes on to refer to an earlier judgment, *Wivenhoe Port Limited v Colchester Borough Council* [1985] JPL 396 and to the premise in that case that conditions cannot enlarge upon the grant, although they might clarify it. He says, at paragraph 30, that "*The fundamental distinction between use and operations which informed the decision in Wivenhoe is a powerful factor in the interpretation.*" At paragraph 31, he adds that "*The conditions do presuppose operational development but, as in Wivenhoe, I do not accept that it is permissible to allow them to change the clear meaning of the grant.*"
17. I appreciate that there are some differences between the subject case and the circumstances in *Kane* and these are alluded to by the parties. Nonetheless, it seems to me that some of the reasoning in *Kane* applies here. In particular, whilst condition 3 in ref. HGY/2013/0764 refers to matters related to operational development it should not, on the basis of the wording used in that condition, be interpreted as enlarging the scope of the permission which was for a change of use. In the light of that, I do not consider that this condition assists the appellant's interpretation of the scope of the planning permission.
18. The Council mentions judicial findings which have provided clarification on the scope of conditions. It was held in *Wheatcroft v Secretary of State for the Environment* [1982] JPL 37 that conditions could not be imposed on a planning application that had the effect of allowing development that was different in substance from that which was applied for. In *Pye v Coventry City Council ex parte Arrowcroft plc* [2001] PLCR 113, it was adopted as a starting point that a condition may have the effect of modifying the development proposed by the application provided that it does not constitute a fundamental alteration in the proposal. I have noted these cases but they do not assist me greatly in interpreting the relevant planning permission.
19. Taking into account all the above and all other matters raised, I have reached the conclusion that the 2013 planning permission can only be properly interpreted as being for a change of use from A3 (restaurant/cafe) to A5 (hot food takeaway). Having regard to the construction of the 2013 planning permission and condition 3 in particular, separate planning permission was required for the installation of the extraction duct to the rear of the property. I

would have reached the same findings had I focussed on the 2010 planning permission.

20. I therefore find on the balance of probabilities that the development alleged in the enforcement notice constitutes a breach of planning control. The appeal on ground (c) fails. The enforcement notice will be upheld.

Andrew Dale

INSPECTOR