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## Appeal Decision

Site visit made on 24 April 2017

**by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)**

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

**Decision date: 30 May 2017**

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**Appeal Ref: APP/X5990/C/16/3163163**  
**367-369 Edgware Road, London, W2 1BS**

- 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 Tariq Mubarak against an enforcement notice issued by the City of Westminster Council.
- The enforcement notice, Ref 13/53658/K, was issued on 11 October 2016.
- The breach of planning control as alleged in the notice is without the requisite planning permission and within the last 4 years, the installation of an extract duct at the rear elevation of the building extending from ground floor level to second floor level.
- The requirements of the notice are:
  - 1) Remove the extract duct installed at the rear elevation of the building from ground to second floor levels, shown outlined by red lines on Photographs A to C; and
  - 2) Following completion of Step 1), make good any damage to the rear façade and flat roof caused by the installation or removal of the extract [duct].
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

**Summary of Decision: The appeal is dismissed and the enforcement notice upheld.**

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### Application for costs

1. An application for costs was made by the Council against the Appellant. This application is the subject of a separate Decision.

### Procedural matters

2. At the time of my visit the ground floor restaurant had been closed as a result of a legal dispute between the Appellant and the landlord. I was therefore unable to gain entry to the premises. At my unaccompanied visit I was unable to see the whole of the rear of the property from Adpar Street because of the location of the building immediately behind the appeal property. The Appellant and the Council were advised, that in the circumstances and without any knowledge of when, of indeed if, the Appellant would be able to grant access to the property I proposed to determine this appeal on the basis of the photograph attached to the notice and the various documents that had been submitted. Neither Party objected to this course of action.
3. From information received from the Appellant<sup>1</sup> it appears that the restaurant business has been sold and that the operation proposed at the appeal site in

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<sup>1</sup> Email dated 9 May 2017

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future is likely to be different from that undertaken previously. However, I have to determine this appeal as at the date of the notice, that is, 11 October 2016 and from what I saw on my visit and have read in the documents submitted.

### **Relevant planning history**

4. At some time in the past the appeal property was a retail shop. The upper floors are in residential use following grants of planning permission in 2008 and 2009<sup>2</sup>. Permission was granted in January 2012 for use of the ground floor as a restaurant<sup>3</sup> which included permission for a ventilation duct located within the chimney stack, rising to roof level. However, according to the Appellant, because of a number of constraints and/or design issues the Appellant did not implement the ventilation arrangements as approved but installed the ventilation system that is the subject of the notice.
5. The Appellant applied to regularise this alternative arrangement in January 2015<sup>4</sup> but the application was refused on 28 July 2016. The reason for the refusal was that it had not been demonstrated that the mechanical plant complied with noise criteria whilst the termination of the ducting below habitable room windows was a likely source of odour nuisance. No appeal was made against the refusal and the notice was issued.

### **The appeal on ground (a) and the deemed planning application**

6. In an appeal on ground (a) the Appellant is saying planning permission ought to be granted for the matter alleged in the notice, that is, the installation of an extract duct at the rear elevation of the building extending from ground floor level to second floor level.
7. From the reasons for issuing the notice, the main issue is the effect of the extract duct on the residential occupiers of the upper floors with regard to noise and odour.
8. The appeal property is a five-storey mid-terraced property on the western side of Edgware Road. The lawful use of the ground floor is a restaurant and the first to fourth floors comprise six residential units. To the rear of the appeal building is a residential care home which directly faces the rear elevation of the appeal building. The property is within the Secondary Frontage of the Church Street/Edgware Road District centre and it also lies within the North Westminster Economic Development Area.
9. The Appellant has produced a number of reports. The first is a Building Regulations Part E Sound Insulation Test Report dated October 2011 and refers to sound insulation for the residential units from the restaurant. The second is dated November 2011 and is an environmental noise survey in respect of a new kitchen extract fan. However, from the description and the plans this is the extract fan that was proposed, that is, a ventilation duct inside the chimney stack; the report does not relate to what has actually been installed. These reports were also submitted with the January 2015 retrospective application but they do not provide information about the duct that is the subject of the

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<sup>2</sup> Refs 08/10156/FUL (first floor) and 09/06734/FUL and 09/09120/ADFULL (second, third and fourth floors)

<sup>3</sup> Ref 11/04641/FULL

<sup>4</sup> Ref 15/00475/FULL

notice. In the circumstances neither of these reports is of any assistance to me and I give them no weight.

10. A Noise and Odour Report dated November 2016 presented the findings of noise and odour survey assessments into the effect of the flue on the surrounding residential flats. However, I note that the noise assessment was undertaken in accordance with British Standard 4142:2014 'Methods for rating and assessing industrial and commercial sound' (BS4142) which seeks to establish whether the plant or machinery is likely to cause a statutory nuisance pursuant to s.80 of the Environmental Protection Act 1980 not whether the duct complies with Council policy and standard planning conditions for plant a machinery. The noise assessment is not helpful to me in, among other things, that it did not use the lowest measured background noise level during the operating hours as required by policy but used the representative background noise level as advised by BS4142 which is not the lowest; it did not assess the noise impact on the residential occupiers above the restaurant immediately adjacent to the unauthorised duct but on occupiers some 10m distant; and it relied on manufacturer's data for the kitchen extract fan and measured data for noise breakout from the duct but no measurements were taken or manufacturer's data referred to in relation to the kitchen supply fan which the Council officers considered to be the primary noise source when they took measurements in July 2015<sup>5</sup>. I therefore give very limited weight to the noise assessment.
11. With regard to odour, I accept that there have been no complaints but I note that the Report states that kitchen air is being extracted through an unabated opening at ground floor level and that the extract duct is not being used which appears to me to defeat the objective of having an extractor duct. It also means that no proper assessment of odour could have been carried out. I understand from the Council that kitchen air should be extracted through an extract duct that terminates at least 1m above eaves or above adjacent properties. In this case the existing extract duct (whether in use or not) only extends to the second floor level and there is a residential occupier in the mansard roof directly above the termination flue. In the circumstances I am not persuaded that the extractor duct would not have an unacceptable adverse effect on residential occupiers with regard to odour.
12. I appreciate that the appeal property is in an area where there is, at times, significant background noise and that there are many restaurants in the vicinity. I also note that a nearby air conditioning unit is noisy but I am informed by the Council that it is immune from enforcement. In addition, although the visual impact of the extractor fan is not stated as a reason for issuing the notice I note that extractor duct is not visible from street but it is from the properties facing the rear and as such is an unattractive feature in the townscape.
13. However, these matters do not outweigh my conclusion that the extract duct has a harmful effect on the residential occupiers of the upper floors with regard to noise and odour. I also conclude that the installation of the extract duct is in breach of Strategic Policies S29 and S32 of the Westminster City Plan and saved Policies DES5, ENV6, ENV7 and TACE9 of Westminster City Council

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<sup>5</sup> The Officer's delegated report in 15/00475/FULL Appendix 1

Unitary Development Plan which seek to ensure, among other things, that development does not have an adverse effect on residential amenity as a result of noise and smells.

14. The appeal on ground (a) fails and the deemed planning application is refused.

**The appeal on ground (f)**

15. In an appeal on ground (f) the Appellant is saying that the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control or to remedy any injury to amenity which has been caused by any such breach.

16. The Appellant submits that any unacceptable noise and/or odour impacts could be mitigated without requiring the removal of the duct but by either an adjustment, a redesign or by being repositioned. However, the Appellant has not provided any details of how these matters could be undertaken. Therefore any 'lesser steps' could not be drafted to the required degree of certainty and specificity in order for them to accord with s.173(3) of the 1990 Act.

17. The purpose of the requirements is to remedy the breach or remedy any injury to amenity caused by the breach<sup>6</sup> and in the circumstances of this appeal I consider that the requirements fulfil the statutory purpose.

18. The appeal on ground (f) fails.

**The appeal on ground (g)**

19. An appeal on ground (g) is on the basis that the period specified for compliance with the notice falls short of what should reasonably be allowed.

20. The Appellant notes that the restaurant business would be adversely affected by the removal of the ventilation arrangements and that there is no obvious urgency and he seeks a period of six months to provide for alternative arrangements, taking into account the possible need for further consents.

21. Whilst I accept that alternative arrangements may be necessary, the period for compliance relates to the actual works required. These are, in essence, to remove the extractor duct and make good any damage. These works are not extensive or onerous and I consider that three months is a reasonable period of time in which they could be undertaken.

22. I have mentioned above that the restaurant is currently closed. In these circumstances, if the Appellant should have problems with regard to the time for compliance I remind the Council of its powers in s.173A(1) of the 1990 Act to extend the period for compliance.

23. The appeal on ground (g) fails.

**Conclusions**

24. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

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<sup>6</sup> S.173(4) of the 1990 Act

**Decision**

25. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

*Gloria McFarlane*

Inspector