The Planning Inspectorate

Appeal Decision

Site visit made on 26 June 2017

by Jonathan Tudor BA (Hons), Solicitor (non-practising)

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

Decision date: 04 August 2017

Appeal Ref: APP/X5990/W/17/3172553
91 Edgware Road, London W2 2HX

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Ms H Gordon against the decision of City of Westminster Council.
- The application Ref 16/07352/FULL, dated 2 August 2016, was refused by notice dated 27 September 2016.
- The development proposed is change of use to Sui Generis Class A1/A5.

Decision

1. The appeal is dismissed.

Procedural Matter

2. The Council has submitted an updated version of *'Guidelines for the control of odour from commercial kitchen extract ventilation systems'* (the Guidelines)[1] with the appeal documentation. Although updated after the Council determined the application, a previous similar version was cited during the application process. Subsequently, according to the Council, the latest version was also sent to the appellant. Therefore, the appellant has had the opportunity to comment on the Guidelines during the course of the appeal.

3. The Council advises that Policy ENV 6 of the Unitary Development Plan[2], which relates to noise disturbance, was referred to in error in the decision notice.

Main Issue

4. The main issue is the effect of the proposed development on the living conditions of neighbouring occupiers, with particular regard to cooking odours.

Reasons

5. The appeal site is a ground floor commercial premises located within a row of retail and other commercial outlets along Edgware Road. Residential flats are located immediately above. The existing shop is relatively small, long and narrow with seating for about 4 or 5 people.

6. A change of use is proposed from a purely Class A1 retail use to a mixture of A1 and A5 use, which would fall within use class sui generis. The purpose would be to enable a mixed use as part hot food takeaway (A5), and use as a milkshake/juice bar and ice cream parlour (A1). The appellant advises that

[1] December 2016 Revision 1
[2] Adopted January 2007

there would be two upright shawarma grills on which lamb and chicken would be cooked.

7. Policy S29 of Westminster's City Plan (WCP)[3] advises that the Council will resist proposals that result in an unacceptable material loss of residential amenity and that development should aim to improve the residential environment. Saved policy TACE 9 of the UDP indicates that permission will only be granted for entertainment uses, which applies to the appeal site, where the proposed development has no adverse effect upon residential amenity or local environmental quality as a result of, amongst other things, smells.

8. The shawarma grills are already in place and are located at the front of the premises adjacent to the pavement and road. Although there is a fixed glazed window, the doorway of the shop is open to the street. The application proposed opening hours of 1200 to 0200 every day but appellant has indicated a willingness to close earlier at 2300, which could be secured by condition. Nevertheless, there is concern that the cooking odours from the operation of the grills would adversely affect the living conditions of the occupiers of neighbouring properties, particularly the residential flats immediately above the premises.

9. Above the grills is an extract ventilation system, installed over four years ago, and intended to disperse cooking heat, fumes and odours. Whilst the appellant submits that it is a 'state of the art' system, the Council considers it to be inadequate and unsuitable as the discharge would be at low level through a louver grille just above the entrance. That would, as is clear from the submitted plans and was evident on my site visit, be only a few metres below the windows of habitable rooms of the flat directly above.

10. The Council's Environmental Health Officers (EHOs) have objected to the extraction arrangements citing the Guidelines. Whilst the Guidelines are not a formally adopted supplementary planning document, they refer to national guidance published by DEFRA[4] and are used by the Council's EHOs in support of adopted development plan policies, which aim to protect the living conditions of neighbouring occupiers.

11. Those Guidelines are clear and advise that for sui generis use premises involving a substantial hot food element, either a scheme of full height kitchen extract discharge or an approved recirculation scheme is necessary, in order to prevent loss of amenity from odour. As the extraction system already in place in this appeal discharges externally, the relevant requirement would be for a full height discharge, at least one metre above the roof eaves and above the height of nearby buildings. The low level position of the discharge at the appeal premises, just below the windows of the flat above, fails to meet that requirement. The Guidelines advise that EHOs will recommend refusal in those circumstances.

12. A detailed rationale for the 'full height' discharge requirement is provided within the Guidelines. It is submitted that a discharge point at the full height of a building is more likely to avoid adverse effects on living conditions *'as no odour reduction system discharging at low level completely eliminates all odours.'* Moreover, that a full height discharge gives greater flexibility to

[3] November 2016
[4] Guidance on the Control of Odour and Noise from Commercial Kitchen Exhaust Systems

accommodate a full range of food and cooking styles, without need for it to be further adapted. Low level odour reduction systems, it says, incorporate numerous elements including processes and filtration with generally higher maintenance requirements and costs.

13. I give significant weight to the professional assessment and experience of the Council's EHOs, whose job it is to regularly consider and take enforcement action against harm to living conditions. Their supporting Guidelines would appear to have been developed on the basis of their experience. I also note similar concerns about cooking odours expressed by a neighbouring resident. It seems to me reasonable to adopt a precautionary approach when considering proposals which could have a significant adverse effect on the living conditions of neighbouring occupiers, which WCP and saved UDP policies aim to protect.

14. Whilst the windows of the flats above are set back slightly from a ledge or protruding aspect of the wall, just above the fascia sign of the shop, I do not see that it would provide any meaningful protection from odours emanating from the appeal premises. Although Edgware Road is a busy street with traffic fumes, it is not unreasonable for residential occupiers to be able to open their windows in warm weather, as they had on the day of my site visit, without being subject to significant cooking odours from just below.

15. The appellant has provided a brief report from 'Purified Air' confirming the specification of the extraction system. It indicates that a 'very high level of control' is required, because of such factors as the low level method of dispersal, and says that the system could be compliant. The Council, based on its experience and as indicated in its Guidelines, finds that such systems are highly reliant on proper maintenance, also referred to in Purified Air's report, to function effectively and do not eliminate all odours. My concern is that even residual odours could have a significant adverse effect on the living conditions of the occupiers of the flat above because it is so close to the dispersal point.

16. A survey report from Kinsman Ltd confirms that the system is in good condition and properly installed. However, whilst that is favourable, its condition is not likely to have deteriorated since its installation because it appears to be agreed that it has not been in use. The appellant also advises that they have entered a maintenance contract, although no copy of it or any maintenance schedule has been supplied. Whilst a number of the above factors are positive, they do not overcome the Council's fundamental objection to the low level position of the discharge point, given the close proximity of windows of the residential flat above. It is that relationship that has swayed my judgement against the appeal proposal.

17. My attention has been drawn to a previous appeal decision[5] at the same site relating to a similar proposed change of use to a hot food takeaway, issued on 24 January 2013. That appeal was dismissed on various grounds but the Inspector referred, relatively briefly, to the issue of odour generation and considered that provided that the extraction system was well maintained and serviced, which could be secured by condition, it would be likely to adequately remove potential odours.

[5] APP//X5990/A/12/2180128

18. Whilst I note the Inspector's view, it is not clear to me from the evidence provided, whether the Council's Guidelines were in place at that time or what the views of the Council's EHOs were. As the appeal concerned a range of issues and was ultimately dismissed on other grounds, including a need to retain A1 uses, harm to character and appearance and the effects of waste storage, it is not apparent what specific evidence was presented with regard to the issue of odour generation.

19. I have already ascribed significant weight to the professional views and experience of the Council's EHOs together with the explicit advice contained in their recently updated Guidelines. Therefore, with the benefit of the evidence before me, I take a different view from the previous Inspector on the issue of the control of odours and whether it could be satisfactorily dealt with by condition in this case. In any event, I have decided the appeal on its own merits on the basis of the evidence before me.

20. There are some other premises on Edgware Road with low level extraction, but the Council advises that the examples given by the appellant were not granted planning permission and many have been subject to enforcement investigations. The Council says that in the part of Edgware Road between Connaught Street and Kendal Street, where many of those premises are located, the buildings are designed historically with that type of extraction level, which has led to difficulties in effective enforcement action. In contrast, according to the Council, in the section of Edgware Road which includes the appeal site, between Kendal Street and Burwood Place, there are far fewer units with extraction systems at low level. The Council details the difficulties encountered where conditions relating to extraction units imposed on change of use applications have not been discharged. Enforcement action is by definition an 'after-the-event' process and is ultimately discretionary.

21. I give weight to the practical experience of the Council in taking effective enforcement action on these issues in the same area. Conditions need to be reasonably enforceable. It is also noted that, unlike some premises on other parts of Edgware Road, the extraction unit at the appeal premises was, according to the appellant, installed in 2011 rather than having been in place historically. Therefore, given that background, I do not agree that the existence of similar extraction systems at other premises, many without planning permission and others not necessarily in accord with planning conditions, legitimises the appeal proposal.

22. The appellant cites an appeal in the London Borough of Camden at 2 England's Lane, Belsize Park[6], as an example of a case where a low level extraction unit was accepted. However, although I do not have full details or plans of that proposal, the decision indicates that there were commercial premises immediately above the appeal site kitchen rather than residential. Windows serving habitable rooms are referred to in nearby elevations but not in such close proximity as in the appeal before me. There was also an existing low level extraction system serving a nearby café/restaurant which had not generated complaints.

23. Moreover, in the particular circumstances of that appeal, the Council's EHOs were satisfied that the effects of odour would be suitably mitigated by the proposed low level extraction system. It is clear from paragraph 12 of that

[6] APP/X5210/A/13/2202108

decision that, although that Council's Planning Officers took a different view, the Inspector gave weight to the view of the EHOs given the lack of credible evidence to bring their professional opinion into question.

24. In the appeal before me the professional view of the Council's EHOs and Planning Officers is that such a system would not be suitable, given the proximity of the residential dwelling immediately above. That approach is supported by their bespoke Guidance. Therefore, whilst there are similarities, I do not consider that the 2 England's Lane appeal represents a direct comparison to the circumstances of this appeal. If anything, it supports an approach which places weight on the views of EHOs. Paragraph 14 of that decision refers to another case in the same Borough where a low level extraction system was dismissed on appeal. It is clear, therefore, that such decisions depend on the particular facts and the characteristics of a site. In any case, I have decided the appeal on its own merits.

25. The appellant advises that the number of hot food items on the menu is limited but, as the majority of the other items are juices and milkshakes, it is reasonable to think that the hot food element would form a significant proportion of sales. Shawarma grills are generally cooking permanently during opening hours and would, therefore, be producing levels of odour and heat continually. Consequently, that substantial hot food element means that it does need to comply with the Guidelines.

26. Planning permission for a change of use from Class A1 to a Class A3/A5 grill at 14 Market Parade, Havant[7] is referred to, in the appellant's Planning Statement, as an example of a similar scheme. The Officer's Report assessing that proposal recognises that once permission is granted, in the future different types of hot foods could be cooked, which could require the type of extraction system appropriate to be reconsidered, which is also the case in this appeal. Therefore, conditions were imposed strictly limiting the types of foods that could be cooked and sold.

27. Whilst that approach has been considered, the Guidelines, cited in the appeal before me, advise that: *'Restricting food types and cooking methods in planning conditions has proved to be impracticable because of the possibility of changes of proprietors of food premises and styles of cuisine offered – once such a use is granted it cannot be rescinded or reviewed.'* No plans relating to the 14 Market Parade, Havant application have been provided. Therefore, although residential flats above are referred to, the layout and their proximity to the extraction system dispersal point is not clear. Moreover, the extent of the conditions felt necessary to allow that proposal could be considered unduly restrictive in terms of the National Planning Policy Framework's (the Framework) requirement of reasonableness.

28. Other appeal decisions were submitted by the appellant at the application stage, relating to 61—69, 71 and 73 Edgware Road[8], 193 Edgware Road[9] and 101 & 103 Edgware Road[10] but they concerned various matters focussed on enforcement issues about unauthorised mixed use, the provision of outdoor tables and shisha smoking. Therefore, whilst I have considered them, I do not

[7] APP/15/2069
[8] APP/X5990/C/14/2221704 & 2221706
[9] APP/X5990/A/13/2200913
[10] APP/X5990//14/2211786

find that they are directly relevant to the reason for refusal in the appeal before me.

29. The appellant has expressed a willingness to close at 2300 rather than the 0200 closing time indicated in the original application. Whist that is positive, it would still mean that the shawarma grills could be operated from 1200 to 2300. Therefore, there would still be the potential for cooking smells to emanate from the premises through much of the day and evening, during periods when occupants of the dwellings immediately above would be likely to be at home. Consequently, a condition securing such hours would not adequately mitigate the harm.

30. The Human Rights Act 1998 enshrines into UK law most of the fundamental rights and freedoms contained in the European Convention on Human Rights (ECHR). The appellant refers to an entitlement to the peaceful enjoyment of her property without undue interference and suggests that encompasses a right to trade as an A5 takeaway. Article 1 of the First Protocol to the ECHR refers to an entitlement *'to the peaceful enjoyment'* of possessions, which would include land and property. However, it is a qualified right. Article 1 goes on to state that: '*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest…'.*

31. Planning law which controls the use of property does to an extent interfere with that entitlement and Article 1 is, therefore, engaged. However, Article 1 explicitly accepts that such interference by the State to control the use of property, in accordance with the general interest, is acceptable. In this appeal, I have considered the effect of a refusal of the change of use, which would mean that the premises could not sell hot food prepared there. However, the site would retain its existing lawful A1 retail use and various forms of business could be operated from it. I have balanced that interference against the wider public interest of ensuring that the living conditions of adjoining residents are not adversely affected by the proposed change of use, in accord with development plan policies. I have also considered whether harm could be sufficiently mitigated by condition and share the Council's view that, in this case, it could not.

32. A precautionary approach is, in my view, reasonable and appropriate where living conditions are at issue. Overall therefore, the factors above lead me to conclude that the proposal would harm the living conditions of neighbouring occupiers, with particular regard to cooking odours. It follows that the proposal conflicts with policy S29 of WCP and policies TACE 9 and ENV 5 of the UDP which comply with the Framework and, amongst other things, seek to protect the living conditions of neighbouring residents and ensure that where ventilation systems are required, the design and positioning minimises the effect of emission of odours.

Conclusion

33. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be dismissed.

Jonathan Tudor

INSPECTOR