
Appeal Decision

Site visit made on 25 July 2019

by Sandra Prail MBA, LLB (Hons), Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 12 August 2019

Appeal Ref : APP/L3815/C/18/3212527

Wildwood, 30 Southgate, Chichester, West Sussex, PO19 1DP

- 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 Tasty plc against an enforcement notice issued by Chichester District Council.
- The notice was issued on 16 August 2018.
- The breach of planning control as alleged in the notice is without planning permission non compliance with condition 8 of planning permission reference CC/96/01257/COU (the Permission) which states that 'the store/covered yard and store/wc areas to the rear of the premises as shown on the permitted plans shall be retained for these purposes in perpetuity and shall not be used for any other purpose whatsoever including any additional restaurant seating area.
- The requirements of the notice are to i) discontinue the use of the ground floor store/covered yard and store/wc areas at the rear of the premises as a kitchen; and ii) remove the kitchen extraction system, ductwork and cooking equipment from the store/covered yard and store/wc areas.
- The period for compliance with the requirements is four 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 succeeds in part and the enforcement notice is upheld as varied in the terms set out below in the Formal Decision.

Ground (a) appeal and deemed application

Main Issue

1. Planning permission reference CC/96/01257/COU (the Permission) includes a condition (condition 8) preventing the use of land at the rear of the premises for any purpose other than as a store/covered yard and store/wc. The main issue in this appeal is the effect of the use of this land as a kitchen without compliance with condition 8 on the living conditions of occupiers of the neighbouring residential property with particular regard to noise and disturbance and cooking odours.

Living conditions

2. The appeal site is a Grade II Listed Building located within the Chichester City Conservation Area. To the rear of the building is a single storey extension with door openings onto Old Market Avenue. The rear extension shares a boundary

- with a two storey dwellinghouse (Winterbourne House, 2 Old Market Avenue). The surrounding area is a city centre location with a mix of commercial uses.
3. The development plan (including the Chichester Local Plan) mirrors the National Planning Policy Framework (the Framework) in seeking to ensure that development respects its surroundings. Policy 47 of the Local Plan provides that development shall conserve and enhance the historic environment. The appeal site is located within a Conservation Area which means that special attention shall be paid to the desirability of conserving or enhancing the character or appearance of the area.
 4. The Permission is for the change of use of the ground floor from A1 shop to A3 restaurant. Condition 8 of the Permission provides that the store/covered yard and store/wc areas to the rear of the premises as shown on the permitted plans shall be retained for these purposes in perpetuity and shall not be used for any other purpose whatsoever including any additional restaurant seating area'. The reason given for the imposition of this condition is 'in the interests of amenity'. The Council's concern is the harm to the living conditions of the residential neighbour by reason of noise and disturbance and cooking odours by virtue of the use of the rear extension as a kitchen in breach of condition 8.
 5. I note that the Appellant has always intended to use the area as a kitchen and was not aware of condition 8 but these are not matters that weigh heavily in favour of the appeal. I note that the approved plan the subject of listed building consent Ref. 14/03075 for internal alterations annotates the covered yard area as 'kitchen' but this does not provide planning permission for its use as a kitchen.
 6. There is reference before me to the potential lawfulness of the kitchen extract system but there is no ground (d) appeal and this appeal does not concern an application of a certificate of lawful use or development.
 7. The areas the subject of condition 8 are in close proximity to the residential neighbour on Old Market Avenue. I have before me the engineering report commissioned by the neighbour and submitted to the Council in connection with a statutory nuisance complaint. That report records a low frequency total 'drone' in the main bedroom during the operating hours of the restaurant, a 'low roar' in the roof space and noise in the courtyard garden. It comments that windows will not be able to be opened without experiencing cooking smells. The Council's Environmental Health response to a retrospective application for change of use of the rear extension to a kitchen identified a history of complaint about noise and odour and concluded that whilst there may be engineering solutions to these issues insufficient information had been provided of acoustic and odour abatement to demonstrate that it would not impact on the amenity of neighbouring premises. The Appellant has not been able to secure access to the neighbouring property in order to provide a noise survey but has proposed an acoustic wall and extract system upgrades as part of section 78 applications which are not the subject of this appeal. The details of these mitigation measures are not before me.
 8. I have no reason to doubt the neighbour who complains of disturbance which affects her day to day enjoyment of the domestic property including not being able to sleep in her bedroom due to noise and vibration from use of the land as a kitchen. There is no quantitative evidence before me to cast doubt on her engineer's assessment. Whilst the legitimate expectations of residents in a city

centre location will be different to those in a quiet residential area the noise and odours described adversely affect the day to day enjoyment of the dwellinghouse to an unreasonable degree. Whilst I recognise that the Council has stated that there may be appropriate engineering solutions and that the Appellant believes this to be the case there is nothing before me to enable me to conclude with any certainty that effective mitigation is possible.

9. On the basis of the evidence before me I conclude that due to the close proximity of the rear extension to its residential neighbour removal or variation of condition 8 to permit use as a kitchen would cause undue harm to the living conditions of the neighbouring residential property with particular regard to noise and disturbance and cooking odours contrary to the development plan and the Framework.
10. I have considered whether conditions could overcome the identified harm. I have taken into account the Planning Practice Guidance. I have considered the conditions proposed by the Council. None is proposed by the Appellant.
11. If a mechanical ventilation scheme was able to prevent the transmission of noise and vibration between the appeal site and the neighbouring dwellinghouse I consider that the identified harm could be overcome. But there is insufficient evidence before me to enable me to ascertain whether this is a plausible and practical solution. It is not appropriate for me to impose such a condition without being satisfied that it is reasonably capable of being satisfied. I consider that a condition restricting the hours of operation of the use of the rear extension as a kitchen would be reasonable and necessary but without a ventilation solution it would not make the development acceptable.
12. For the reasons given above the appeal on ground (a) does not succeed and planning permission is refused on the deemed application

Ground (f) appeal

13. This ground of appeal is that the steps required to comply with the notice are excessive.
14. There are two purposes which an enforcement notice can seek to achieve. The first is to remedy the breach of planning control and the second it to remedy the injury to amenity caused by the breach. In this case the steps require discontinuance of the use and therefore it seeks to remedy the non-compliance with condition 8 of the Permission. I consider that no lesser steps would secure compliance with the purpose of the notice.
15. The Appellant argues that a solution to the Council's concerns will be delivered by the determination of a section 78 appeal. But I cannot speculate as to the outcome of any such appeal. I have no information before me as to the content or timescale for determination of any such appeal. No lesser steps are proposed.
16. I conclude that the requirements of the notice are not excessive and the ground (f) appeal does not succeed.

Ground (g) appeal

17. This ground of appeal is that the period for compliance is unreasonably short. The notice provides for a four month compliance period. The Appellant argues

that six months is appropriate to enable works to be undertaken to convert the first floor preparatory kitchen to a full kitchen and to secure appropriate permissions.

18. I have balanced competing interests. The private interest of the Appellant in running a business and the public interest in bringing the identified harm to an end without unnecessary delay. The steps required by the notice are not specialist or complex but I recognise the planning necessary to mitigate any adverse impact on customers. I therefore find that six months strikes an appropriate balance and I shall amend the notice accordingly.
19. For the reasons given I conclude that a reasonable period for compliance would be 6 months and I am varying the enforcement notice accordingly prior to upholding it. The appeal under ground (g) succeeds to that extent.

Formal Decision

20. The appeal is allowed on ground (g) and it is directed that the enforcement notice be varied by the substitution of 6 months as the period for compliance. Subject to this variation 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.

S. Prail

Inspector