



Appeal Decision

Site visit made on 12 September 2019

by Andrew Dale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 October 2019

Appeal Ref: APP/G5750/C/18/3211700

Land at Warehouse W, Western Gateway, Canning Town, London E16 1BD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
 - The appeal is made by Servest Arthur McKay Limited (formerly Arthur McKay & Co. Ltd) against an enforcement notice issued by the Council of the London Borough of Newham.
 - The enforcement notice was issued on 17 August 2018 under ref. 17/01072/ENFC.
 - The breach of planning control as alleged in the notice is: *"Without planning permission the erection of an air conditioning plant."*
 - The requirements of the notice are to:
 - "1. Demolish the air conditioning plant (as shown in the approximate location edged in blue on the attached plan, and as shown edged in red on the plan attached at Appendix 1).*
 - 2. On completion of step 1 above, remove all materials and debris from the site."*
 - The period for compliance with these requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2) (e) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice be varied, following the limited success of the appeal on ground (g), by altering the text **"one month"** to **"3 months"** in paragraph 5 as the time for compliance.
2. Subject to this variation, the appeal is otherwise dismissed and the enforcement notice is upheld.

Background

3. Warehouse W is a grade II listed building and comprises a 4-storey former warehouse, dating from 1860-1865 and constructed of bricks and slates. It overlooks Royal Victoria Square and lies adjacent to the ExCeL convention and events centre. There are flats on the upper floors, whilst the ground floor includes the London offices of the appellant company, the main access to which is through a contemporary glazed extension which has been added to the eastern side of the original building. The enforcement notice acts against an air conditioning plant which has been installed on the roof of this extension to serve those offices.
4. A retrospective planning application (ref. 18/01482/FUL) for the *"Retention of replacement air conditioning plant serving the existing ground floor of Warehouse W"* was refused on 17 July 2018 for broadly similar reasons to those outlined in paragraph 4 of the enforcement notice.

5. The appellant sought pre-application advice on 7 December 2018 in order to overcome the reasons for refusal of planning application ref. 18/01482/FUL. This was based on a proposal which showed amendments to the configuration of the air conditioning plant, upgrading of the acoustic mitigation measures and the installation of acoustic screening. The Council officer's response of 28 February 2019 to the submitted details was positive and indicated that the matters relating to neighbouring residential amenities and the heritage interests of the listed building could be resolved, subject to the formal determination of any planning application. No update on this position was provided in the appellant's final comments of 24 May 2019. I have therefore approached this appeal case on the basis that planning permission has not yet been obtained for an alternative installation of air conditioning plant.

The appeal on ground (e)

6. Ground (e) arises where an appellant wishes to argue that copies of the enforcement notice were not served as required by section 172 of the 1990 Act as amended. This is one of the legal grounds of appeal and the burden of proof falls on the appellant to make out the case.
7. The key issue is whether the notice was served properly on the owner and on the occupier of the land to which it relates and on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice. If it was not served properly, the test is whether anyone with an interest in the land has been substantially prejudiced by the failure to serve a copy of the notice on them.
8. Section 176(5) of the 1990 Act as amended gives the Secretary of State or the appointed Inspector power to disregard any failure to serve the notice on anyone as required, if neither the appellant nor the person concerned has been substantially prejudiced by the failure to serve him or her.
9. The appellant company has a lease of part of Warehouse W. An appeal was lodged on behalf of the appellant company in good time. Nonetheless, the gist of the ground (e) appeal is that the Council failed to take reasonable steps to identify all owners of the building and potential mortgagees and thereby effect proper service. The Council's position is that it conducted HM Land Registry searches and Council Tax record searches and studied other records it held prior to the issue of the enforcement notice. The Council maintains that the notice was served on all relevant parties it found in its search, listed on page 5 of the notice as: Circle One Ventures Limited (incorporated in Gibraltar); Mr Adrian Davison at the appellant company in Warehouse W; and the owner/occupiers(s) at Warehouse W.
10. The HM Land Registry title number EGL467492, appended to the appellant's grounds of appeal, contains a schedule of notices of leases on pages 3-5 and the appellant says that the Council should have served the enforcement notice "... by reference to the owners of this title as well as each of the titles listed therein."
11. The ownership and leasehold structure for Warehouse W appears to be somewhat complex and titles appear to be registered under various numbers.

For example, the "Superior Lease", dated 20 April 2001, is registered under title EGL422814, as referred to on page 1 of the register of title submitted by the appellant. However, neither that title document nor any others, apart from the one with ref. EGL467492, has been put before me. I do not know what HM Land Registry records the Council consulted.

12. I note that the appellant has not objected to the service of the notice on Circle One Ventures Limited (incorporated in Gibraltar) yet I cannot identify that company on the register of title relied upon by the appellant. The relationship between that company and the proprietor of the title absolute (Warehouse W Residence Limited) set out in the submitted document is not clarified by the appellant and it has not been made sufficiently clear that the Council was incorrect to serve the enforcement notice on the former company and not on the latter. No representations have been sent or forwarded on from that latter company to declare that an appeal would have been made if they had been served with the enforcement notice.
13. The Council accepts that the enforcement notice was not served directly on the individual owners/occupiers of the many flats in Warehouse W listed on pages 3-5 of HM Land Registry title number EGL467492. The Council's opinion was not unsound. It is not easy to see how the owners/occupiers of those flats could be said to be substantially prejudiced by the failure of service. They have no direct interest in the air conditioning plant and a good number of them have complained to the Council about the plant. None of them draw any benefits from the plant which serves the ground floor offices. Moreover, insofar as I am aware they were notified about the appeal against the enforcement notice and had an opportunity to make written representations about the appeal. The occupiers of 2 of the flats have responded and it is little surprise to find that there was no mention of a missed opportunity to appeal against the enforcement notice.
14. So on balance, this is a case where I judge that, even if there has been a failure of service in accordance with section 172, I am satisfied that this has not caused substantial prejudice to the appellant or any other person or company and I exercise my power to disregard it.
15. In the light of all this, the appeal on ground (e) fails.

The appeal on ground (g)

16. This ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance given in the notice is one month. The appellant seeks a period of 12 months.
17. The appellant's case for that request ranges over various factors: the importance of the subject plant for air conditioning, heating and ventilation in creating the proper working atmosphere for about 70 staff and in cooling the IT equipment upon which the company is heavily reliant; the difficulties of providing alternative temporary solutions to heating, cooling and ventilation; further time for an alternative scheme to be agreed with the Council; the need to relocate the business if such a permanent alternative solution cannot be found; and the engineering challenges involved in the removal of the air

conditioning plant which is likely to include the use of a crane and suitable expertise, with a substantial lead-in time.

18. I attach some weight to all the factors advanced by the appellant. They are well argued and pertinent. That said, I have to have due regard to the reasons for issuing the notice and to the complaints the Council has received, particularly from residents within the same building concerning noise, disturbance and vibration arising from the operation of the air conditioning plant. In line with the advice at paragraph 58 of the National Planning Policy Framework, last updated in February 2019, effective enforcement is important to maintain public confidence in the planning system. I also note that the appellant may well be more advanced in securing an alternative development that might be acceptable to the Council than is indicated in the appeal representations.
19. In all the circumstances and on the evidence available to me, I am not persuaded that the period of 12 months sought by the appellant is justified as it would be tantamount to the grant of a temporary planning permission for development that is the cause of planning harms. On the other hand, a compliance period of one month would barely give time for the safe removal of the subject plant and does not offer sufficient time for the submission and determination of a planning application for an alternative scheme. I judge that a period of compliance of 3 months would be a more proportionate response to the breach of planning control that has occurred. It would strike the appropriate balance between the competing private and public interests in this case without placing a disproportionate burden upon the appellant company.
20. However, should any unforeseen circumstances arise and the appellant is able to convince the Council that a longer period is necessary for whatever reason, the Council is plainly aware that it has the discretion to extend the period for compliance with the notice, even after this appeal decision, under the provisions of section 173A (1) (b) of the 1990 Act as amended.
21. In the light of all this, the appeal on ground (g) succeeds to a limited extent and the period for compliance with the notice has been varied to 3 months.

Andrew Dale

INSPECTOR