



Appeal Decision

Site visit made on 2 October 2019

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 October 2019

Appeal Ref: APP/U5360/C/18/3212450

Land at 19 Hackney Road, London E2 7NX

- 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 Angelo Turco of Johnny Take UE against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The enforcement notice was issued on 21 August 2018.
 - The breaches of planning control as alleged in the notice are:
 - A) The material change of use of the ground floor and basement of the property from retail (Class A1) to a restaurant (Class A3);
 - B) The erection of a flue on the southern side of the rear elevation of the property, (extending onto the mansard roof);
 - C) The installation of a metal flue on the roof of the rear of the property (as seen on the photograph 1).
 - The requirements of the notice are:
 - 1) Cease the use of the ground floor and basement of the property as a restaurant;
 - 2) Remove all fixtures and fitting facilitating the restaurant use;
 - 3) Remove the flue located on the southern side of the rear elevation of the property (and extending onto the mansard roof) and all its fittings;
 - 4) Remove the metal flue on the roof of the rear of the property (as seen on the photograph 1 appended to this notice) and all its fittings;
 - 5) Make good damage resulting from compliance with other requirements of the notice;
 - 6) Remove all waste, materials, equipment, and debris from the property resulting from compliance with the requirements in paragraphs 5(1) to (5) of this notice.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (f) of the Town and Country Planning Act 1990 as amended (the Act).
-

Decision

1. It is directed that the enforcement notice is varied by the deletion in section 6 of the words "Three (3) months" and their replacement with "Six (6) months". Subject to this variation, the appeal is dismissed and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

2. The appellant has confirmed that as well as the grounds pleaded initially, a ground (g) appeal is also requested, that the period for compliance falls short of what should reasonably be allowed. The Council has had an opportunity to comment upon this and I will deal with the appeal on that basis as well.

Ground (a) appeal and the Deemed Planning Application

Main Issues

3. The Council agrees that the use of the premises as a restaurant is acceptable but the details of how the use operates or could potentially operate are of concern. With respect to those detailed matters, there are 2 main issues.
4. The first main issue is the effect of the use, with particular reference to the external extraction flues, upon the character and appearance of the area. In considering this main issue, I will pay special attention to the desirability of preserving or enhancing the character or appearance of the Kingsland Road Conservation Area (the CA). The second main issue is the effect of the change of use on living conditions within nearby residential properties with reference to activity and also the effects of the extraction system.

Character and appearance

5. The appeal site is within a busy part of north London and within a terrace of close-knit traditional properties. The ground floors of this terrace are largely in commercial use with I am told, residential properties above. There is a complex of offices and studios behind known as the "Perseverance Works" from where I had a view of the rear of the terrace including the appeal site.
6. The CA contains a variety of buildings and as well as similar traditional terraces and the large St Leonard's Church which dominates the junction of Hackney Road with Kingsland Road, there are also blocks of modern buildings. The character and appearance has clearly altered with the incorporation of modern buildings and changes explained in the CA appraisal as referred to by the appellant.
7. I could only see the external flue from the rear of the building, hence the need to enter into the grounds of the Perseverance Works. It is not clear how the flue referred to in section 3 (c) of the notice is connected to the rest of the system and I could not see it. The rear of the terrace is less ordered than the front. There is a variety of window openings and designs, various rainwater downpipes vertically and horizontally on the rear walls, various heights of mansard roofs and above those there are some protrusions such as aerials and other flues.
8. The shining metal flue ascends vertically at the rear of the building from ground floor of the appeal site up to the roof-top mansard and turns across the roof, kinking upwards, roughly at a right-angle next to a satellite dish and television aerial. At that high level, the flue is finished off with a bulbous fan which although is not prominent from the street-scene, can be clearly seen from the properties to the rear. The structure is also wider than the rainwater downpipes and stands much higher than other flues on the roof-scape. It is an alien looking feature, standing out even amongst the various functional additions at the rear of the terrace.
9. Planning permission has been granted previously which included alterations to a previous form of flue at the rear of this building. This was subject to an appeal decision in 2007 (ref APP/U5360/A/06/2024276). In that decision, which was under the provisions of S78 of the Act, the Inspector points out, it was not for them to determine whether the flue was authorised or not. That case also related to a minor alteration to that existing feature and additional

details of the painting or treating of the flue submitted pursuant to a planning condition imposed on that decision were not agreed. Furthermore, the Inspector in that appeal stated that the flue was prominent and unsightly but the appeal only related to minor alterations to it that would cause no material additional harm.

10. Whether or not that previous flue that was deemed to be harmful to the CA had been previously been authorised, it no longer exists and could not be re-constructed without further planning permission. It is not a fallback position and therefore has no weight in my consideration of the present flue which I have considered on its own merits as they apply at this time.
11. In relation to the first main issue, the external extract flue that I could see from the rear of the appeal site has a harmful impact upon the character and appearance of the area. The other part of the extraction system which I could not see has no obvious impact given its discrete location but I am unclear of the extent to which it is severable from the rest of the extraction system.
12. The development overall does not therefore comply with Policies 7.4 and 7.6 of the London Plan 2016, 24 and 25 of the Hackney Core Strategy 2010, DM1 and DM28 of the Hackney Development Management Local Plan, 2015 (DMLP). Although the harm to the significance of the CA in these respects would be less than substantial, from the evidence available I do not consider that there are sufficient public benefits to outweigh that harm. The development does not therefore comply with the advice set out in the National Planning Policy Framework.

Living conditions

13. The Council considers that the hours of the restaurant could be limited to prevent impacts from the comings and goings of customers upon nearby residents. I agree that this would be a way of adequately controlling that aspect of the use, in what is a busy urban environment.
14. The extraction system terminates above the roof level of the building although there are window openings at a high level. It is not clear from the submitted evidence whether the venting point is adequate to prevent smells from entering the nearby residential properties or whether the system adequately filters smells before they are vented. Some third parties do indicate that the development has caused some odour problems but it is not clear to what extent that is the case and some evidence contradicts that. Such a system also relies upon mechanical extraction which can cause noise and again there is evidence that this has caused some disturbance of nearby residents.
15. There may be a way of adapting or changing the system to ensure that it does not cause disturbance to or unacceptable smells for neighbouring residents. However, I have insufficient evidence to give me the confidence that these matters can be satisfactorily overcome by attaching conditions and I return to that matter below.
16. In relation to this main issue, although the hours of operation of the change of use could be controlled through a planning condition, I am concerned that the unauthorised extraction system has unacceptable impacts upon living conditions within nearby residential properties. This does not therefore comply with DMLP Policies DM2 and DM11.

Other matters

17. The appellant concedes that the change of use did require planning permission and no appeal is made on grounds (b) or (c). It is also accepted that the change of use granted by Article 3, Schedule 2, Part 3, Class C, of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) does not apply as that requires a prior approval process. The prior approval process requires an assessment of various matters including the siting, design or external appearance of facilities such as ventilation and extraction installations. The theoretical applicability in different circumstances of the permitted development right has little weight in my decision.
18. It has been very helpful to have an agreed Statement of Common Ground and there is some understanding between the main parties that the use could be accepted subject to conditional controls. However, I am dealing here with the development as alleged on the enforcement notice. It is not sufficiently clear that my concerns with the external flues could be resolved through the submission of further details to alter this current installation. To attach a planning condition which could result in a different form of development may also prevent nearby occupants from having their say about the altered development. On the other hand, to approve the use as alleged with conditions that may not be possible to comply with could negate the benefit of the planning permission. As such trying to resolve the problems by attaching planning conditions would be unreasonable.
19. I am told that the appellant did not install the flue and was not made aware of the Council's concerns when agreeing to take on the premises. This is unfortunate but this and the other matters above do not outweigh my conclusions on the main issues.

Conclusion on ground (a)

20. For the reasons given above and having regard to other matters raised, the appeal on ground (a) and the application for deemed planning permission fail.

The Appeal on ground (f)

21. The appeal on this ground is that the steps required by the notice to be taken or the activities required by the notice to cease, exceed what is necessary to achieve the purpose of the notice. The original grounds of appeal document suggests that requirements 2, 3 and 4 should be deleted but no reasoned justification is provided.
22. The notice has been drafted with the purpose as set out in s173(4)(a) to remedy the breach. I have not been provided with evidence to demonstrate that the steps can be reduced and whilst still achieving that purpose.
23. The appeal on ground (f) fails.

The Appeal on ground (g)

24. The appeal on this ground is that any period specified in the notice falls short of what should reasonably be allowed.
25. Further time is requested to enable the appellants to find alternative premises. Such restaurants are often located where there can be conflicts due to the proximity of residential premises. I can understand that finding suitable

premises in London without similar problems can be difficult. In the 3 months allowed for compliance it would be challenging to find suitable premises, move equipment and also get the business up and running again.

26. I have to weigh the justification for additional time for compliance with the impacts of the development. The development causes some harm as I explain within the ground (a) appeal above. This includes some effects upon nearby residents although I have no evidence to indicate that the degree of the impact is such that the existing short period is essential.
27. In these circumstances, I consider that 3 months is an inadequate time to comply with the requirements, to look at alternative solutions or find alternative premises. A period of 6 months would in my view strike a more proportionate and reasonable balance.
28. To this extent therefore the appeal on ground (g) succeeds.

Conclusion

29. For the reasons given above, I conclude that the appeal on grounds (a) and (f) fail but that the appeal on ground (g) succeeds. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

A Harwood

INSPECTOR