
Appeal Decision

Site visit made on 1 October 2019

by Paul Thompson DipTRP MAUD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31st October 2019

Appeal Ref: APP/X5990/W/19/3233910
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 Helen Gordon against the decision of City of Westminster Council.
 - The application Ref 18/10111/FULL, dated 27 November 2018, was refused by notice dated 29 January 2019.
 - The development proposed is the change of use from A3/A5 mixed use (sui generis) of Ground Floor Premises 91 Edgware Road, London W2 2HX.
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is the effect of the proposed development on the living conditions of occupiers of neighbouring residential properties and businesses, with particular regard to cooking odours.

Reasons

Background

3. A previous planning application¹ for the change of use of the ground floor of the building to a sui generis use, entailing A1 and A5 uses, was refused by the Council and unsuccessfully appealed² (the 2017 appeal). These decisions are reasonably recent and there have been no relevant intervening changes in planning policy. Furthermore, the appeal site, its environs and the substance of the appeal scheme before me are broadly the same to the previous appeal decision. This is therefore a material consideration of significant weight in my deliberations.
4. The earlier planning application³ for an identical use to that referred above, was also refused permission and unsuccessfully appealed in 2013⁴. However, the Inspector dismissed the appeal in relation to the retention of A1 uses, harm to the character and appearance of the area and from waste storage. These decisions are not therefore comparable with the appeal scheme before me and

¹ Ref 16/07352/FULL

² Ref APP/X5990/W/17/3172553

³ Ref 11/11969/FUL

⁴ Ref APP/X5990/W/12/2180128

have, in any case, been overtaken by the outcome of the more recent decision referred to above.

Living conditions

5. The appeal site is occupied by small commercial premises located at ground floor within a row of retail and other commercial outlets, including cafes and restaurants. Residential accommodation is situated immediately above the premises.
6. I am mindful that the temporary flexible use of the premises⁵ to a use falling within Class A3 (restaurants and cafés), which has been trading since 4 July 2018, will terminate on 12 June 2020. After this point the premises will revert to its previous use within Class A1 (retail). I also acknowledge that the Council has granted a Lawful Development Certificate⁶ for the shopfront, ventilation louvre and associated ventilation system within the building, as those works were immune from enforcement action.
7. The proposal differs from the existing temporary use in that it would also operate as a takeaway alongside the restaurant and on a permanent basis. Given that the ventilation system is critical to avoiding nuisance from odour, its suitability would determine whether the proposal would be acceptable. Moreover, the proposal would be served by the existing ventilation louvre that is situated only a few metres away from the windows of the residential accommodation above and the business premises to either side.
8. In determining the 2017 appeal, the Inspector had regard to national guidance published by DEFRA⁷ and the Council's own guidelines⁸ (the Guidelines). DEFRA's guidance has since been withdrawn⁹, so compliance with this document would no longer carry any weight. Although the Guidelines are not a formally adopted supplementary planning document, they are used by the Council's Environmental Health Officers (EHOs) in support of the application of adopted development plan policies in relation to proposals for commercial kitchens.
9. The Inspector for the 2017 appeal gave significant weight to the professional assessment and experience of EHOs on the basis that they regularly consider proposals for commercial kitchen extraction ventilation systems. They are also required to take enforcement action, in accordance with the Environmental Protection Act 1990, where there is harm to living conditions. Based on the evidence before me I have no reason to take an opposing view to the previous Inspector in this respect and I also afford the Guidance significant weight.
10. I am mindful that a high-level system may not necessarily be achievable for the appeal site. Although the Guidelines do not explicitly exclude the use of low-level ventilation, in such situations an approved recirculation scheme is required. However, this is likely to be permitted in limited circumstances, as the Guidelines suggest that 'no odour reduction system discharging at low level completely eliminates all odours.' Whilst the certification of the ventilation system provided by 'Purified Air' suggests that a very high level of odour

⁵ Ref 18/04021/TFU under Schedule 2, Part 4, Class D of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

⁶ Ref 18/08982/CLEUD

⁷ Guidance on the Control of Odour and Noise from Commercial Kitchen Exhaust Systems (2005)

⁸ Guidelines for the control of odour from commercial kitchen extract ventilation systems (December 2016)

⁹ Withdrawn by the government on 15 September 2017.

control can be achieved, the certification is based on compliance with the withdrawn DEFRA guidance, not the Guidelines.

11. I note that Edgware Road is a busy vehicular street with traffic fumes and commercial premises, but it is not unreasonable to expect that residential occupiers should be able to open their windows, particularly in warmer weather, without being harmed by significant cooking odours emanating from just below. Similarly, odour can also be a source of disturbance to those working within business premises. Based on the proximity of the low-level ventilation louvre with the residential and business premises, even residual odours could be a nuisance to the occupiers, particularly those above, as the windows are in very close proximity of the louvre.
12. Based on the evidence before me, it does not appear that the ventilation system has been altered since the 2017 appeal. In that decision, the Inspector found that the ventilation system would not be appropriate to facilitate the use of the appeal site for the intended use. I share the view with the previous Inspector that a precautionary approach is therefore reasonable and appropriate where living conditions are at issue. I also consider that the ventilation system would still not meet the requirements set out in the Guidelines in relation to the proposed development.
13. The appellant suggests that neither herself or the Council have received any complaints regarding nuisance from smells or odour from the A3 use, whilst it has been trading. However, concerns were raised during the consultation exercise undertaken through the planning application. Needless to say, the absence of such concerns would not outweigh the harm that I have identified above.
14. I have been referred to the use of planning conditions in order to address the implications of odour emanating from the premises. The appellant has advised that they have entered a maintenance contract with 'Purified Air'. Although I have not been provided with details of this or a maintenance schedule, in practice, a scheme of maintenance for the ventilation system could be secured by planning condition as it would be necessary, precise and therefore enforceable in the context of the guidance contained in Paragraph 55 of the National Planning Policy Framework.
15. However, I share the view of the previous Inspector that restricting the nature of food that could be sold from the premises, in the form of a personal permission, would not be reasonable and the Council has evidence that this will not be practicable. Moreover, the Guidelines advise that: 'low level discharging systems have to be bespoke designed for the particular food operation and...it is impracticable to restrict in planning conditions the operation precisely to what was applied for [as]...proprietors, food types and/or cooking methods regularly change.'
16. Similarly, due to the proposed operating hours, there would be the potential for cooking smells to emanate from the premises through much of the day and evening, during periods when occupants of the residential accommodation above would be likely to be at home. With this in mind, a condition securing the operation of the use in accordance with these hours would not adequately mitigate the harm that I have identified.

17. I have also been referred to two appeal decisions for developments including ventilation systems within the London Boroughs of Southwark¹⁰ and Camden¹¹; and to several situations where low level ventilation systems have been installed throughout other parts of London, including at the O2 Arena.
18. The Inspector for the 2017 appeal provided a robust justification to explain why the appeal in Camden did not represent a direct comparison to the circumstances of that appeal. Based on the evidence provided in relation to the appeal before me, I have no reason to come to a different view. There are, however, similarities between the Southwark and Camden appeals in that both Inspectors referred to the comments of the Councils' EHOs, particularly as they did not object to the nature of the ventilation systems proposed. This is not the case for the appeal before me.
19. I am not aware of the full circumstances behind the identified cases elsewhere in London so I am not able to consider their relevance to the appeal scheme before me. However, the aforementioned appeals would not be wholly comparable with the appeal scheme before me, except that the appeals support an approach which attributes great weight to the professional advice of EHOs. I have therefore determined the appeal scheme before me based on its own individual merits.
20. For the above reasons, I conclude that the cooking odours from the proposed development would have an unacceptably harmful effect on the living conditions of occupiers of neighbouring residential properties and businesses. Hence, the proposal would not accord with Saved Policies ENV 5 and TACE 9 of the City of Westminster Unitary Development Plan (adopted January 2007) (UDP); and Policy S29 of the Westminster City Plan (Revised November 2016) (City Plan). Together these policies seek to avoid proposals that result in an unacceptable material loss of living conditions, having particular regard to the arrangements to be made to prevent smells, including through the careful design and siting of ventilation exhausts.

Other Matters

21. I note that the proposed development would not require any additional alterations to the external appearance of the building and the Council has not raised any concern regarding the traffic or late-night activity associated with the proposed development. Furthermore, the fan associated with the ventilation system may have been tested and found to be compliant with the Council's guidance on noise. However, the absence of harm through these matters would not outweigh the harm that I have identified in relation to the nuisance that would be caused by odour from the proposed development.

Conclusion

22. For the reasons given above I conclude that the appeal should be dismissed.

Paul Thompson

INSPECTOR

¹⁰ APP/A5840/A/11/2161709 - 8 Redcross Way, London SE1 9HR

¹¹ APP/X5210/A/13/2202108 - Ginger and White, 2 England's Lane, Belsize Park, London NW3 4YG