
Appeal Decisions

Site visit made on 29 October 2019

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 December 2019

Appeal A, Ref: APP/G5750/C/18/3200968

442 Green Street, Upton Park, London E13 9DB

- 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 Mr Patrick Adams against an enforcement notice issued by the Council of the London Borough of Newham.
 - The enforcement notice was issued on 23 March 2018.
 - The breach of planning control as alleged in the notice is without planning permission, the material change of use to a mixed use comprising a restaurant and a hot food takeaway. Without planning permission, the construction of a single storey rear infill extension and the construction of an extractor flue.
 - The requirements of the notice are:
 1. Cease the use of the property as a mixed use comprising a restaurant and a hot food takeaway.
 2. Remove from the premises all fixtures, fittings and equipment which solely facilitate the use as a restaurant and a hot food takeaway, including, but not limited to, kitchen appliances, seating and advertising signage.
 3. Demolish the extractor flue (as shown on the photograph attached to the notice).
 4. Demolish the rear extension (as shown edged in blue on the plan attached to the notice).
 5. On completion of steps 1 to 4, remove all materials and debris from the site.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B, Ref: APP/G5750/W/18/3197840

442a Green Street, Upton Park, London E13 9DB

- 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 Mr Patrick Adams against the decision of the Council of the London Borough of Newham.
 - The application, Ref 17/03652/FUL, dated 28 October 2017, was refused by notice dated 15 February 2018.
 - The development proposed is the change of use from Use Class A1 (Hairdressers shop) to Use Class A3 (Restaurant) with A5 (Takeaway).
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Decisions

Appeal A

1. The appeal is allowed insofar as it relates to the single storey rear infill extension and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the single storey rear infill extension at 442 Green Street.

2. It is directed that the enforcement notice be varied by the substitution of six months for three months as the period of compliance. The appeal is dismissed and the enforcement notice is upheld, as varied, insofar as it relates to the material change of use to a mixed use comprising a restaurant and hot food takeaway and the construction of an extractor flue and planning permission is refused in respect of the material change of use to a mixed use comprising a restaurant and hot food takeaway and the construction of an extractor flue on the application deemed to be made under section 177(5) of the 1990 Act as amended.

Appeal B

3. The appeal is dismissed insofar as it relates to a material change of use from Use Class A1 (Hairdressers shop) to Use Class A3 (Restaurant) with A5 (Takeaway) and the installation of an extractor flue. The appeal is allowed insofar as it relates to the single storey side infill extension and planning permission is granted for the single storey side infill extension at 442 Green Street, Upton Park, London E13 9DB in accordance with the terms of the application, Ref 17/03652/FUL, dated 28 October 2017, so far as relevant to that part of the development hereby permitted.

Procedural Matters

4. The address of the site stated in the notice is 442 Green Street, Upton Park but the address in the application form is 442a Green Street, Forest Gate. At the site visit I saw that it is the flat above the premises which is identified as 442a. In addition, it is clear that the appeal site lies within the Upton Park neighbourhood as the Forest Gate area lies further north. I will therefore proceed on the basis that the address of the appeal site is 442 Green Street, Upton Park.
5. The description of development provided by the appellant for the planning application omitted reference to the single storey side infill extension and the installation of an extractor flue. These were shown on the application plans as being proposed and elsewhere in the application form it is stated, in relation to the extension, that the proposed materials and finishes are to be 'GRP weathering to flat roof over new toilet and storage area.' The Council therefore added this operational development to the description and considered it when determining the application.
6. The appellant claims that the extension was already built; the drawings only showed it to be 'new' in order to obtain a building control certificate. Be that as it may, the Council sought consent to add it and the flue to the description of development and it appears the appellant agreed. I shall therefore proceed on the basis that the application includes the operational development shown on the plans and that both the material change of use and the operational development had occurred by the time the Council determined the application.¹
7. The refusal of planning permission and the reasons for issuing the notice referred to a number of draft local plan policies, which were in an advanced stage of preparation. The Council also relied upon policies in their Core Strategy and Detailed Sites and Policies Development Plan Document. These

¹ The appellant emailed the Council in January after he had submitted the application to say that the business was now open.

have all now been superseded as on the 10 December 2018, the Council adopted their new local plan.

8. The Council also rely on policies in The London Plan² which is in the process of being updated. The draft for public consultation, which was published in December 2017, has now progressed to The Draft London Plan – Consolidated Suggested Changes Version July 2019 following the Examination in Public. I shall therefore have regard to the Newham Local Plan (LP), as well as The London Plan (TLP) and The Draft London Plan (DLP) in deciding these appeals.

Background

9. The appeal concerns a mid-terrace property with a two storey, half width rear projection and a small courtyard at the rear. The lightwell area has been infilled with an extension the subject of the notice. The ground floor of the premises is in use as a small restaurant and takeaway, which is also the subject of the notice and there is a separate flat at first floor level.

Appeal A, ground (d)

10. This appeal has been made only in respect of the infill extension. This ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The burden of proof in an appeal on this ground lies with the appellant. As such, he needs to show, on the balance of probabilities, that the erection of the infill extension was carried out more than four years before the notice was issued. The notice was issued on the 23 March 2018 so the appellant needs to show that the extension was substantially complete before 23 March 2014.

The appellant's case

11. The appellant's case is that the extension has been there for more than four years. He relies on information from the Valuation Office Agency (VOA), a letter from the current owner and the images from Google Maps and Bing Maps. He also submits that the plans accompanying the planning application the subject of Appeal B, clearly show not a new extension but the erection of a new block wall.

The Council's case

12. The Council state that the information shown on the application drawings indicates that a new extension has been built and that the roof plan and the existing ground floor plan show the area to the side of the two storey projection was open. However, they also acknowledge that there may have been a canopy or structure in the lightwell area before the construction of the extension but there is insufficient information to show if this was changed, modified or removed by the appellant.

Assessment

13. One satellite image is dated 2018 and appears to show that the lightwell has been infilled with a structure that has two roof lights. The other image is also dated 2018 but the extension is not visible in it. However, what is visible is the end and part of the side elevation of the two storey projection. It would

² The London Plan: The Spatial Development Strategy for London (consolidated with alterations since 2011) published March 2016

therefore appear that previously the lightwell area was only partially infilled. The VOA information is dated the 1 April 2010 and the 1 April 2017. This provides the floor space of the property broken down into retail areas, public toilets and storage areas. The figures are derived from the VOA measuring the property and in both periods the floor space figures remain the same, namely, in total, 54.7sqm.

14. The appellant submits that this is evidence that the extension has been there since 2010 as there is no increase in floor area in 2017. However, it is likely that the premises were surveyed some time before the figures were published on the 1 April 2017 and the appellant states that he did not start the development the subject of the application and the notice until the 28 October 2017. It is therefore possible that the total floor area figure could change by the next publication date to reflect the current larger extension.
15. From the satellite images, it would appear that the extension the subject of the notice is not the same as that shown in the images as it appears to be larger than that which allegedly existed before hand. The plans accompanying the application also do not appear to show the structure visible in the satellite imagery. This is because the existing ground floor plan shows a wall abutting the party wall in the lightwell area extending as far as the depth of the two storey projection and returning towards it. Also, the existing roof plan does not show that the lightwell area is roofed whereas the proposed roof plan annotates the new roof and shows the line of slope.
16. In conclusion, it is considered the appellant has failed to demonstrate that the extension the subject of the notice was substantially complete prior to the 23 March 2014. There are unexplained discrepancies between the information shown on the satellite imagery and the appellant's own plans. The undated letter from the owner of the site provides no details about the extension other than it has been in place for over 10 years. However, there are no photos of the premises or estate agent details from when he bought the property to support this claim.
17. The Planning Practice Guidance advises that if a local planning authority has no evidence itself nor any from others to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to reject it. This is provided the appellant's evidence is sufficiently precise and unambiguous, on the balance of probabilities.
18. From all the material before me, I therefore find that the appellant has not satisfied the requirement to submit evidence that is sufficiently precise and unambiguous, on the balance of probabilities. Consequently, he has not discharged the onus of proof that the extension was substantially complete for a period of four years before the issue of the notice. The ground (d) appeal therefore fails.

The ground (a) appeal, the deemed planning application and the section 78 appeal

Main issues

19. The main issues are i) whether, having regard to national and local planning policies, this is an appropriate location for the development; and the effect of the development on ii) the character and appearance of the area; and iii) the

living conditions of neighbouring occupiers, having regard to noise, disturbance and litter.

Reasons

Appropriateness of location

20. The appeal site lies to the south and outside Green Street District Centre which is mainly located to the north of Upton Park underground station. The commercial area is centred midway along Green Street, a long road linking Barking Road in the south with Romford Road in the north. Green Street is identified as a key movement corridor in the LP. These strategic linear gateways are vital to peoples' impression of place and their perceptions of how attractive Newham is as a place to live, work and stay, as set out in the supporting text to Policy SP7 of the LP.
21. Green Street District Centre not only contains a range of shops, a market and other related town centre uses, such as restaurants and takeaways, but it is also recognised as a specialist ethnic retail centre. This is not just within the borough but is also across London. This is set out in Policy INF5 of the LP which seeks to expand its comparison, community and quality leisure offer whilst retaining independent traders. In addition, Policies S1 and S6 from the LP set out an overarching vision for the borough which in respect of town centres seeks to improve their vitality and viability. The borough's objectives are reflected in Policy 2.15 of TLP and Policy SD6 of the DLP.
22. With that in mind, Policy SP6 from the LP seeks to prevent non retail uses, particularly hot food takeaways, reaching disproportionate levels within town centres and also at or adjacent to (outside the boundaries) its gateways. The Council, as does The London Plan, also places a particular emphasis on the creation of healthy neighbourhoods. This is achieved, in part, through taking into consideration the cumulative impact of takeaway uses (Policy SP2 of the LP).
23. In particular, Policy SP9 sets out the need to avoid over concentrations of specific uses, such as hot food takeaways. This is achieved by ensuring that there are no more than three premises in the same specified use within 400 metres of each other. Also, by ensuring that a 400m catchment drawn around a proposed specified use does not overlap with any more than two other catchment areas drawn around existing, committed or proposed units in the same specified use.
24. it is considered that the development does not accord with these policies in that it is clearly outside the defined district centre. Not only is it outside but it is in a gateway location on a key movement corridor which the Council are seeking to improve. Furthermore, the location of the use is within 90m of St Edward's Catholic Primary School to the south of the site on Green Street. It is also in an identified hotspot for hot food takeaway uses where the Council state there are approximately 20 other hot food takeaways within a 400m catchment of the site.
25. The appellant submits that the National Planning Policy Framework (the Framework) requires councils to allocate appropriate edge of centre sites for main town centre uses that are well connected to the town centre. However, the Framework has been revised since 2012 and a new paragraph 85 (d) and

- (e) states planning policies should allocate sites within town centres for main town centre uses. It is only where suitable and viable town centre sites are not available that policies should allocate appropriate edge of centre sites. The spatial strategy for town centres in Newham is to consolidate commercial development within them and to prevent non retail uses outside the boundaries.
26. Whilst the commercial space already exists, in that the appeal site was formerly a hairdressing salon before the restaurant and hot food takeaway use began, the new use is development that requires planning permission. As such, regard must be had to the Council's recently adopted LP in order to consider the acceptability or otherwise of the new use. The LP not only contains policies concerning town centres but also policies about creating healthy neighbourhoods
27. The appellant refutes the Council's evidence that the appeal site lies within a hot food takeaway hotspot. At the site visit I saw that opposite the appeal site there was a Chinese takeaway at No 459 and at Nos 468 and 472 there were two further hot food establishments. Ken's cafe at No 467 was not open at the time of my visit so it is not clear whether it offers eat in facilities only or also includes a takeaway element. However, notwithstanding this, the proximity of the first three together with the appeal site conflict with the requirements of Policy SP9 3 b iii in that the use of the appeal site exceeds the limit set out in the policy. Whilst the appeal site does not lie directly adjacent to another hot food takeaway (Policy SP9 3 b i and ii), the current use does not accord with paragraph 3 b iii.
28. The appellant submits a copy of an appeal decision³ to support his case. However, this decision was reached prior to the adoption of the current local plan and without empirical information to demonstrate the prevalence of other hot food takeaways in the area. This particular appeal site was also within a town centre and for these reasons can be distinguished from the appeal before me.
29. The appellant also takes issue with the Council's assumption that all takeaway food is unhealthy. However, the LP was developed in consultation with Newham Care Commissioning Group and whilst not all fast food is unhealthy, it is typically high in saturated fat, salt and calories. This applies regardless of where the hot food is derived from. Nevertheless, I note the appellant's offering includes some grilled food as well as stews.
30. Whilst the appellant's references to the Core Strategy are now out of date, the review of TLP has progressed such that it now carries more weight. Policy E9 from the DLP refers to a 400m walking distance of existing and proposed *primary* (my emphasis) and secondary schools. Contrary to the appellant's findings, the nearest secondary school is to the west of the appeal site, Lister Community School, which is just a few streets away and not 13 miles distant. This is in addition to the much nearer St Edward's Catholic Primary School to the south of the appeal site.
31. I note the appellant's arguments concerning secondary school children but the policy applies to both primary and secondary children. Where the location of a new hot food takeaway is acceptable, the approach in Policy E9 is to require

³ APP/G5750/W/15/3013871

that a condition is imposed to require the operator to achieve and operate in compliance with the Healthier Catering Commitment standard. However, the location of the appellant's premises is not acceptable as it is outside the town centre and in a gateway location. Therefore such a condition would not mitigate the effect of the development. Finally, although the appellant refers to Council bias to support his case, it would appear he has his own assumptions that could be interpreted as bias, namely that children attending a catholic primary school would not enjoy 'the spicy nature of African food'.

Character and appearance

32. Along this section of Green Street the character of the area is largely residential interspersed with some commercial uses at ground level. The appeal site is bounded by residential property to the north and south and the former rear garden area has been taken over by the builders' merchant shop that occupies No 434 to 438 Green Street. This is situated on the corner of Green Street and Selsdon Road and like other properties in the area was formerly Victorian housing, subsequently converted into a shop. The former gardens to these properties are accessed from Selsdon Road and have now become a yard, which is used for external storage of building items. The remaining outside space at the appeal site can be accessed from this area. The yard is bounded by the gardens of Victorian housing and there is a mature tree in one of them. Whilst the surrounding area has undergone much change over the years, its character and appearance are still recognisable as a Victorian neighbourhood, where individual properties have been well maintained.
33. The extractor flue has been installed at the rear of the appeal site on the end wall of the two storey projection, adjacent to the bedroom window of the first floor accommodation. It extends well above the height of the projection and can clearly be seen from Selsdon Road against the skyline. I find that it is unduly prominent especially in the rear gardens area and is only partly screened from some households by the mature tree, though this would be less so in winter. It is an incongruous feature in the gardens area, notwithstanding its proximity to the builders' merchant yard, and there appears to be no other similar structure in the immediate area.
34. I turn now to consider the infill extension. The Council's concerns regarding this extension are in respect of the external finish. I saw at the site visit that it has a rendered finish even though the host property is finished in brick. Whilst the use of an alternative external finishing material can sometimes look out of place, it is my view it is not in this instance. This is because it is in close proximity to rendered walls at Nos 440 and 444.
35. In particular, the two storey projections at Nos 440 and 444 now have a rendered finish and the single storey rear extension at No 440 also has a rendered finish. Furthermore, the extension at the appeal site is single storey and views of it are essentially confined to the occupiers of No 444, the end wall of the extension being enclosed by a high fence around a small courtyard, which screens it from other views.
36. For these reasons it is concluded that the external finish of the extension preserves the character and appearance of the area. It therefore accords with Policies SP3 of the LP, 7.4 and 7.5 of TLP and D2 of the DLP which require high quality urban design. No conditions are necessary as the development is

complete. However, the installation of the flue has not preserved the character and appearance of the area and therefore does not accord with these policies.

Living conditions

37. The appeal site is situated in close proximity to adjoining residential properties and therefore has the potential to harm the living conditions of neighbouring occupiers. These are safeguarded by Policies SP8 of the LP, 7.15 of TLP and D13 of the DLP. In particular, there is living accommodation directly above the entrance to the premises and the entrance to the first floor level flat is immediately adjacent to the entrance into the premises. The small forecourt at the appeal site is also overlooked by habitable windows from neighbouring properties.
38. While Green Street is a heavily trafficked road and has a number of bus routes, it is my view that traffic levels are likely to reduce after the rush hour when takeaways do most of their trade. The nature of hot food takeaways is that people often queue or hang around waiting for their order to be completed. This can often lead to small groups of people standing around and talking and this would be more noticeable of an evening given the proximity to residential properties. Whilst it would be possible to impose an opening hours condition to limit the hours of business to acceptable times, this would not prevent people gathering outside or require their dispersal.
39. The appellant submits that the majority of what he cooks is not 'street food' but meals to be taken away to be eaten at home. This element of the business would also be secondary to the main restaurant use which accommodates 12 covers. Nevertheless, even the operation of a small restaurant in this predominantly residential area is likely to have the potential to cause harm in terms of noise and disturbance. This would be caused by people coming and going of an evening when local residents might expect some respite from daytime activities. The appeal site is located outside of the town centre and nearby commercial premises, other than the Chinese restaurant at No 459 do not open in the evening. Whilst I have not been advised of any complaints, that does not mean that the use is acceptable.
40. In conclusion, I find the use has the potential to harm the living conditions of neighbouring occupiers, having regard to noise and disturbance. This aspect of the development therefore does not accord with the Policies SP8 of the LP, 7.15 of TLP or D13 of the DLP.
41. The Council are also concerned that the appellant has failed to provide sufficient waste and recycling storage. At the site visit I saw a large red general waste bin on four wheels, which was situated on the appeal site forecourt. In the rear yard, waste oil was stored in re-used plastic bottles. This is where the general waste bin is stored when it is not collection day, as shown in the appellant's photographs.
42. It is my view that the appellant has addressed most of the Council's concerns. He makes use of a proper commercial waste bin and take steps to recycle waste cooking oil. He also has an appropriate place to store his waste. Should I be minded to allow the appeal, a condition could also be imposed which would require the provision of an additional waste bin for use by his customers. Altogether, these measures would and do protect the living conditions of

adjoining neighbours, having regard to litter, and as such this aspect of the development accords with Policy SP8 of the LP.

Conclusion

43. I find no harm caused by the erection of the extension and, in particular, its external finish and, with the imposition of an appropriate condition, that the appellant's waste facilities are acceptable. However, the appeal site is an inappropriate location for the use and the installation of the flue causes harm to the character and appearance of the area. The use also has the potential to cause harm to the living conditions of neighbouring occupiers. For these reasons the ground (a) appeal succeeds in part. It therefore follows that the appeal on ground (f) excludes the infill extension.

Appeal A, ground (f)

44. The appeal on ground (f) is that the requirements of the notice exceed what is necessary to achieve the purpose of the notice. The purposes of a notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (S173(4)(a)) or to remedy injury to amenity (S173(4)(b)). In this case the notice requires the cessation of the use and that various items that facilitate the use, including the flue, should be removed. The purpose of the notice is therefore to remedy the breach of planning control.
45. The appellant submits that the requirements are excessive as the harm could be remedied by ceasing the takeaway use only. The flue could be removed as the appellant could cook elsewhere and make use of the microwave on site.
46. However, whilst this suggestion might be appropriate if the reason for issuing the notice was because of injury to amenity, that is not the case here where the purpose of the notice is to remedy the breach of planning control. The lesser steps suggested by the appellant would not remedy the breach of planning control as the breach of planning control is the action of carrying out the material change of use and installing the flue. Removing the flue and ceasing part of the material change of use would not undo that initial action and would not address all of the harm caused by the development, as set out in the reasons for issuing the notice.
47. I therefore find that the steps required by the notice in respect of the material change of use and the installation of the flue do not exceed what is necessary to remedy the harm caused and the appeal on ground (f) fails.

Appeal A, ground (g)

48. This ground is that the time given to comply with the requirements of the notice is too short. The appellant requires nine months, not three, to enable the business to be relocated.
49. In cases involving business uses, it is necessary to weigh the interest of the business against the harm caused by the development the subject of the notice. On the one hand, the appellant has calculated that he would need nine months to find alternative premises, engage contractors and fit out the new premises. On the other, the notice includes a number of reasons setting out

the harm caused by the development. These include, amongst other matters, it's inappropriate location.

50. I consider nine months would be a disproportionately long period of time to comply with the notice but six months would be a reasonable period. This would enable the appellant to comply with the requirements of the notice, which is the purpose of the time period, not time given to find alternative premises. This would strike the appropriate balance between these competing needs. To this limited extent the appeal on ground (g) succeeds.

Conclusions

Appeal A

51. For the reasons given above I conclude that the appeal should succeed in part only, and I will grant planning permission for one part of the matter the subject of the enforcement notice, otherwise I will uphold the notice with a variation and refuse to grant planning permission on the other part. The requirements of the upheld notice will cease to have effect so far as they are inconsistent with the permission which I will grant by virtue of section 180 of the Act.

Appeal B

52. For the reasons given above I conclude that the appeal should be allowed in part and dismissed in part.

D Fleming

INSPECTOR