



Appeal Decision

Site visit made on 16 December 2019

by Paul T Hocking BA MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 January 2020

Appeal Ref: APP/U5360/C/19/3229089

Land at 17 Bradbury Street, London N16 8JN

- 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 Levi Scarlett against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The enforcement notice was issued on 17 April 2019.
 - The breach of planning control as alleged in the notice is: 1. Without planning permission, the material change of use of the property from a retail shop (Class A1) to a takeaway (Class A5). 2. Without planning permission, the erection of a flue to the rear of the property.
 - The requirements of the notice are: (1) Cease the takeaway (Use Class A5) at the premises. (2) Remove all fixtures and fitting that facilitate the A5 use from the premises. (3) Remove flue and its fittings from the rear of the premises. (4) Remove all waste, materials, equipment and debris from the property resulting from compliance with the requirements in paragraphs 1 to 3 of this notice.
 - The period for compliance with the requirements is: Six (6) 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. Since the appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Summary of Decision

1. The appeal is dismissed and the enforcement notice upheld with corrections and a variation.

The Enforcement Notice

2. The enforcement notice makes reference to both the "property" and "premises". In the interests of consistency, in my formal decision below I have corrected the requirements of the enforcement notice to refer to the "property" throughout and to correct typographical errors. Such corrections do not lead to any injustice to the parties.

The ground (a) appeal

Main Issues

3. The main issues are:
 - i. the effect of the use on the living conditions of neighbouring occupiers; and,

- ii. the effect of the loss of the retail unit upon the retail function, character and vitality of the local shopping area.

Reasons

4. The appeal site consists of the ground-floor of a three-storey terraced building. There is residential accommodation above. The site is situated in close proximity of Kingsland High Street. Bradbury Street itself is a short road that predominantly consists of food/eating establishments at street-level. The site is also within the Dalston Conservation Area (the CA).
5. The site is in-use as a takeaway specialising in Caribbean food. I am advised that it has been operating since April 2016 under a flexible use right that ceased in April 2018. A flue has also been constructed which is located internally above the cooking area and exits through a flat roof at the rear of the building. It then is fixed to the rear of the building where it discharges approximately at the roof-level of the three-storey building.

Living conditions

6. The Council is concerned about the absence of a noise report and management plan that would detail measures to mitigate against noise, disturbance and anti-social behaviour.
7. There is however no recognisable management plan before me. I am also concerned to ensure that odour would be controlled from the premises, particularly from that of the flue, and there is little evidence from the appellant concerning this matter. I consequently have little substantive evidence to persuade me that the change of use has not had a detrimental impact upon surrounding residential amenity. Indeed, the evidence of local-residents is that the takeaway does prejudice the use of the remainder of the building for residential occupation, particularly in terms odour.
8. I am mindful that the area contains a number of similar premises and other evening as well as night-time economy uses. There is evidence of anti-social behaviour in the area, but little to directly attribute this to the use of appeal site itself, although concerns have been expressed about parking and where customers consume the food purchased from the appeal site. I am also advised that there is a Community Action Plan and Residents Association which works with the Police and local businesses to combat such issues, but I am unaware as to the effectiveness of these initiatives.
9. The management of the site and its use, including odour and litter control, its general functioning and other matters that may require mitigation, therefore require careful consideration and control. In the absence of such evidence, and that I attach considerable weight to these matters, I do not consider it appropriate to defer these matters by granting planning permission subject to planning conditions. This is because I have no reasonable certainty that these matters can be adequately mitigated in planning terms.
10. The appellant has however commissioned a Noise Impact Assessment in respect of the plant installation (the flue). It concludes that subject to proposed mitigation measures, including that a solid enclosure be installed around the fan unit, noise emissions should be within accepted tolerances. This could be controlled by a suitably worded planning condition. I have no evidence from the Council to dispute these findings and little evidence as to why the flue could not

then be sufficiently maintained thereafter. I also have very little evidence before me to substantiate concerns about vibration nuisance associated with the flue.

11. I nevertheless conclude that the use as a takeaway is harmful to the living conditions of neighbouring occupiers. The use therefore contravenes Policy CS15 of the Hackney Local Development Framework Core Strategy (the CS), Policies DM2 and DM11 of the Hackney Development Management Local Plan 2015 (the LP), as well as Policy 7.15 of the London Plan, 2016. These policies amongst other things, require such uses to: take account of their impact on local residential amenity; consider the impacts of noise, odour and other forms of pollution; consider the impact of the development on amenities of adjoining and or adjacent residential accommodation; and, avoid significant adverse noise impacts on health and quality of life as a result of new development.

Retail function

12. The site has historically been used as an A1 retail shop. It is within the Dalston Major Town Centre (DMTC) and in an area covered by the Dalston Area Action Plan (DAAP). The Council's appeal statement however provides very little additional evidence about these matters.
13. The appellant contends that the current use is not inconsistent with the general mix of uses in the DMTC and does not undermine the DAAP or general character or aspirations of the area. I am also advised that the Council's data, from the Hackney Town Centre and Retail Study 2017 (health check study), shows that 56.4% of premises in the primary shopping frontage are occupied by A1 retail units. The Council has not disputed the relevance of these figures to the appeal site. Whilst I appreciate that Bradbury Street itself has a higher number of food or takeaway uses, the figures do not indicate an over-concentration in the wider area.
14. I therefore have little evidence to persuade me that the vitality of the local shopping centre has been detrimentally impacted by the change of use. I also observed during my site visit that other essential shops are within close proximity of the site.
15. I appreciate that there has not been a marketing exercise, which then may or may not have demonstrated the shop had little prospect of becoming occupied by new retail uses. However, in light of the evidence before me, I am not persuaded that there is a requirement to then justify the change of use by this means.
16. I conclude the loss of the retail unit has not had a detrimental impact upon the retail function, character and vitality of the local shopping area. The use therefore accords with Policy CS1 of the CS, Policy DM9 of the LP and Policies 4.7 and 4.8 of the London Plan, 2016. These policies, amongst other things, seek to: rejuvenate Dalston town centre by adding new uses; ensure there will not be an adverse effect on the vitality and viability of the centre as a whole and/or on the individual shop unit; ensure retail, commercial, culture and leisure development should be focused on sites within town centres; and, support a successful and diverse retail sector and related facilities and services. For the same reasons it accords with Section 7 of the National Planning Policy Framework.

Other Matters

17. The Council has not raised concerns regarding the effect of the developments enforced against on the character or appearance of the CA and so I have not considered the CA further. It has raised Policies CS24 and CS25 of the CS and Policy DM3 however as these relate to design, the historic environment and promoting health, which are not of direct relevance to the main issues in this appeal, I have not considered these matters further.
18. I appreciate the appellant is aggrieved by how he considers the matter has been handled by the Council, however this is not a matter before me.

Conclusion

19. For the reasons given above the appeal on ground (a) therefore fails.

The ground (f) appeal

20. The purpose of the enforcement notice is to remedy the breach of planning control. Therefore, for an appeal on ground (f) to succeed it would be necessary for the appellant to explain why the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control and propose lesser alternatives to achieve this.
21. However, the appellant does not propose alternative or lesser requirements. Rather, the points raised under this ground of appeal actually relate to that of the ground (a) appeal, where I have accordingly considered them.
22. As I have little further evidence to consider, the appeal on ground (f) must fail.

The ground (g) appeal

23. I appreciate the use enforced against provides the appellants only source of income and that a number of staff are employed. The appellant has also made a significant investment in the business. However, I have not been persuaded as to why 6 months would not be an adequate period to comply with the requirements of the enforcement notice and allow the winding down of the business.
24. I am however mindful that the absence of a management plan could be addressed by means of submitting a planning application. This would also establish whether concerns regarding odour can be adequately controlled by planning conditions, based upon specific evidence. Whilst this would then be a matter entirely for the Council, it is within my discretion to consider extending the period for compliance if I believe it would be a proportionate response.
25. To this effect an additional period of 2 months would afford the appellant this opportunity, should he wish. Local residents would also be able to make representations on the contents therein. I do not consider that an additional period of 2 months would be disproportionate, or otherwise unnecessarily or harmfully perpetuate the breaches of planning control.
26. Accordingly, the appeal on ground (g) succeeds to this extent.

Overall Conclusion

27. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and a variation and refuse to grant planning permission on the deemed application.

Formal Decision

28. It is directed that the enforcement notice be corrected by:

- deletion of the words "*(1) Cease the takeaway (Use Class A5) at the premises. (2) Remove all fixtures and fitting that facilitate the A5 use from the premises. (3) Remove flue and its fittings from the rear of the premises.*" and their replacement with the words "*(1) Cease the takeaway use (Use Class A5) at the property. (2) Remove all fixtures and fittings that facilitate the A5 use from the property. (3) Remove the flue and its fittings from the rear of the property.*"
- substituting "*Eights (8) months*" as the period for compliance.

29. Subject to these corrections and variation the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Paul T Hocking

INSPECTOR