



Appeal Decisions

Site visit made on 28 January 2020

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 February 2020

Appeal A: APP/P4225/C/19/3235965

Appeal B: APP/P4225/C/19/3235966

Land at 673 Manchester Old Road, Middleton, Manchester M24 4GF

- 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 appeals are made by Ms Nazia Hussain (Appeal A) and Ms Sidra Akhtar (Appeal B) against an enforcement notice issued by Rochdale Metropolitan Borough Council.
 - The enforcement notice was issued on 8 August 2019.
 - The breach of planning control as alleged in the notice is: Without the benefit of planning permission, a material change of use of the premises from a café (A3) to a hot food takeaway (A5) facilitated by operational development consisting of the installation of two externally attached flues, and the installation of food storage and cooking equipment.
 - The requirements of the notice are:
 - (a) Cease the unauthorised hot food takeaway use at the property;
 - (b) Remove the two flues attached to the rear of the property from the Land;
 - (c) Repair the rear wall and roof using matching materials following removal of the flues, and;
 - (d) Remove all other items from the Land that have been brought onto it to facilitate the hot food takeaway use, including
 - (i) Commercial hot hold food counters
 - (ii) Griddles
 - (iii) Kebab machine
 - (iv) Deep Fat Fryers (including Henny Penny)
 - (v) Commercial Pizza ovens
 - (vi) Interior ducting and canopy
 - The period for compliance with the requirements is three months.
 - Appeal A is proceeding on the grounds set out in section 174(2) (a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an 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 as amended.
 - Appeal B is proceeding on the grounds set out in section 174(2) (b), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application deemed to have been made under section 177(5) of the Act as amended, has lapsed.
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Decision

1. The appeals are dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended (Appeal A).

Background

2. The appeal premises form part of a terrace which is situated on a main road and close to a pedestrian crossing. The character of the area is predominantly residential with the occasional "corner shop". There are residential properties on either side of the appeal premises and to the rear.
3. The parties agree that the lawful use of the Land is a café (Use Class A3), and prior to the appellants purchasing the Land it had been used as a café/sandwich bar with the front room laid out with tables and chairs. There was a small extract fan on the rear wall of the premises. The appellants purchased the property in 2018 and have undertaken extensive internal and external works to the premises, including the installation of two rear external flues, cooking equipment and a new servery/counter within the front room. The appellants have advised that the premises now serve American style breakfasts, burgers, fries, kebabs and pizzas.

Appeal A and Appeal B on ground (b)

4. The main issue is whether as a matter of fact the premises was in a single primary use as a hot food takeaway at the time when the notice was issued. The burden of proof falls on the appellants to make out their case.
5. There is no dispute that the two external flues have been installed. However, the appellants consider that the use of the premises is not as a hot food takeaway but is a mixed A3/A5 (sui generis)¹ use.
6. According to the appellants, since the notice was issued, and the appeal was lodged, they have undertaken some changes to the business premises and how it operates to attract more customers to eat inside the premises as a café use. Those changes include, alterations to the signage to include reference to a café use and changes to the premises internal layout in order to increase the amount of space available for seating. In addition, they advise that they have extended the opening hours to early mornings to provide a breakfast menu.
7. However, the photographs, google images and email correspondence appended to the Council's Statement of Case show that at the time of their investigations the internal layout had been altered to remove the traditional restaurant/café seating and replacement with bar stools around the edge of the room. There had been an increase in the food preparation/service area with new cooking equipment and extraction equipment, including two substantial external flues which had not previously been required for other business operating an A3 use from the premises. In addition, at that time there was significant external advertisements on the premises mainly for fried food and meal deals common place in hot food takeaway establishments and a shift of late night/evening opening hours.
8. It seems to me that at the time the notice was issued the layout and seating arrangements were more suited to people waiting for food to be cooked rather than eating in and enjoying a meal. In addition, the extensive food preparation area and cooking equipment installed together with the menu adverts and the delivery service all indicate a primary hot food takeaway use.

¹ Meaning 'of its kind' when no use classes order fits.

9. Moreover, I have not been provided with any substantive evidence that would demonstrate to me that in August 2019 the café use (A3) and takeaway (A5) operated as a single primary use of the Land, which is necessary for it to be operating as a mixed use, as claimed by the appellants. For example, no evidence from account books/till receipts have been provided which would show how much food is served for takeaway purposes and how much is eaten on the premises. There is no evidence of menus that show different choices/prices for eating in or taking out. Nor did I see on my visit any evidence of cutlery or condiments for use by customers who may be wishing to eat in.
10. From the evidence before me and on the balance of probability the primary use of the Land following the appellants' purchase and refurbishment of the premises was in use as a hot food takeaway (A5) (August 2019), and the breach has occurred as a matter of fact.
11. The appeal on ground (b) therefore fails.

Appeal on ground (a), deemed planning permission (Appeal A only)

12. Section 177 (5) of the 1990 Act states that where an appeal has been brought under section 174 (2) (a) the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control. I have found that the breach of planning control alleged in the notice has occurred as a matter of fact. Whilst the appellant claims that the deemed planning permission should be for a mixed A3/A5 use, this is not the breach of planning control that occurred and as stated in the notice. It is not therefore the development before me. My considerations and the deemed planning permission are therefore confined to the material change of use of the premises from a café (A3) to a hot food takeaway (A5) facilitated by operational development consisting of the installation of two externally attached flues, and the installation of food storage and cooking equipment.

Main Issues

13. The main issues in this case are the effect of the development on the:
 - character and appearance of the host property and surrounding area; and
 - living conditions of the occupiers of nearby residents.

Reasons

Character and appearance

14. Two substantial flues have been constructed on the rear elevation of the premises. One of the flues passes through the roof of the single storey outrigger, whilst the other emerges from the rear wall at first floor level. They both extend approximately a metre above eaves height.
15. The rear elevation of the terrace as a whole is clearly visible to public views from Boothroyden Road and is directly overlooked by the occupiers of the properties fronting the car parking area/access road at the rear of the Land. It has a simple domestic form and appearance, with the usual domestic rainwater/drainage pipes and microwave antennae visible on its rear elevation.

16. In contrast the flues have an industrial scale and appearance which on this residential terrace are visually intrusive. Their overall scale, bulk, height and finish give them a stark and incongruous appearance in this location and they detract from the terrace's simple domestic form and the visual qualities of the surrounding area. I have taken into consideration the appellant's offer to provide a different finish to the flues. However, although a darker finish would provide some mitigation, a change in the colour would not overcome the harm I have identified to character and appearance by reason of their overall scale, height and positioning. I therefore give this consideration limited weight.
17. I conclude that the flue's have a harmful effect on the character and appearance of the host property and the surrounding area. I therefore find conflict with the development plan and in particular with Policies DM1 and P3 of the Rochdale Core Strategy, adopted 2016 (CS) which seek to ensure, amongst other things, that new development is of a high standard of design, is not visually intrusive and is compatible with surrounding land uses. I also find conflict with the adopted Guidelines & Standards for Hot Food Takeaway Uses, Supplementary Planning Document, updated 2017 (SPD) which advises that the visual impact of flues requires careful consideration where they would be visually prominent.

Living conditions

18. The Council's SPD makes it clear that a balance is needed between the provision of hot food takeaways and the need to protect the amenity of residents living adjacent to or near such establishments.
19. The takeaway is in close proximity to a number of residential properties and both the Council and a neighbouring resident have raised concerns regarding noise and disturbance from the takeaway use and from noise/vibration associated with the extraction equipment.
20. I appreciate that the premises are situated on a main road. However, the character of the area is predominantly residential. Therefore, it is not an area where there is generally a lot of late night pedestrian activity or where there is a vibrant evening economy. The lawful use of the premises is as a café/restaurant which I understand has no opening hour constraints. However, in my experience the amount of activity/potential disturbance from a takeaway use is much greater than that generated by a café/restaurant, particularly during the evening hours. For example, the number of covers available in a café/restaurant restricts the number of customers. Furthermore, those customers eat on the premises and will not therefore be consuming hot food on the street and outside neighbouring dwellings, which is often the case with a takeaway. The customers are also likely to spend more time within the premises and therefore the coming and goings tend to be less. Furthermore, customers utilising a café/restaurant are more likely to be considerate when parking their vehicles if they are leaving them for some time to eat a meal. The delivery service available with the takeaway undoubtedly increases trade, with an inevitable increase in the number of short stay visits by delivery vehicles and noise/ disturbance associated with them.
21. Even with the revised opening times suggested by the appellant, I am not convinced that the activities associated with the use of a takeaway up to 2200hours on a Sunday evening would provide for acceptable living conditions for neighbouring residents. In addition, I have not been provided with any

substantive evidence that would demonstrate that a takeaway use with the suggested hours of opening restriction, would be less harmful than the premises lawful use.

22. It is clear that the type and amount of cooking equipment that has been brought in to facilitate the takeaway use also needed an extract and ventilation system to deal with odours and fumes. The SPD advises that such systems should have a minimal impact on visual amenity, be acoustically attenuated to achieve a level of no more than 40dB(A) when measured 1m from noise sensitive premises, and should not have an unacceptable impact on the amenity of neighbouring occupiers, for example by virtue of vibration, noise or odour. The appellant has not provided any technical information or noise reports to demonstrate that the equipment that has been installed meets these requirements and it is clear from third party representations that the existing system has a noise impact. Indeed, the location of the flues in such close proximity to the neighbour's bedroom window is undoubtedly a cause for concern.
23. The appellant has advised that she would be willing to accept a condition requiring a new scheme for the extraction of cooking odours to be submitted, agreed and implemented. However, given that the scheme may involve a new extract flue, it is likely to require planning permission to be granted for development that is not, and not a part of, the development enforced against. The imposition of planning conditions would not therefore be a suitable mechanism to achieve what would effectively be a new development.
24. In conclusion, I consider the A5 takeaway business and associated externally attached flues to have harmful implications for the character and appearance of the area and for the living conditions of occupiers of nearby dwellings in terms of noise, disturbance and vibration. This is contrary to the design and amenity aims of CS Policies DM1, C6 and G9 and the SPD, and does not comprise sustainable development in the context of the Framework when read as a whole.

Conclusion

25. There is conflict with the development plan and having regard to all other matters raised, I find no material considerations of sufficient weight to justify a grant of planning permission. I conclude that the appeal in ground (a) must fail.

Appeal A and Appeal B on ground (f)

26. The issue is whether the requirements are excessive to achieve the purpose(s) of the notice.
27. Section 173 of the Town and Country Planning Act 1990 (as amended) indicates that there are two purposes which the requirements of an enforcement notice can seek to address. The first is to remedy the breach of planning control that has occurred and the second to remedy any injury to amenity which has been caused by the breach. In this case the purpose of the notice is to remedy the breach of planning control.
28. The appellants believe that the requirement to remove all of the cooking equipment listed in paragraph 5 (d) of the notice is excessive as they consider

that the equipment indicated is perfectly normal and reasonable for the lawful A3 use.

29. The breach of control is the material change of use of the premises from a café (A3) to a hot food takeaway (A5) facilitated by operational development consisting of the installation of two externally attached flues, and the installation of food storage and cooking equipment. Planning permission is not required for any kitchen equipment, but it is required for any extraction equipment (in this case the flues) which has materially affected the external appearance of the building. However, in this case the cooking equipment and the extract ventilation system were installed to facilitate the material change of use, albeit some of it could be used in a café/restaurant. Therefore, even if such works in their own right do not constitute development, only their complete removal would restore the Land to its condition before the change of use took place. There are no lesser steps that would remedy the breach of planning control.

30. The appeal on ground (f) must fail.

Appeal A and Appeal B on ground (g)

31. The issue is whether the compliance period of three months is reasonable. The appellants consider that a period of six months would be more reasonable and would give them sufficient time to carry out the works with a builder.

32. The removal on the extract ventilation system and flue would require the engagement of professional and technical services. However, I am also mindful of the harm the continued unlawful use is having on the living conditions of nearby residents. In the absence of any substantive evidence that would demonstrate that the services required to remove the equipment could not be engaged within three months, I consider this to be a reasonable time frame within which the notice can be complied with.

33. The appeal on ground (g) must fail.

OVERALL CONCLUSION

34. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177 (5) of the 1990 Act as amended.

Elizabeth Pleasant

INSPECTOR