The Planning Inspectorate

Appeal Decision

Site visit made on 27 January 2020

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 February 2020

Appeal Ref: APP/U5360/C/19/3232363
Land at 263 Wick Road, Hackney, London E9 5DG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act) by the Planning and Compensation Act 1991.
- The appeal is made by Mr Majid Malak against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice was issued on 5 June 2019.
- The breach of planning control as alleged in the notice is without planning permission the installation of an extractor flue to the rear of the property on the flat roof of the rear ground floor extension.
- The requirements of the notice are:
    1) Remove from the property the extractor flue in its entirety and all its fixtures and fittings;
    2) Make good all damage to the property resulting from compliance with the other requirements of the notice;
    3) Remove all waste, materials, equipment and debris from the property resulting from compliance with the requirements in paragraphs 5(1) to (2) of this notice.
- The period for compliance with the requirements is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decision

1. It is directed that the enforcement notice is varied by the deletion in section 6 of the words "2 (two) months" and their replacement with "4 (four) 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.

Procedural Matter

2. Access to the roof of the appeal property was not sufficiently safe for me to view the alleged development at close quarters. The appellant and Council's officer suggested that we view the site from to the rear, within Kenworthy Road. It was necessary to walk onto the front driveway of a dwelling at the end of that road, which we did only after the appellant asked for the permission of the occupier.

3. I am required to deal with the development as it existed at the time that the notice was issued. The notice describes the general form of development that I saw even though at the site visit, the Council officer indicated that it was different from the flue the Council had seen when considering enforcement action. The description of the allegation as set out above is appropriate to the

development that I saw. The appellant has understood the description used. The notice is not hopelessly ambiguous and I can go on to consider the grounds of appeal.

The Appeal on grounds (b) and (c)

4. To succeed on ground (b), it is incumbent on the appellant to demonstrate that the alleged breach has not occurred, as a matter of fact. On ground (c), the onus of proof is also on the appellant to demonstrate that the development does not constitute a breach of planning control.

5. The appellants' representations state that the flue is a replacement or repair of an original flue that was in position previously. An aerial photograph has been submitted which is taken from a well-known website. This is not a very clear image. However, I can make out on that image, a regular shaped silver or grey object which appears to protrude from the back wall of No 263 and terminate before the end of the building. Whilst I cannot understand the precise dimensions of this previous structure purely from the un-dated aerial image, it does appear of a similar proportion and in a similar position as that shown on the plan dated 'Nov 1999'. I am told by both the appellant and the Council, that planning permission (North/644/99/FP) was previously given for the continuation of the use of the site as a hot-food takeaway including the retention of the "rear flue duct". The 'Nov 1999' plan is marked with a Council stamp indicating that it is the plan that was approved at that time.

6. From the information supplied by the appellant and from what I could see from Kenworthy Road, the extraction flue currently extends further to the rear of the property and is of a different design that the previous system. The rectangular metal box extending from the back wall of the building is similar to the 1999 design. However, towards the end of the rectangular box-section, a broader circular section has been added and after that, the rest of the structure is tubular rather than the "square flue duct" indicated on the 'Nov 1999' plan. After the perpendicular turn upwards, the circular tube extends upwards, terminating above the eaves of the rear-outrigger, with an angled extraction point facing towards the roof. The 'Nov 1999' design had included more angular looking carbon-filtration sections and also terminated with a conical cowl.

7. The current design varies considerably from the 'Nov 1999' design in terms of the shape, size and style of the ducting. With respect to s55 of the Act the operations that have been carried out, based upon the evidence available to me, involved a material alteration affecting the external appearance of the building. As such, they have involved "development" which required planning permission.

8. I therefore consider that development has taken place as alleged, that this requires planning permission and no current planning permission exists for this. The appeals on grounds (b) and (c) therefore both fail.

The Appeal on ground (a) and the deemed planning application

Main issues

9. The first main issue is the effect of the development on the character and appearance of the appeal site and surrounding area. The second is its effect

upon living conditions of neighbouring properties with particular reference to odour and noise.

Character and appearance

10. The appeal site is within a mixed commercial and residential area. The development is at the rear of the building. It is amongst the rear roof-scape of the buildings. Along the back of the terrace I could see, from limited road level vantage points, that there is a degree of utilitarian form to the rear of the buildings. Chimneys, rainwater-goods, aerials, flats roofs all provide a lack of uniformity to the appearance of the buildings.

11. Previously planning permission was given for an extraction system shown on the 'Nov 1999' plan. That planning permission can no longer be utilised as it has been implemented and the development has materially changed. That 1999 design is not a fall-back development that the appellant can go back to without requiring further planning permission. It is however reasonable to take account when assessing the effects of the use on the surrounding area, that there will be a need for some form of system at the same level as the current development.

12. The large metal extraction duct stands out amongst the varied roofscape at the rear of the properties that I have described above. However, I do take into account that the previous system was seen, and a replacement is also likely to be seen from the nearest properties. There is a very limited visual impact on the wider area however and I could not see the development from Wick Road or Benn Street. In this context therefore, the development does not look out of place. In assessing whether a development such as this is of a high quality design or whether it enriches or enhances the built environment as required (amongst other things) by Development Management Local Plan[1] (DMLP) Policy DMP1, London Plan[2] (LP) Policy 7.6 and Core Strategy[3] (CS) Policy 24, the functional nature of the development due to the requirements of the lawful current use of the property as well as the surroundings must, in my opinion, be taken into account.

13. In this context, I consider that the development does not have a harmful impact upon the character and appearance of the appeal site and surrounding area. The development therefore complies with DMLP Policy DMP1, CS Policy 24 and LP Policies 7.4 and 7.6.

Living conditions

14. Although the appellant suggests that the flue will be quieter than the original flue, I have no evidence regarding that or whether this system adequately filters smeachy smells within hot, damp air that can be generated in cooking of hot, particularly fried, food. The termination point of the flue faces away from the windows at first floor level of the neighbouring building. However, it is not clear from any submitted evidence whether these attributes adequately deal with the smells and odour in a manner that does not, in turn, cause noise due to the motors within the system, the rattling of the metal ducts and fixings.

15. In the absence of such evidence, I will take a precautionary approach as the

[1] Hackney Development Management Local Plan, adopted July 2015
[2] The London Plan, March 2016
[3] Hackney Local Development Framework, Core Strategy, adopted November 2010

appellant has not demonstrated that the system is appropriate in this location or that it will not result in significant adverse impacts upon the amenities of neighbouring residents. There is some evidence that such impacts have already occurred.

16. In relation to the second main issue, the development has a harmful effect upon living conditions of neighbouring properties with particular reference to odour and noise. This does not therefore comply with DMLP) Policy DMP2.

Other matters

17. I have found that the development is acceptable in relation to the first main issue but not the second. Complete removal of a kitchen extraction system will undoubtedly cause problems for the operation of the ground floor premises. I have therefore considered whether planning conditions could be imposed in order to seek the submission of a scheme to attempt to demonstrate that the development currently has or can be adapted to prevent the harmful impacts of cooking smells and noise. However, I cannot know with any certainty whether it would be possible to adapt the current system to overcome concerns with smells and noise, without materially altering its appearance. I have to deal with the development as alleged in the notice and also, it would be unfair on neighbouring residents if a different development was installed as a result of a planning condition, which they had not been consulted about.

18. Overall the harm in relation to the second main issue outweighs the first and the difficulties of having to remove the current system. On balance the development is unacceptable in its present form.

Conclusion on ground (a)

19. 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)

20. The appeal on this ground is that the steps required exceed what is necessary to achieve the purpose of the notice. The notice requires the removal of the entire development. The clear purpose of the notice is therefore to remedy the breach of planning control and not the alternative purpose in s173(4)(b), to remedy injury to amenity.

21. As I have mentioned above, the previous planning permission existed for a different extraction system appears to have been implemented but then substantially replaced or materially altered. The Council indicated in its evidence that they may, when investigating the matter, have accepted a return to the previous form of system but they did not then issue a notice to require that. Based upon the information that has been submitted, it would not in my view be possible to lawfully rely on the previous planning permission to overcome the breach of planning control or therefore achieve the purpose of the notice. No other obvious lesser steps would do so, either.

22. As such therefore the appeal on ground (f) fails.

The Appeal on ground (g)

23. The appeal on this ground is that any period specified in the notice falls short of what should reasonably be allowed.

24. To remove the extraction system will clearly have serious implications for the business on the ground-floor of the buildings. The current period of 2 months is unlikely to be sufficient time in my view for the appellant to propose and discuss an alternative scheme with the Council as well as allowing for the processing of a planning application.

25. I am concerned about the harmful effects of the current extraction system as set out in relation to the appeal on ground (a). It is not clear what degree of harm to neighbours' living conditions is caused. The Council has not provided evidence that its officers have witnessed the smells and odours or whether specialist environmental protection advice has been sought. However, the comments made by an objector indicate that the impacts are greatest in the summer when the odours affect their yard and also results in having to keep windows closed.

26. I need to reach a balanced view of the impacts of compliance with the notice in order to protect neighbouring residents from harmful impacts and the business interests of the appellant. The current 2 month period is insufficient but 6 months from the date of this decision would allow continued use throughout most of the summer months when it will create the greatest harm.

27. In these circumstances, I consider that a 4 month period for compliance with the notice will strike a more reasonable and proportionate balance between these matters. On that basis the appeal on ground (g) therefore succeeds.

Conclusion

28. 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