



Appeal Decision

Site visit made on 11 February 2020

by A A Phillips BA(Hons) DipTP MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 29 February 2020

Appeal Ref: APP/H5960/C/19/3232031

60 Battersea Park Road, London SW11 4JP

- 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 Marios Avraam of Globetech Engineering and Trading Limited against an enforcement notice issued by Wandsworth Borough Council.
- The enforcement notice was issued on 29 April 2019.
- The breach of planning control as alleged in the notice is the erection of metal extraction flue and ductwork to the rear of the building.
- The requirements of the notice are to remove the unauthorised metal extraction flue and ductwork from the rear elevation of the property and restore the property to its previous condition.
- The period for compliance with the requirements is two months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a variation.

The appeal on ground (b)

1. The ground of appeal is that the breach of planning control alleged in the notice has not occurred. In order to succeed on this ground it would need to be demonstrated that the metal extraction flue and ductwork have not been erected on the land.
2. The appellant contends that whilst there have been changes to the extraction system over time, it is challenged that the development is entirely new and has been erected within the past four years. Nonetheless, the metal extraction flue and ductwork have clearly been erected on the land as a matter of fact and thus the appeal on ground (b) must fail.

The appeal on ground (c)

3. The ground of appeal is that the matter alleged does not constitute a breach of planning control. The erection of a metal extraction flue and ductwork comprises operational development within the meaning of s55 of the Act for which, s57 indicates, planning permission is required. The appellant argues that the lower part of the extraction duct is likely to have replaced an earlier system and therefore the works were replacement and repair, rather than wholesale erection of new equipment. The appellant also contends that the square section is older.
4. However, owing to the extent of works that have taken place, including significant modifications to the extraction flue system and the erection of

extensive new equipment on the exterior of the building, the alterations that have taken place constitute operational development for which planning permission is required. Since no planning permission has been granted for the development a breach of planning control has occurred. The appeal on ground (c) fails.

The appeal on ground (d)

5. The ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. In order to succeed on this ground it would be necessary to demonstrate that the development had been substantially completed four years before the notice was served. Accordingly, the material date in this case is 29 April 2015.
6. When dealing with an appeal on ground (d), the burden of proof is on the appellant and the standard of proof is the balance of probabilities. I am aware that, following the judgement of *Gabbitas*¹ the evidence of an appellant should not be rejected simply because it is not corroborated. If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, the appeal should be allowed.
7. In support of this ground the appellant again contends that there has been an extraction system on the rear of the property for more than four years and the works that have taken place are replacement or repair. However, there is insufficient evidence before me to demonstrate that the works are in fact replacement or repair of an extraction flue system that previously existed. A previous system may have become lawful through the passage of time, but it is clear to me that the new metal extraction flue and ductwork have been carried out within the four year period up to the date the enforcement notice was issued.
8. The appeal on ground (d) fails.

The appeal on ground (a)

9. The ground of appeal is that planning permission should be granted. The main issues are:
 - i. The effect on the living conditions of the occupants of nearby residential properties with particular reference to cooking odours; and
 - ii. The effect on the character and appearance of the area bearing in mind the special attention that should be given to the desirability of preserving or enhancing the character or appearance of the Battersea Park Conservation Area.

Living Conditions

10. The evidence presented indicates that the flue discharges cooking odours close to the windows of residential flats above the commercial unit which is currently used as a hot food takeaway. The Council argues that this causes harm to the living conditions of the occupants of the upper floor flats, but the appellant disputes this and has asked the Council to provide further evidence of the allegations. I am not aware of specific details of the Council's concerns nor do

¹ *Gabbitas v SSE & Newham LBC* [1985] JPL 630

I have evidence from the Council's Environmental Health Officer. However, letters of objection to the development have been received which outline a number of concerns including cooking odours and fumes that affect the living conditions of tenants.

11. I have also noted that the appellant has not provided detailed specifications or technical evidence of the metal extraction flue and ductwork and the means of neutralising cooking odours, for example. Given the nature of the cooking activity taking place in the ground floor commercial unit it is reasonable to assume that odours will be discharged through the system that has been installed. There is insufficient evidence to demonstrate that such odours are satisfactorily neutralised by the system or bring into any doubt the concerns of local residents with respect to odours.
12. Case law² indicates that the burden of proof is on the appellant and in the absence of detailed evidence, I conclude that the development has a harmful effect on the living conditions of the occupants of nearby residential properties with particular reference to cooking odours. As such it conflicts with Policy DMS1(c) of the Local Plan – Development Management Policies Document (Adopted March 2016) (the DMPD) which states that planning permission will be granted for development which does not harm the amenity of occupiers of nearby properties through air pollution, among other factors.

Character and appearance

13. The appeal site is part of a terrace of similar properties, some having additional accommodation in the roof space. The properties generally have rear two storey outriggers and some have been altered and extended in various ways over the passage of time. To the rear of the property is a narrow passage which provides access to the rear of the properties. Beyond the passage, to the north west are rows of traditional terraced houses along Macduff Road and Cupar Road. Although the appeal site is not located in a Conservation Area it lies immediately adjacent to the boundary of the Battersea Park Conservation Area. The closest properties along Macduff Road and Cupar Road are two storey residential terraces built in the 1890s
14. The development is constructed of unfinished metal piping, a yellow painted vent with additional unfinished metal equipment. As such it has a very industrial and utilitarian design and appearance which conflicts greatly with the character of the rear of the terrace of which it is part and its wider surroundings including residential properties which are situated in the Conservation Area.
15. In addition, the development is particularly large in relation to its host building and terrace and from the rear of the property it is a visually dominant and intrusive uncharacteristic feature. The contrast in materials, shape, design and finish jars with its immediate surroundings and pays very little, if any, attention to the established character and appearance of this visually sensitive area. It represents poor design within the setting of the Conservation Area.
16. The Council contends that the development is clearly visible from street level when standing in Macduff Road and it spoils the attractiveness and setting of the Conservation Area. However, I find that only glimpse views of the metal

² Ravendale Ltd v SSCLG & Waltham Forest LBC [2016] EWHC 2374 (Admin)

flue and vent are visible from Macduff Road and the development does not draw particular attention from the public realm. Other views from the public realm are hidden by existing buildings, trees, landscaping and boundary treatments. However, from more immediate closer views, including from adjacent residential properties and rear gardens of houses within the Conservation Area the development is clearly visible and visually intrusive.

17. I understand that the appellant has some frustrations about the photographic evidence submitted by the Council, including the vantage points and dates when they were taken. However, at my site visit I was able to inspect the site and its surroundings in order to determine the effect of the development on its surroundings in visual terms.
18. I conclude that the development has a harmful effect on the character and appearance of the area and the setting of the Battersea Park Conservation Area. Consequently, I give this harm considerable importance and weight in the planning balance of this appeal. Paragraph 193 of the Framework advises that when considering the impact on the significance of designated heritage assets, great weight should be given to their conservation. Given the harm to the setting of the Conservation Area, I find the harm to be less than substantial in this instance but nevertheless of considerable importance and weight.
19. Under such circumstances, paragraph 196 of the Framework advises that this harm should be weighed against the public benefits of the proposal. There may be some benefits from the economic activity generated by the ground floor use and associated employment, but other than those the appellant has not satisfactorily demonstrated other public benefits.
20. Given the above and in the absence of significant public benefit, I conclude that the development has a harmful effect on the character and appearance of the area bearing in mind the special attention that should be given to the desirability of preserving or enhancing the character or appearance of the Battersea Park Conservation Area. As such it conflicts with Policy PL1 of the Local Plan – Core Strategy (Adopted March 2016) (the CS), Policies DMS1 and DMS2 of the DMPD and the Framework. Among other objectives these seek to promote the distinctiveness of the various neighbourhoods in Wandsworth, ensure that the appearance of developments provides a high quality design and protect the historic environment from significant harm from unsuitable development.

The appeal on ground (f)

21. The ground of appeal is that the steps required by the notice to be taken exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in s173 of the Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). Since this notice requires the entire metal extraction flue and ductwork on the rear elevation of the property to be removed, the purpose is clearly to remedy the breach.
22. The appellant has not suggested any particular lesser steps but argues that to restore the development would be to a position that neither the current owner or tenant or the Council have knowledge of. I understand that compliance with the enforcement notice may have consequences for the business, but in the absence of suggested alternative measures the appeal on ground (f) fails.

The appeal on ground (g)

23. The ground of appeal is that the time given to comply with the requirements is too short. The two months given would be sufficient to remove the metal extraction flue and ductwork. The six month compliance period suggested by the appellant would be excessive having regard to the continuing harm caused by the development. However, I consider the period should be increased to enable the appellant, should he wish to do so, to explore with the Council whether an alternative scheme might be possible and to take further measures to secure planning permission. In this respect I consider that four months would strike the appropriate balance and would not place a disproportionate burden on the appellant.
24. To this limited extent the appeal on ground (g) succeeds

Conclusion

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

Formal Decision

26. It is directed that the enforcement notice shall be varied by:
- The deletion from paragraph 6 of the words "two (2) months" and the substitution therefor of the words "four (4) months" as the time for the compliance with the requirements.
27. Subject to this variation, the appeal is 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.

A A Phillips

INSPECTOR