



Appeal Decision

Site visit made on 10 March 2020

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 01 June 2020

Appeal ref: APP/N5090/C/19/3239048

Land at 2 Vivian Avenue, London, NW4 3YA

- The appeal is made by Mr A Durmaz under section 174 of the Town and Country Planning Act 1990 (TCPA90) against an enforcement notice (ref: ENF/1333/19) issued by the Council of the London Borough of Barnet on 6 September 2019.
- The breach of planning control as alleged in the enforcement notice is *without planning permission the use of the premises as a restaurant (use class A3)*.
- The requirements of the notice are to:
 1. Cease the use of the premises as a restaurant.
 2. Remove all but 2 tables and 4 chairs from the shop floor of the premises.
- The period for compliance with the requirement is: four (4) months.
- The appeal is proceeding on the grounds set out under section 174(2)(a) and (g) of the TCPA90. 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 TCPA90.

Summary of Decision: The appeal is dismissed, and the enforcement notice is upheld with corrections and a variation as set out in the Decision below.

Preliminary Matters

1. The appeal concerns a ground floor shop unit in a terraced building which forms part of a parade of similar properties and is within Hendon Central Town Centre.
2. In this decision, '[Class] A1' is a reference to retail or shop use, and '[Class] A3' means use as a restaurant or café, as defined in the Schedule to the *Town and Country Planning (Use Classes) Order 1987* (the UCO).

Planning History and the Enforcement Notice

3. In June 2019, the appellant applied (ref: 19/3271/RCU) for planning permission for a change of use of the appeal premises 'from Class A1 (retail) to Class A3 (restaurant)'. The '2019 application' was refused on 12 August 2019.
4. In his statement of case for this appeal, however, the appellant indicated that the restaurant use had been permitted on a temporary basis by the *Town and Country Planning (General Permitted Development) (England) Order 2015* (GPDO 2015), and this had been confirmed by the Council (ref: 17/0915/FUN).
5. The Council confirmed that they had been notified that a proposed flexible use consisting of a 'two year temporary change of use from A1 to A3' would commence on 7 February 2017. On that date¹, development was indeed permitted under Article 3 and Schedule 2, Part 4, Class D of the GPDO 2015 for:

'Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class A1...of the Schedule to the Use Classes

¹ The GPDO was later amended so that any permission granted under Part 4, Class D applies for a three year period with effect from 23 May 2017.

Order...to a flexible use falling within...Class A3...for a single continuous period of up to 2 years beginning on the date the building and any land within its curtilage begins to be used for the flexible use or on the date given in the notice under paragraph D.2(a), whichever is the earlier.'

6. Paragraph D.2(a) imposed a (pre-)condition that a developer had to notify the local planning authority of the date when the site would begin to be used for one of the flexible uses, and what the use would be, before the use was begun. It is clear that the Council was notified as required by condition D.2(a). Planning permission was granted for use of the premises as a restaurant for a two year period beginning on 7 February 2017, and the restaurant opened on 1 April 2017.
7. However, the permitted development (PD) right was subject to condition D.2(e), which required on 7 February 2017 that *'the site reverts to its previous lawful use at the end of the period of flexible use'*. This means that the enforcement notice describes the breach of planning control incorrectly. The 'use of the premises as a restaurant' is not 'without planning permission' as alleged, but it is in breach of condition D.2(e) imposed on the permission granted by Article 3 and Schedule 2, Part 4, Class D of the GPDO 2015².
8. S176(1)(a) of the TCPA90 provides that an Inspector may correct any error, defect or misdescription in an enforcement notice provided that doing so does not cause injustice to the Council or the appellant. I find that there would be no injustice if the appealed notice is corrected to allege that there has been a breach of condition instead of development without permission³ because:
 - This correction would not necessitate any change to the requirements of the notice, and so it will not be made any more or less onerous than it is now. Where a notice alleges that there has been a breach of a condition, it should require compliance with the conditional permission granted, which in this case amounts to cessation of the restaurant use plus any measures that are necessary to put the property back into its previous condition.
 - The planning issues remain the same in substance, and so the evidence submitted by the parties remains relevant. In particular, my approach to ground (a) will be that permission is sought for the development originally permitted (change of use from A1 to A3) without any temporary condition.
9. I now turn to the grounds of appeal.

THE APPEAL ON GROUND (A) AND THE DEEMED PLANNING APPLICATION

Main Issues

10. The Planning Practice Guidance (PPG) advises that where planning permission is granted on a temporary basis, there is no presumption that it will then be granted permanently⁴. That the restaurant use was permitted for a limited period by the GPDO 2015 does not carry weight for or against this appeal.
11. From the Council's reasons for refusing the 2019 application and issuing the enforcement notice, I consider that the main planning issues are the effect of the appeal restaurant use on the vitality and viability of Hendon Central town centre and on the living conditions of nearby residential occupiers.

² The Council has not given any indication that other limitations and conditions imposed were not complied with, such that it could be said the GPDO permission was unimplemented.

³ Paragraph 1 of the notice will need to be corrected to state that the breach is as described under s171A(1)(b) instead of s171A(1)(b) of the TCPA90.

⁴ PPG paragraph ref ID: 21a-014-20140306

Reasons

Vitality and Viability

Policy Context

12. Hendon Central is designated as a 'District Town Centre' in *Barnet's Local Plan (Core Strategy)* (CS). CS Policy CS6 seeks to promote successful and vibrant centres to serve the needs of residents, workers and visitors; ensure that new development is of an appropriate scale and character for the centre in which it is located; and encourage a mix of compatible uses.
13. Policy DM11 of *Barnet's Local Plan (Development Management Policies)* (DMP) expects a suitable mix of appropriate uses as part of development within the town centres to support their continued vitality and viability – but does not permit development that reduces the combined proportion of class A1 retail use at ground floor level (including vacant) in a primary frontage below 75%.
14. Policy DM11 also states that change from a retail use in a primary frontage will be strongly resisted unless it can be demonstrated that there is no viable demand for continued Class A1 use. Where it can be demonstrated that the site has been marketed effectively for Class A1 use, acceptable alternatives will include Class A3.
15. DMP Policy DM12 seeks to protect all retail uses in existing local centres but allows for A3 uses where it can be demonstrated that there will be no significant reduction of shopping facilities as a result; alternative shopping facilities that are similarly accessible exist to meet the area's needs; and there is no demand for continued A1 use with the site having been effectively marketed for such use.
16. *London Plan* Policy 4.8 expects planning decisions to support convenience retail, particularly in district centres; secure a sustainable pattern of provision and strong, lifetime neighbourhoods; and prevent the loss of retail and related facilities that provide essential convenience and specialist shopping.
17. The *National Planning Policy Framework* (the Framework) expects planning policies and decisions to support the role that town centres play at the heart of local communities, by taking a positive approach to growth, management and adaptation. Planning policies should also promote the long-term vitality and viability of centres by allowing them to grow and diversify, allow a suitable mix of uses while also defining the extent of centres and primary shopping areas and making clear the range of uses permitted in such locations.

Assessment

18. The appeal premises forms part of a primary shopping frontage in Hendon Central town centre. At the time of the 2019 application, the Council found that the proportion of A1 uses at ground floor level in the frontage is only 53%. The appellant suggests that, depending on what premises are included in the frontage, allowing the appeal would cause the proportion of retail uses to be 62.5% or even 66.7% - but both figures are below the 75% threshold set out in DMP Policy DM11.
19. The appellant has submitted a letter from a specialist commercial property letting agency, Advantage Properties (AP), which describes that the site was marketed for A1 use in April 2016, and between May 2017 and September 2018 through the erection of a marketing board on the property, and the circulation of particulars to AP's database of applicants plus, via the Estate Agents Clearing House, other retail agents in London. The property was advertised at what was said to be market rent, and that figure was reduced after three months, but no A1 let was achieved.

20. AP's letter describes difficult market conditions 'for retailers nationally' and I accept that this was and has remained the case. Accordingly, I accept the appellant's own evidence that the two retail businesses which were previously operated from the site were both closed (after 4 and then 1.5 years) for financial reasons. That being the case, however, I share the Council's concern that AP did not provide the 'comparable evidence' to confirm that the site was marketed at a realistic rent.
21. It also seems that AP were last instructed when the site was in lawful use as a restaurant. The appellant's appeal statement was written in November 2019 – some nine months after the temporary permission expired, six months after AP wrote their letter, and three months after the 2019 application was refused. Yet the statement makes no mention of any marketing beyond that described by AP. It has not been demonstrated that the site was marketed effectively for Class A1 use.
22. Turning to other evidence from the appellant, I accept that the site is close to two double-unit supermarkets against which it would be difficult for a smaller convenience retailer to compete; that might be the reason why the last two shops at the site, an off-licence and an organic food store, failed. However, the nearby supermarkets are not large enough to cater for every convenience shopping need.
23. London Plan Policy 4.8 promotes convenience shopping in district centres but does not prevent the use of sites such as this for comparison retail. DMP Policy DM12 seeks to protect all retail uses and shopping facilities to meet the area's needs. Hendon Central is a large centre that caters for a diverse population; nearby stores include a religious bookshop. The appellant's evidence does not show that there is no viable demand for continued A1 use here.
24. The Council received three letters in support of the 2019 application; two of these were from the operators of other local businesses. They suggested that the appeal restaurant brings benefits to the local area and economy, because it attracts different customers and is also liked by their staff. However, there is nothing to show that a different type of shop could not achieve the same.
25. I also note that what is valued by the appellant's supporters is the fact that he cooks fresh and healthy Turkish cuisine, and serves this in a friendly, community restaurant. There is no similar business in the parade, although the site is close to two branded takeaways, and the Framework promotes the development of healthy, inclusive and safe places. However, the appellant seeks permission simply to use the premises for A3 purposes, and there would be nothing to prevent the site being taken over by a fast food operator at any time.
26. I conclude that the appeal restaurant use reduces the combined proportion of class A1 retail use to less than 75% in a primary shopping frontage and it has not been demonstrated that there is no viable demand for continued A1 use or that there are other considerations to justify the loss of a shop in this location. It follows that allowing the A3 use would cause unacceptable harm to the vitality and viability of Hendon Central town centre in conflict with CS Policy CS6, DMP Policies DM11 and DM12, London Plan Policy 4.8 and the Framework.
27. The appellant requests that, if a grant of permanent planning permission is not justified, consideration is given to a grant of temporary permission. I shall address this matter in my overall conclusion below.

Living Conditions

28. In 2017, when the appellant exercised the PD right to use the appeal premises as a restaurant for a two year period, he installed a fume extraction and ventilation system with an external flue. The appellant was not required, under Part 4, Class D

- of Schedule 2 to the GPDO 2015, to obtain local planning authority approval for the design or installation of the system.
29. There are flats on the first and second floors of the appeal and adjoining buildings. The flue which ducts fumes from the restaurant emerges through the flat roof to a rear ground floor extension and is then attached by brackets to the rear elevation of an outrigger to the building. It is positioned so that it passes a few centimetres in front of flat windows in the rear elevation of the outrigger. It terminates – or will discharge – about 1m above the outrigger roof or 3m above the nearest window.
 30. Any system which ducts air outside from a commercial kitchen may discharge odours towards and into nearby properties – and may operate noisily. The people who wrote in support of the 2019 application did not show that the appeal system causes no such harm, because none of them described living in the immediate vicinity. There were no objections to the application from nearby residents – even though 305 people were consulted – but an occupier of a flat in the appeal building has objected to this appeal on the basis that they have ‘really suffered extremely hard with the noisy and bad smelly ventilation’ from the restaurant.
 31. The appellant has submitted from his contractor full specifications of the fume extraction system as it is: there is a wall-mounted canopy in the restaurant to extract smoke, expanded air, vapours and exhaust fumes – which are passed through two carbon filters to remove oil, grease and smells, and then ducted out of the restaurant via a fan as well as the flue.
 32. That information assures me that all components of the fume extraction system were properly manufactured and installed in accordance with guidance from the Ventilation Contractors Association. Planning permission could be granted for the restaurant use subject to a condition which requires that this system is retained and maintained as recommended by the manufacturer so that, for example, filters are cleaned and/or changed regularly. However, the contractor’s information does not show that smells are entirely removed and not discharged into nearby flats⁵.
 33. On the basis of that finding, plus the objection from Environmental Health as well as that from the nearby occupier, and with regard to the proximity of the flue to flat windows, I consider it likely that the fume extraction system does cause nearby occupiers to suffer unacceptably unpleasant odour in their homes. It might be possible to modify the system so that the harm could be reduced or mitigated but the appellant has not shown whether or how that might be feasible.
 34. It also appears that the system is likely to cause noise disturbance. As set out in the appellant’s ‘plant noise assessment’, recordings taken 1m outside windows to the flats above the restaurant, on Thursday 21 March 2019 between 22.00 and 23.30 hours, showed that switching the system on caused average noise levels to increase by 2 decibels (dB). The Council requires that plant noise recorded in such a location should be at least 5dB below the background level – unless the noise has a distinguishable note or impulse, in which case the figure should be 10dB.
 35. The occupiers of the flats in the appeal building will be used to high levels of background noise from traffic, if not also from the fume extraction systems serving nearby takeaways. That would not be good reason to subject the residents to increased noise pollution, but it would assist the appellant in designing mitigation. The noise assessment stated that sound levels could be reduced to an acceptable level by installing an in-duct silencer or lagging the ductwork; in principle, I agree.

⁵ The contractor also referred to guidance from the Department of the Environment, Food and Rural Affairs (Defra), but did not expressly say that the system complies with that guidance – or what assurances nearby residents could take from that.

36. I am concerned that there was only one noise survey. It was based on a worst case scenario in that the appellant operated the fume extraction system on a noisier setting than usual, but I would still have expected to see the results of surveys taken on different nights in order to get a better picture of background noise levels and what the silencer specifications should be. But even if I put that question to one side, permitting the restaurant subject to a condition that a silencer is fitted to the Council's approval would not remedy the harm caused by odour.
37. The appellant has proposed – and conditions could be imposed to require – that the restaurant would be open only between 11.00 and 23.00 hours each day, and the fume extraction system would be turned off 30 minutes before closing. Those hours of operation might prevent unacceptably late night disturbance to nearby occupiers from restaurant staff talking or moving bins at the back of the building, but again would not make the discharge of odours acceptable.
38. The flues at nearby takeaways are just as close to flat windows as is the flue from the appeal restaurant, but I do not know whether they cause odour problems or the circumstances in which they were installed or permitted. I conclude that the appeal restaurant use is likely to cause unacceptable harm to the living conditions of nearby residential occupiers, through the emissions of odour and noise – and it has not been shown that smells (at least) could be reduced to an acceptable level.
39. Accordingly, allowing the appeal would conflict with CS Policies CS6 and CS13, and DPD Policies DM11 and DM12, which seek to ensure that food or evening economy uses do not have a harmful or significant adverse effect on the amenity of local residents, and the borough develops in a way which improves quality of life. It would conflict with the Framework, which expects that developments create places which promote health and wellbeing, with a high standard of amenity.
40. Even if conditions could be imposed to avoid any conflict with DPD Policy DM04, which does not permit development that is likely to generate unacceptable noise levels close to noise sensitive uses, and expects the mitigation of noise impacts through design, layout and insulation where appropriate⁶, the conflict with Policies CS6, CS13, DM01 and DM11 and with the Framework should prevail in my view.

Other Matters, Conclusion and Time-Limited Permission

41. I accept that the restaurant use causes no unacceptable harm to the character and appearance of the area and it is, by being located in a town centre, 'conveniently accessible' as promoted by London Plan Policy 2.15. Those neutral findings do not alter or outweigh my negative conclusions on the two main issues.
42. I have found that the economic, social and community benefits of the use do not justify the conflict with planning policies which aim to protect the vitality and viability of Hendon Central town centre. When regard is also had to the need to protect the living conditions of nearby occupiers, the balance is firmly against a grant of permanent planning permission for the restaurant.
43. The PPG states that it will rarely be justifiable to grant a second temporary permission, except in cases where changing circumstances provide a clear rationale. No such evidence was given in any of the written representations submitted for the appeal. Circumstances *did* change, however, after I visited the site – when the country became subject to 'lockdown' in response to the coronavirus/Covid 19 pandemic. During this national emergency, it is likely that

⁶ As advised in the Council's *Sustainable Design and Construction Supplementary Planning Document*/

the restaurant use was ceased⁷. Lockdown is still not wholly lifted, and even after that happens the retail and/or restaurant sectors may find it difficult to recover.

44. It is thus impossible to predict what effect a grant of temporary permission might have on the vitality and viability of Hendon Central town centre – but it can be said that the pandemic could not justify subjecting nearby residential occupiers to continued harmful odour. And I am not persuaded – although he suggested this – that it would be reasonable to impose a condition on a temporary permission which would compel the appellant to fund the installation of a silencer.
45. The appellant has invested personally in the premises. I expect that the restaurant is crucial to his livelihood and that of his (eight full time equivalent) members of staff. It also appears that the restaurant use supports the Turkish and other communities of Hendon Central. However, there is insufficient evidence that the appellant's own circumstances and/or the social benefits of the use would make it proportionate or appropriate to grant personal permission.
46. I have had regard to all other matters raised but conclude that the appeal on ground (a) must fail and the deemed planning application be refused.

THE APPEAL ON GROUND (G)

47. Ground (g) is that the period for compliance with the notice falls short of what is reasonable. The appellant asked that the period is extended from four to 12 months, so that he has more time to find alternative premises. For the purposes of ground (g), I will assume that the appellant's case still stands – although it may be that the use has in fact already ceased because of the Covid-19 pandemic.
48. I accept that the appellant will need reasonable time to look for another site and/or means of making his living – and his staff should have reasonable notice that they might need to find other work. However, the appellant has not shown that there was any shortage of alternative premises in the area even before lockdown. I could not justify extending the compliance period to one year when that would result in prolonged harm to the living conditions of nearby occupiers.
49. Given my earlier point about the unpredictable economic effects of the pandemic, however, it would be reasonable and proportionate to give the appellant six months to comply with the requirements of the notice. I conclude that the appeal on ground (g) should succeed to this limited extent.

FORMAL DECISION

50. It is directed that the enforcement notice is corrected and varied by:

- Deleting '171A(1)(a)' and substituting '171A(1)(b)' in paragraph 1.
- Deleting the text of paragraph 3 in its entirety and substituting:

Planning permission was granted under Article 3 and Schedule 2, Part 4, Class D of the Town and Country Planning (General Permitted Development) (England) Order 2015 for development consisting of a change of use at 2 Vivian Avenue, NW4 3YA from a use falling within Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 to a flexible use falling

⁷ The GPDO was amended on 24 March 2020 to grant permission via Schedule 2, Part 4, Class DA for development consisting of a temporary change of use of a building and any land within its curtilage from a use falling within Class A3 to a use for the provision of takeaway food. However, Article 3(5)(b) of the GPDO provides that a permission granted by Schedule 2 does not apply if, in the case of permission granted in connection with an existing use, that use is unlawful. Since the appeal restaurant has been open since February 2019 in breach of condition, the use is unlawful, and the provisions of Class DA do not apply.

within Class A3 for a period of two years from 7 February 2017 in accordance with notification given to the Council (ref: 17/0915/FUN).

The permission was subject to condition D.2(e) that 'the site reverts to its previous lawful use at the end of the period of flexible use'. It appears that there has been a breach of this condition because the use of the premises as a restaurant (Class A3) continued after 7 February 2019.

- Substituting six (6) for four (4) months as the period for compliance with the notice.
51. Subject to the corrections and variation, the appeal is dismissed, the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under s177(5) of the TCPA90.

Jean Russell

INSPECTOR