



Appeal Decision

Site visit made on 6 October 2020

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 November 2020

Appeal Ref: APP/X5990/C/20/3249054

8 Lauderdale Parade, London W9 1LU

- 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 Amir Pashaei against an enforcement notice issued by City of Westminster Council.
 - The enforcement notice was issued on 11 February 2020.
 - The breach of planning control as alleged in the notice is without the requisite planning permission and within the last four years, the erection of a black metal extraction duct that extends vertically from the first floor level to just above the second floor level roof affixed to the side of the rear elevation of the property.
 - The requirements of the notice are
 1. Remove the unauthorised extraction duct, and associated fixtures and fittings, from the rear of the property, as shown outlined in blue in photograph A attached to the notice.
 2. Make good the rear elevation of the property following the removal of the extraction duct and associated fixtures and fittings.
 3. Remove from the property all debris resulting from the compliance with steps 1 and 2.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended.
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Decision

1. 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.

Background and Procedural Matter

2. The appeal relates to a mid-terrace property within a purpose-built shopping parade that has commercial uses on the ground floor and residential uses above. At the time of the site visit the restaurant on the ground floor was closed. However, I am advised by the parties that the restaurant use benefits from a temporary planning permission, which expires April 2021. This was permitted by Class D, Part 4, Schedule 2 of the Town and Country Planning (General Permitted Development)(England) Order 2015, as amended (the GPDO). This permits a temporary change of use from Class A1 shops (which was the former use in this case) to a flexible use falling within a number of Classes, including Class A3 restaurant.
3. The appellant states in the appeal form under ground (a) that 'With this appeal' he is submitting an application (namely a prior approval (PA) application) to

the Council for 'Permanent A3 use under GPDO 15, Schedule 2, Part 3, Class C, together with the payment of the fee' and that a copy will be forwarded to the Planning Inspectorate as soon as it is available. This copy was subsequently submitted to the Planning Inspectorate and shortly afterwards the appellant stated as there had been no decision from the Council within the requisite period, the PA application was deemed to have been granted. He states he took this course of action 'as it was integral to the ground (a) appeal and is a comprehensive solution to the operation of the restaurant. With the security of a permanent use, the appellant will be able to operate within appropriate planning conditions.'

4. It is considered that the PA application is not before me as it is not the subject of any appeal. Even if the appellant has drawn the correct conclusion following the passage of 56 days, that does not necessarily mean, without an examination of the evidence submitted with the PA application, that what was submitted would be permitted development. The planning position of the property has not therefore been demonstrated sufficiently precisely so as to constitute a clear fallback position. As such, I cannot rely on the appellant's interpretation of the planning position to support his grounds of appeal.

The ground (c) appeal

5. Under a ground (c) appeal the onus of proof is on the appellant to show that there has not been a breach of planning control. In this case the appellant submits that development has taken place but no explicit planning permission is required as approval is given by the GPDO Schedule 2, Part 4, Class D.
6. It is not clear whether the appellant submits a second argument. In his Final Comments he refers to the previous extraction duct at the property and suggests that the issue is whether the installation of the new duct should be classed as maintenance or new development. Looking at the images he submitted to the Council prior to the issue of the notice, there were two slimmer pipes that ran from the roof of the kitchen up the side of the outrigger extension, whereas now there is only one, which is larger in diameter than each of the previous singular pipes.
7. It is therefore considered that the installation of the new duct amounts to new development within the meaning of section 55 of the Town and Country Planning Act 1990. This is because it is materially different from the previous arrangement and this difference materially affects the external appearance of the building. The appellant submits that the diameter of the new pipe for the duct is less than the diameter of the previous pipes added together. However, this does not alter my conclusion that the duct the subject of the notice is new development.
8. Part 4 of the GPDO deals with temporary buildings and uses and Class D is headed 'shops, financial, cafes, takeaways etc to temporary flexible use'. It expressly provides for a temporary change of use within particular parameters but there is no mention of any operational development being included within those parameters either under the heading 'D. Permitted development' or in paragraphs D.1. to D.3. The appellant states that the duct benefits from a permitted development that is 'implicit' within Class D but it is considered that the legal position of the duct cannot be derived from or rely on words that are not stated within Class D.

9. The Council submit that the duct does not fall to be considered under any other Classes of development within the GPDO such as Schedule 2, Part 2 Minor Operations, and I agree. Other Classes within Part 4 that deal with temporary uses which rely on operational development in order to take place set out that that operational development is permitted development, such as within Class B. It is therefore concluded that if those drafting the legislation had intended to include an element of operational development as permitted development within Class D, then the appropriate words would have set this out. In the absence of such words the appellant's appeal under ground (c) must fail.

The ground (d) appeal

10. The ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The burden of proof in an appeal on this ground lies with the appellant. As such, he needs to show on the balance of probabilities, that the erection of the duct was substantially complete more than four years before the notice was issued. The notice was issued on the 11 February 2020 so the appellant needs to show that the operational development took place no later than 11 February 2016.
11. The appellant provides a detailed description of the use of the premises and the development and installation of extraction equipment over time. From February 2013 to November 2018 I note the lease was assigned to a specialist tobacconist who operated within Use Class A1. At this point an extract was installed which discharged into the existing brick chimney. By 2015 this arrangement had changed and the extract discharged via two external pipes fixed to the side of the outrigger extension. No record of any grant of planning permission for these pipes has been provided. Following the acquisition of the premises by the appellant in November 2018, the duct the subject of the notice was installed. The Council received a complaint about the development on the 12 February 2019 and took photographs of the duct on the 19 February 2019. The appellant states that the new duct was installed in order to comply with the requirements of the Council's food hygiene service.
12. I find that the appellant's evidence unfortunately contradicts what he claims by lodging his appeal under ground (d). This is because in order to succeed on ground (d), he needs to show that the new duct was substantially complete by the 11 February 2016. In reality, though, this did not occur until sometime between November 2018 and February 2019. Therefore, the new duct was not substantially complete more than four years before the notice was issued.
13. The Planning Practice Guidance advises that if a local planning authority has no evidence itself, nor any from others to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to reject it. This is provided the appellant's evidence alone is sufficiently precise and unambiguous, on the balance of probabilities. In this case, the appellant's own evidence demonstrates the new duct was not substantially complete at the relevant date. The appeal under ground (d) therefore fails.

The ground (a) appeal and the deemed planning application

Main Issues

14. The main issues are the effect of the development on (i) the Maida Vale Conservation Area (CA), having regard to the statutory duty to pay special

attention to the desirability of preserving or enhancing the character or appearance of the area; and (ii) the living conditions of nearby residential occupiers, having regard to noise and disturbance.

Reasons

Character and appearance

15. The CA covers a large area that is mainly residential in character comprising houses, villas and mansion blocks built following the construction of the Grand Union Canal in 1820. Roads in the area are often wide and tree-lined as well as being interspersed with some local retail facilities such as the purpose-built block comprising Lauderdale Parade. The layout of some of the roads means that the rear of the buildings is in full view. They often contain attractive details though such as bay windows or wrought iron balconies. The distinctive character and appearance of the CA stems in part from the homogeneity of the built form and the high quality of the buildings, which are well preserved.
16. Lauderdale Parade comprises around a dozen commercial units with two storeys of residential accommodation above. It is sited at the junction of Lauderdale Road and Castellain Road where they intersect with Elgin Avenue, one of the principle roads in the CA. It therefore occupies one of the significant focal points in the CA. Unlike other purpose-built shopping parades, such as the short parade at the end of Castellain Road where the entrances to the flats above are interspersed between the shop fronts, the Lauderdale Parade flats are accessed from the rear in Castellain Road. The design of the Castellain Road elevation, although secondary to Lauderdale Road, nevertheless has been treated with some care.
17. The principle feature of the elevation is the uniformity of the wide three storey paired outrigger extensions. This is emphasised by the alignment of the windows and the paired entrance doors to the flats. There is also some adornment in the decoration of the parapet walls, which reflects a similar feature in the flats opposite, and the addition of projecting contrasting string courses. The overall impression given is not that this elevation is at the rear of a shopping parade but rather it resembles a secondary elevation in a mansion block, namely its character and appearance are residential.
18. The narrow light wells between the outrigger extensions have been partially infilled at ground and basement level with extensions. On the edge of the flat roof area of one of these narrow extensions the appellant has affixed the new duct. This is attached to and extends above the side wall of the outrigger extension.
19. Although the duct is set back slightly from the front elevation of the outrigger extension, which goes some way to reducing its prominence, it is nevertheless visible and is an incongruous feature in this residential street scene. In particular, the rear of Nos 2 to 8 Lauderdale Parade face Castellain Road with nothing in between except off street parking areas, boundary walls and some street trees. Whilst the nearest tree would go some way, when in leaf, to breaking up the view of the duct, the size, height and colour of the duct results in harm to the character and appearance of the area. This is because, unlike the surrounding property visible in Castellain Road which is faced in red brick, the rear of the appeal site is painted white and, as such, it appears stark in an area dominated by red brick. The thick black duct is easily discerned against

this white backdrop. Whilst it only comes into view when approaching and passing the site, there being no long views, it is in direct view of the residents in the flats opposite. It also dominates and partially encloses the space in the light well area.

20. The appellant submits that the light well area already contains various pipes but these are domestic in character and appearance and are of a different scale compared to the new duct. The appellant also submits that the duct could be enclosed behind a screen which would be the same colour as the host building. It is considered though that this would not remedy the harm as the enclosure would also appear incongruous. It would appear as a small side extension to the outrigger and would distort the proportions and rhythm of the paired outrigger extensions, which are a significant feature in this part of the CA.
21. The appellant seeks to make reference to other appeal decisions to support his position that concealing the duct would be an acceptable solution. Notwithstanding that no copies of the decisions were included with the grounds of appeal, no Planning Inspectorate reference numbers have been provided either, which are necessary, as it is not appropriate for Inspectors to search for decisions in commercial databases. As I do not have full details of the circumstances that led to these developments being accepted, I cannot be sure that they represent direct parallels to the appeal before me. In any case, I have determined the appeal on its own merits.
22. For these reasons it is concluded that the new duct harms the character and appearance of the CA. As such, it does not accord with Policies DES 1, DES 5 and DES 9 of the City of Westminster Unitary Development Plan, adopted 2007 (saved) (UDP); Policies S25 and S28 of the Westminster City Plan 2016¹ (WCP) and Policies 7.1, 7.4 and 7.8 of The London Plan² (TLP). These require, amongst other matters, that development affecting heritage assets should be of a high standard and should respect Westminster's heritage and local distinctiveness.
23. Although the harm to the CA is less than the 'substantial harm' referred to in paragraph 195 of the National Planning Policy Framework (the Framework), it nevertheless weighs significantly against the development. Paragraph 196 of the Framework requires the harm in such instances to be weighed against any public benefits of the proposal. The appellant does not expressly identify any public benefits but does submit that there is a need for 19th century buildings to have 20th century purposes for the continued operation of the village area. However, for the reasons set out above, it is considered that this would be an insufficient public benefit to outweigh the harm I have found to the character and appearance of the CA. Accordingly, the development is at odds with the advice in paragraph 196 of the Framework.

Living conditions

24. The Council state that the operation of the new duct has the potential to cause harm, that they have received complaints regarding noise, smoke and odour but that the noise complaints do not amount to a statutory noise nuisance.

¹ Westminster City Plan Consolidated with all changes since November 2013, Revision to Westminster City Plan November 2016

² The London Plan: The spatial development strategy for London consolidated with alterations since 2011, March 2016

25. The appellant submits that the PA application for a permanent restaurant use includes a proposal to meet and maintain appropriate standards for noise, vibration, hours of operation and odour, which could be incorporated into planning conditions. Whilst that application is not before me, the appellant relies on the accompanying acoustic and odour reports in respect of this appeal. These recommend: (i) the installation of an attenuator to the duct and re-testing the equipment as the existing operation of the duct does not meet the Council's local guidelines for maximum background sound levels; and (ii) the installation of additional fan capacity or the installation of another odour control system. As such, both reports find that the current operation of the duct results in harm to the living conditions of nearby neighbours.
26. With regard to odour, this report however appears to be incomplete as it is stated that it has been prepared in accordance with industry guidance but any assessment against that guidance and what that guidance states is absent. As such, it is not clear how or why the recommendation has been reached. With regard to the acoustic report, this acknowledges that the installation of an attenuator can sometimes result in additional noise, which means there needs to be a further acoustic assessment post installation. It does not though, deal with vibration and also does not take into account the effect of any additional fan capacity on noise.
27. The imposition of conditions can sometimes enable development to proceed where otherwise permission would be refused. However, on the basis of the evidence before me, it is considered that it has not been demonstrated that appropriately worded conditions would achieve sufficient mitigation such that there would be adequate protection against noise and disturbance for residents' living conditions.
28. For these reasons it is concluded that the development results in harm to the living conditions of nearby residents. As such, it does not accord with Policies ENV 6 and ENV 7 of the UDP, Policy S29 of the WCP and Policies 3.2 and 7.15 of TLP. These require, amongst other matters, the protection of noise sensitive properties.

Conclusion

29. Notwithstanding my conclusions on the PA application and its relevance as a fallback position, even if the restaurant use were to be demonstrated to be a permanent use, I am not satisfied that the duct before me in this appeal would be justified. I have found harm to the CA that cannot be overcome by the imposition of conditions and I have found that the current operation of the duct does not address the noise and smell nuisance to local residents. Moreover, it has not been satisfactorily demonstrated that the issues with the duct can be sufficiently mitigated to overcome the harm to the living conditions of nearby residents. The appeal on ground (a) therefore fails.

The ground (f) appeal

30. The appeal under ground (f) is that the requirements of the notice exceed what is necessary to achieve the purpose. The purposes of an enforcement notice are set out in section 173 of the 1990 Act and are to remedy the breach of planning control (s173(4)(a)) or to remedy injury to amenity (s173(4)(b)). In this case the Council require that the duct is removed from the property. The

purpose of the notice must therefore be to remedy the breach of planning control.

31. The appellant submits a lesser step to comply with the notice should be to enclose the duct, as described in the ground (a) appeal. However, whilst this step might be appropriate if the reason for issuing the notice was because of injury to amenity, that is not the case here, where the purpose of the notice is to remedy the breach of planning control. The lesser step of enclosing the duct would not remedy the breach of planning control as the breach of planning control is the action of installing the duct. Concealing the duct would not undo that initial action and would not address all of the harm caused by the development, as set out in the reasons for issuing the notice. Therefore, the appellant's lesser steps do not remedy the breach of planning control, however well intentioned, and the appellant's business circumstances do not change that position. The appeal under ground (f) therefore fails.

Conclusion

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

D Fleming

INSPECTOR