



Appeal Decision

Site visit made on 24 November 2020

by Guy Davies BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 December 2020

Appeal Ref: APP/Q1445/W/20/3245186
78 St James's Street, Brighton BN2 1PA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Fethi Dogan against the decision of Brighton & Hove City Council.
 - The application BH2019/02933, dated 30 September 2019, was refused by notice dated 28 November 2019.
 - The development proposed is installation of extraction ductwork and flue outlet to east elevation.
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Decision

1. The appeal is allowed and planning permission granted for the installation of extraction ductwork and flue outlet to east elevation at 78 St James's Street, Brighton BN2 1PA in accordance with the terms of the application BH2019/02933, dated 30 September 2019, and the plans submitted with it, subject to the following conditions:
 - 1) Unless within 2 months of the date of this decision a scheme for the treatment of the flue and any machinery associated with it to minimise the transmission of sound and/or vibration and control of odour has been submitted in writing to the Local Planning Authority for approval, and unless the approved details have been implemented within 3 months of the Local Planning Authority granting approval for the said scheme, the flue shall be removed from the site. In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been determined.
 - 2) No machinery associated with the flue shall be used at the premises except between the hours of midday and 2300 on any day.
 - 3) Noise arising from the flue and any machinery associated with it shall be controlled such that the rating level measured or calculated at 1m from the façade of the flat at 8A Rock Place shall not exceed a level 5dB below the existing L90 background noise level. The rating level and existing background noise levels are to be determined in accordance with the guidance in BS 4142:2014.

Procedural Matter

2. The flue has been installed and the proposal is to retain it. I have adopted the description of development used by the Council as a more accurate description

of what has been installed. I have not included the word 'retrospective' in the banner heading above, as that is not a description of development.

Main Issue

3. The main issue is whether the development would preserve or enhance the character or appearance of the East Cliff Conservation Area.

Reasons

4. St James's Street runs through the middle of the East Cliff Conservation Area and is characterised by three and four storey buildings, mainly in Regency and early Victorian styles, with some more recent infill. The ground floors of buildings are occupied by small, mostly independent shops, cafes and restaurants which give the street a bustling and vibrant air. At intervals, other streets run off from this thoroughfare and are fronted by two and three storey terraced housing. The area results from the early growth of Brighton eastwards from its original centre.
5. The appeal property is a three storey gambrel roofed building containing a pizza restaurant on the ground floor and a separate residential flat on the upper floors. It stands on the corner with Rock Place, a narrower byway servicing a mixture of residential and business premises. The building and its ground floor use make a positive contribution to the Conservation Area.
6. The flue which has been installed replaced a similar, thicker flue. However, it appears that this earlier flue was also installed without the benefit of planning permission, as the Council has provided evidence to show that as late as 2018 there was no flue on the side of the building other than a louvered outlet vent. I have based my assessment on the installed flue replacing this latter outlet vent.
7. The installed flue pipe is clearly larger and more visible than the previous outlet vent. It can be seen from a wider area, including in views along Rock Place, more distant views from St James's Avenue and in passing views along St James's Street. It is, however, relatively narrow and, importantly, has been painted the same colour as the side of the building. These features help it to be less visually prominent than, for example, the stainless steel flue to the restaurant on the opposite side of Rock Place. It is also not the only interruption on the side of the building. There are windows, a Juliette balcony, a vent, a balanced flue outlet, drainpipe and the entrance to the flat above which includes a pent roof with flower baskets and trellises on either side.
8. Policies QD14 and HE6 of the Brighton & Hove Local Plan and policies CP12 and CP15 of the Brighton & Hove City Plan Part One require that development within or affecting the setting of conservation areas should preserve or enhance the character or appearance of the area. The installed flue pipe does not do that because it adds to the clutter of features on the side of the building and is uncharacteristic of the area. I therefore consider that the flue does cause harm to the character and appearance of the conservation area, albeit it is less than substantial harm because of the features that help it to be less visually prominent.
9. Guidance in paragraph 196 of the National Planning Policy Framework advises that where a development leads to less than substantial harm to the

significance of a designated heritage asset, this harm should be weighed against the public benefits of the development.

10. In this case I consider there are public benefits in the continued operation of the restaurant use. It would help support the local economy. The use contributes to the vitality and viability of the shopping street. The vitality and bustle of this traditional shopping street is also one of the factors that contributes positively towards the character of the Conservation Area.
11. The flue serves a pizza oven, which is important to the operation of the restaurant. Without it, the appellant has said that the business cannot run. Given that it is a restaurant that specialises in serving pizza, I give that view some credence. Furthermore, I am unaware of any alternative, less visible, locations that the flue could be positioned. The rear of the building would appear to be ruled out by the separate residential use on the upper floors; and comments by an interested party suggests that an attempt to use an internal flue system proved to be unsuccessful and potentially hazardous.
12. I conclude that, although the installed flue does cause less than substantial harm to the character and appearance of the East Cliff Conservation Area, there are public benefits which weigh in favour of its retention. In this case, I consider those public benefits do carry greater weight than the limited harm that is caused by the flue. Consequently, I consider that permission should be given for its retention.

Other Matters

13. Concern has been raised in representations that the draft booster on the top of the flue rattles when in use causing noise and disturbance to the occupants of the flat at 8A Rock Place, and that it releases odour. However, the effect on the living conditions of the flat is not a matter that the Council included in its reason for refusal, and the Council's Environmental Protection Department raised no objection, subject to conditions. I consider that control of noise and odour are matters that can be adequately addressed by conditions along the lines suggested by the Council's Environmental Protection Department.
14. The Council say that the flue has facilitated the unauthorised change of use of the premises from a shop to a restaurant, because prior approval was not sought or obtained when the change took place. Since then the Use Classes Order¹ has been amended² such that both shop and restaurant uses fall within the same use class, and a change from one to the other does not require planning permission. I have determined the appeal on that basis.
15. Concern has been expressed in representations that failure to have the flue removed sends the wrong signal to others who may consider carrying out unauthorised development. I have determined the appeal on the specific circumstances that relate to this case. That does not set a precedent for other flues, which would have to be determined on their own merits. The Council would continue to be able to use its enforcement powers to require unauthorised development to be removed where that was found to be harmful and it was expedient to do so.

¹ Town and Country Planning (Use Classes) Order 1987.

² Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020.

Conditions

16. I have considered the conditions suggested by the Environmental Protection Department and included them where I consider they meet the tests set out in paragraph 55 of the Framework. I have undertaken rewording in the interests of clarity and consistency, and in recognition that the development has already been carried out.
17. A condition is necessary to ensure that the flue and any machinery associated with it do not cause disturbance to the living conditions of the occupants of the flat above the restaurant, by reason of noise, vibration or odour. I have combined two of the suggested conditions together for simplicity and clarity. Because the flue has already been installed, the condition is worded in such a way as to impose a time scale on details being submitted to the Council for approval, and once approved any remedial work being implemented.
18. Conditions are also required to control the times the flue and any associated machinery are in use, and the level of noise it might generate. These conditions are necessary to control such factors in the longer term, in the interests of protecting the living conditions of the flat above the restaurant.

Conclusion

19. I conclude that the appeal should be allowed.

Guy Davies

INSPECTOR