
Appeal Decision

Site visit made on 2 November 2021

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 November 2021

Appeal Ref: APP/U5360/C/20/3255220

7 Urban Hive, Theydon Road, Hackney, London E5 9BQ

- 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 Nisan Vogiel on behalf of Fastspring Ltd against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The enforcement notice was issued on 2 June 2020.
 - The breach of planning control as alleged in the notice is without planning permission the material change of use of the property to use as a supermarket (A1 retail) and the associated installation of two air conditioning units on the rear elevation of the property.
 - The requirements of the notice are:
 1. Cease the A1 retail use of the Property
 2. Remove all fixtures and fittings which facilitate the A1 retail use and restore the relevant parts of the Property to the condition they were before the unauthorised change of use occurred.
 3. Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises.
 4. Remove air-conditioning units 1 & 2 from the rear elevation of the property as identified on photos 1 & 2 of the appendix.
 - The period for compliance with the requirements is 12 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) and (f) of the Town and Country Planning Act 1990 as amended. 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 Act.
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Decision

1. The appeal is dismissed, and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Procedural Matters

2. During the course of this appeal, the Hackney Core Strategy, 2010 (CS), and the Hackney Development Management Local Plan, 2015 (DMLP), and policies contained within it, have been replaced with the London Borough of Hackney Local Plan 2033 (LP), which was adopted on 22 July 2020. This must now be given full weight in the decision making process. Both parties have been given the opportunity to comment on the new LP policies, and so have not been prejudiced. I have therefore not assessed the development against the policies of the superseded CS and DMLP.

3. Furthermore, during the course of this appeal, the London Plan, 2016, and policies contained within it, has been replaced with the London Plan 2021 (London Plan), which was adopted on 2 March 2021. This must now be given full weight in the decision making process. Both parties have been given the opportunity to comment on the new London Plan, and so have not been prejudiced. I have therefore not assessed the development against the policies of the superseded London Plan 2016.
4. Further revisions have been made to the National Planning Policy Framework during the course of my consideration of the appeal and a revised version was published in July 2021 (the Framework). I have invited the main parties to comment on the Framework and have taken account of any responses from them in my determination of the appeal.
5. When an enforcement notice is appealed on ground (a) and the fee is paid on time, the appellant is deemed under s177(5) to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting the breach of planning control. Whilst at the time of my site visit, there was no longer any sign of the supermarket or the two air conditioning (AC) units, the deemed planning application (DPA) is based on the material change of use and operations carried out, as stated in the notice. I have therefore determined the appeal on this basis.

Appeal A on ground (a), the deemed planning application

Main Issues

6. The main issues are:
 - The effect of the change of use on the provision of industrial land/floorspace in a Priority Industrial Area (PIA);
 - The effect of the change of use on the vitality and viability of the existing retail centres; and
 - The effect of the AC units on the living conditions of neighbouring occupiers of Redwood Court, with particular regard to noise and disturbance.

Reasons

Provision of industrial land/floorspace in a PIA

7. The appeal site comprises commercial unit located within an industrial estate, which has been designated as a Priority Industrial Area (PIA) in the LP. The evidence indicates that the lawful use of the site is for a Class B1 and or B2 and/or B8 floorspace unit¹.
8. Part B of Policy LP28 of the LP states that: "*New development or redevelopment of sites within PIAs will be permitted where:*
 - i. It maximises the delivery of employment floorspace by maintaining, re-providing the same quantum of industrial floorspace (as either B1c, B2, B8), or intensifying the existing industrial uses;*
 - ii. It includes the maximum viable amount of employment floorspace (refer to Appendix 1)".*

¹ Council ref: 2006/2195: Approved on 11 June 2006

9. The commentary text justifying policy LP28 explains that there is increasing pressure on Hackney's industrial land. Rents are increasing, supply is reducing, and businesses are being pushed further out. The findings of the Hackney Employment Land Study stress the need to ensure the retention of an adequate stock of industrial capacity to support a diverse, adaptable, and more sustainable economy. In order to help protect vital industrial land and floorspace to meet Hackney's economic needs, Policy LP28 supports the protection of industrial land and floorspace.
10. Appendix 1 (Marketing Evidence and Marketing Strategy) of the LP further explains that marketing evidence is required at submission of a planning application for two main purposes:
 - Firstly, to justify the quantum of employment land provided within a scheme.
 - Secondly, where a loss of either employment, retail, or community land/floorspace is proposed as part of a development proposal marketing evidence is required to demonstrate there is no realistic prospect of the land/floorspace being used/ re-used for its existing purposes, or for continued operation in its current lawful use.
11. Contrary to Part B i) of Policy LP28, the supermarket use has resulted in the total loss of the industrial floorspace unit (Class B1, B2 and/or B8 use) within the PIA, thus further increasing pressure on Hackney's existing industrial land.
12. The appellant states that the supermarket has increased employment use on this site (generating approximately 19 jobs) whereas the previous use of the property as a storage/car and van rental use only generated 1-2 jobs. However, the Council state that there was no planning permission for the former storage/car and van rental use, and no substantive evidence has been submitted to demonstrate that this previous use was the lawful use of the site. As such, I attach limited weight to the previous use of the site for storage/car and van rental use. Furthermore, no marketing evidence has been submitted, contrary to the Policy LP28 and Appendix 1. Therefore, it has not been satisfactorily demonstrated that there is no realistic prospect of the land/floorspace being used/re-used for its lawful industrial use. As such, I cannot be satisfied that the supermarket provides the maximum amount of employment floorspace, contrary to Part B ii) of Policy LP28.
13. I therefore conclude that the change of use results in unacceptable harm to the provision of industrial land/floorspace in a PIA, in conflict with Policy LP28 of the LP, which seek the aforementioned aims.

The effect of the change of use on the vitality and viability of the existing retail centres

14. Part A of Policy LP32 of the LP states that *"New retail and leisure development should be located within the following designated centres (as shown on the Policies Map), with the most significant growth being focused primarily in Dalston and Hackney Central, followed by Stamford Hill and Shoreditch"*.
15. Part B of Policy LP32 further states that: *"Development of retail (all A classes) and/or leisure uses over 200sqm outside of the town centres listed in part (A) of this policy (excluding the CAZ) will not be permitted unless it can be demonstrated that there is no suitable premises available in the designated*

centres and that there would be no harm to the vitality and viability of these centres”.

16. The commentary justifying Policy LP32 explains that proposals for development of new or extensions to town centre uses, including all A Class or leisure development, which are outside of town centres and in excess of 200sqm gross internal area of floorspace must comply with the sequential test and impact test as outlined in the London Plan. Where the sequential test demonstrates that the development cannot be located within a town centre, the applicant will be required to submit a retail impact assessment demonstrating that there would be no adverse impact on the vitality and viability of the designated centres as a whole.
17. Contrary to the above, the change of use results in a retail use located outside of the town centre. Whilst no specific floor space measurements have been provided, I observed during my site visit that the unit is of a reasonable size and also includes a mezzanine floor covering over 50% of the unit. As such, a supermarket of this size has the potential to draw shoppers away from the designated town centres. Furthermore, no sequential test, impact test or retail impact assessment has been submitted as part of this appeal. Therefore, it has not been satisfactorily demonstrated that the change of use has not resulted in any adverse impact on the vitality and viability of the designated centres as a whole.
18. In the absence of any robust assessment, I am unable to conclude that the change of use has not had an adverse effect the vitality and viability of the existing retail centres. In this respect, I cannot conclude that the change of use is not in conflict with Policy LP32 of the LP, which seek the aforementioned aims.

The living conditions of neighbouring occupiers of Redwood Court - Noise and disturbance.

19. With regard to the AC units positioned to the rear of the site, whilst the appeal site is located in the industrial location of the PIA, the rear of the site adjoins the residential block of flats of Redwood Court on Woodmill Road. During my site visit I observed when walking along on Woodmill Road, away from Theydon Road, that background noise levels drop considerably. As such, Redwood Court has a fairly quiet, residential character, where noise levels are likely to be relatively low and there is a susceptibility for the living conditions of neighbouring occupiers to be affected by the introduction of plant/machinery. I also observed that a number of residential flats within Redwood Court have habitable/bedroom windows in close proximity to the rear of the appeal site.
20. No noise report has been submitted with this appeal and therefore it has not been satisfactorily demonstrated that the noise emitted from the AC units are acceptable. I also note that objections have been raised from neighbouring occupiers regarding the noise emitted from the units.
21. In an acknowledgement that the AC units, the subject of this appeal, were causing a nuisance, the appellant states that the noise levels have been reduced by restricting the hours of operation and that new quieter units are to be installed. I have therefore considered whether the noise nuisance concerns could be overcome by conditions. However, no details of any such replacement AC units, including their noise levels, have been provided, nor have any details

of the proposed hours of use been suggested by the appellant. Therefore, insufficient evidence has been submitted to demonstrate that these alternative units, or a reduction in their hours of operation would be acceptable.

22. I consider that the noise from the AC units in this residential location, where background noise levels are typically lower, are likely to be more intrusive and consequentially harmful to the living conditions for neighbouring occupiers. In addition, noise from the AC units is expected to be particularly harmful during summer months when neighbouring occupiers are likely to have windows open for ventilation.
23. In the absence of any noise report, I conclude that the AC units fails to provide acceptable living conditions for the neighbouring occupiers on Redwood Court, with particular regard to noise and disturbance. Accordingly, the development conflicts with Policy LP2 of the LP, which amongst other things states that all new development must be appropriate to its location and should be designed to ensure there are no significant adverse impacts on the amenity of occupiers and neighbours.

Other Matters

24. The appellant and third parties state that the supermarket is fulfilling a vital need for the Local Jewish Community. The development may therefore relate to relevant protected characteristics for the purposes of the Equality Act 2010. I am required to have due regard to the Public Sector Equality Duty as required by that legislation. However, whilst I give moderate weight to these needs, they do not outweigh the harms that I have identified in relation to the main issues and the non-compliance with the LP.
25. The appellant's also states that the area is undergoing massive development with many new residential units, occupied by larger families in the lower income bracket, who do not own a car and cannot travel to retail centres. Therefore, the appellant considers that there is a strong requirement for local shopping facilities within walking distance. However, no evidence has been provided to explain why the supermarket could not be located within one of nearby designated retail centres mentioned in the LP. The Council highlight that both Stamford Hill District Centre and Lower Clapton Road Local Centre, are located nearby, and are both well served by public transport in this inner city London location. I therefore attach limited weight to this argument.
26. The appellant states that in accordance with the new Use Classes Order 2020, planning permission is not required to change the use of a Class B1 property into Class A1. This is an argument more appropriately advanced under ground (c) 'that the matters alleged by the enforcement notice do not constitute a breach of planning control'. The onus of proof lies with the appellant, the relevant test of the evidence being the balance of probability. However, this argument has not been further substantiated and based on the very limited information put forward I cannot be certain that the change of use to a Class A1 use is permitted, especially given that the previous planning permission was granted for a Class B1 and or B2 and/or B8 floorspace unit². As such, the appellant has failed to discharge the burden of proof, and it is not necessary for me to consider this further under a 'hidden' ground (c) appeal.

² Council ref: 2006/2195: Approved on 11 June 2006

Conclusion on Ground (a) and the Deemed Planning Application

27. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires planning decisions to be made in accordance with the development plan unless material considerations indicate otherwise. I have found conflict with the development plan with regard to the provision of industrial land/floorspace in a PIA; the vitality and viability of existing retail centres; and to the living conditions for nearby occupiers with regards to noise and disturbance. None of the other matters raised by the appellant, including the need for local shopping facilities, nor the letters of support by third parties outweighs these harms identified. Therefore, there are no material considerations that would lead me to a decision other than in accordance with the development plan in this case
28. For the reasons given and with regard to all other matters raised, I conclude that the appeal on ground (a) should fail and the deemed planning application should be refused.

Appeal on ground (f)

29. The appeal on this ground is "that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters (i.e., the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach".
30. The enforcement notice requires the cessation of the retail use, the restoration of property to its previous condition and the removal of the 2 AC units. Therefore, the purpose of the notice is to remedy the breach of planning control rather than only remedy any injury to amenity.
31. The appellant states that the noise nuisance has been reduced by restricting the hours of operation and that new AC units are to be installed. However, I have already considered this under the ground (a) appeal and have found that insufficient evidence has been submitted to demonstrate that these alternative units, or a reduction in their hours of operation would be acceptable. Indeed, it is open to the appellant to apply for planning permission for new AC units if they so wish.
32. As the notice does no more than seek remedy of the breach, it is not excessive. It is not therefore possible to vary the notice in the ways suggested by the appellant whilst achieving the purpose of the notice. There are no lesser steps drawn to my attention or any obvious alternatives that would remedy the breach of planning control which is the purpose of the notice.
33. On this basis, the Ground (f) appeal fails.

Conclusion

34. 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 application deemed to have been made under section 177(5) of the 1990 Act as amended.

R. Satheesan

INSPECTOR