



Appeal Decision

Site Visit made on 12 October 2021

by N Thomas MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 December 2021

Appeal Ref: APP/L5240/C/20/3263754

**Land situated and building known as 29 Lower Addiscombe Road, Croydon
CR0 6PQ**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Decordeva Dixon against an enforcement notice issued by London Borough of Croydon.
- The notice was issued on 26 October 2020.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the shop premises at 29 Lower Addiscombe Road, Croydon into a hot food takeaway (Sui Generis use) and the erection of a vertical ducting flue on the rear elevation.
- The requirements of the notice are:
 - i) Cease the use of 29 Lower Addiscombe Road, Croydon as a hot food takeaway.
 - ii) Remove the vertical ducting flue on the rear elevation of 29 Lower Addiscombe Road, Croydon.
 - iii) Remove all the resultant debris from the premises as a result of compliance with requirements 1 & 2 as identified above.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f), (g) 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.

Decision

1. It is directed that the enforcement notice is varied by:
 - Deleting 'one' and substituting with 'four' in the period for compliance.
2. Subject to the variation, 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.

Preliminary Matters

3. The appeal site is the ground floor of a mid-terrace property with a flat above. The appellant started using the premises for a jerk chicken takeaway in November 2019 and erected the ventilation duct to the rear of the property. Planning permission¹ was refused for the use and the ducting flue in September 2020. The enforcement notice was then issued. The Council declined to determinate a subsequent application² under section 70C of the 1990 Act.

¹ Ref 20/03278/FUL

² Ref 21/00174/FUL

4. Since the appeal was lodged, the new London Plan (the London Plan) was adopted in July 2021. The parties' comments have been sought on its implications for the case and taken into account. The Council has raised a concern due to Policy E9 of the London Plan in relation to the location of takeaway uses in relation to primary and secondary schools which I have dealt with as a main issue.
5. The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 have come into effect. These make changes to the Town and Country Planning (Use Classes) Order 1987 (UCO) use classes so that hot food takeaways no longer fall into a use class (previously A5) but are *sui generis*. Uses falling with the former A1, A2 and A3 use classes are now all class E, which is a new broad 'commercial, business and service' use class. As the policies refer to the former use classes I have made reference to these in my decision. Changes of use within Class E do not constitute development and cannot be controlled by the local planning authority except through an Article 4 direction. Planning permission is required for the change of use from a Class E use to a hot food takeaway.

Matters concerning the notice

6. The reasons for issuing the notice state in (1) that the unauthorised change of use and vertical ducting flue have not been in existence for more than four years. However, the period for immunity for a material change of use is ten rather than four years. I am satisfied that no injustice is caused to the appellant by this error.

The ground (a) appeal and the deemed application

7. Having regard to the reasons for issuing the notice and the comments from the parties following the adoption of the London Plan, the main issues are as follows:
 - The effect of the vertical ducting flue on the living conditions of adjoining occupiers with regard to outlook, noise and light,
 - Whether the site is a suitable location for the use having regard to its out-of-centre location in a shopping parade,
 - Whether the site is a suitable location for the use having regard to nearby schools,
 - The effect of the use on the living conditions of neighbouring occupiers with regard to hours of use.

Vertical ducting flue

8. The vertical flue serves extraction equipment located in the cooking area within the ground floor premises. It would be reasonable to assume that the use as a hot food takeaway could give rise to smells and smoke from cooking on the premises and that these require attenuation through extract equipment and associated ducting flue. I saw that the use includes cooking food on open barbecues. I also note that there are third party objections listed in the Council Officer's Report raising concerns about smoke and odour.
9. The external plant for the extraction of odours is located on the flat roof of a single storey part of the rear of the building, with the large vertical flue above

terminating at second floor level, at a similar height to a rear dormer. The flue and the plant are in very close proximity to two first floor windows serving the kitchen and dining room of the flat, and are also close to the second floor bedroom served by the dormer. Due to the size of the vertical flue duct in close proximity to the windows, it would be reasonable to assume that it is a dominant feature affecting the natural daylight and outlook, particularly in relation to the dining room and second floor bedroom. This affects the quality of the accommodation and is harmful to the living conditions of the occupiers. Although the plant was not operating at the time of my site visit, I have no reason to disagree with the Council's view that the operation of the plant causes noise and disturbance to the adjoining residential occupiers.

10. The appellant states that planning permission is sought based on the details provided in the Plant Noise Assessment³ submitted with the appeal. The Assessment indicates that a new duct and extraction equipment would be installed. It does not demonstrate that the plant that has been installed results in an acceptable level of noise with minor alterations and relocation as suggested by the appellant.
11. The Assessment proposes an alternative extraction system that would involve the duct and plant being located at the rear of the flat roof, further away from the nearest residential windows. Noise would be mitigated by enclosing the fan within an acoustic enclosure with a support structure. Induct silencers are recommended as well as acoustic lagging to ductwork and vibration control with either steel spring isolators or rubber footings for the fans. The Assessment concludes that subject to the mitigation measures, the extraction system would be within acceptable noise and vibration levels, although I note the Council's pollution team disagrees⁴.
12. In any event, the alternative extraction system would involve a substantial change that would have implications for the appearance of the site and the living conditions of neighbouring occupiers that would need to be given adequate consideration. I am not satisfied that the resulting development could be considered under s177(1)(a) of the Act to be a whole or part of the matters specified in the notice and cannot therefore be considered under the ground (a) appeal.
13. I have considered whether I could grant planning permission for the change of use only, and refuse permission for the vertical ducting flue. If I took this approach, I could impose a condition requiring details of an alternative vertical ducting flue to be submitted to the local planning authority and for the approved details to be implemented. However, I have no certainty that the matter could be resolved through a condition in a manner that adequately controls smoke and odour while safeguarding the living conditions of the occupiers and the appearance of the site.
14. Accordingly, I conclude that the vertical ducting flue is harmful to the living conditions of neighbouring occupiers, in terms of outlook, noise and light. It is thus in conflict with CLP Policies DM10.6 and DM23, London Plan Policies D3, D13 and D14, which require, amongst other things, that new noise and other nuisance-generating development mitigates and manages impacts for neighbouring residents.

³ RBA Acoustics 17 December 2020

⁴ Reference in Planning Officer's report

Shopping parade

15. The site is within a terrace of predominantly commercial ground floor premises with residential uses on the upper floors. It is identified by the Council as being in an out of centre location within a shopping parade that runs between 19-53 (odds) and 36-48 (evens) Lower Addiscombe Road.
16. CLP Policy DM6 of the Croydon Local Plan 2018 (CLP) sets out that hot food takeaways are acceptable in identified shopping parades subject to a number of limitations. Table 5.7 in relation to A5 uses sets out that development should not result in more than 50% of the ground floor of such units falling within the entirety of the parade falling outside the A1 use class, and allows for a range of A2-A4 uses, as well as A5.
17. CLP Policy DM8 seeks to ensure that the vitality and viability of town centres is maintained by setting out a sequential approach to hot food takeaways. Table 5.11 in relation to A5 uses states that they are not acceptable in wards where the existing provision of hot food takeaways exceeds the national average. They are only permitted in out of centre locations where a sequential test demonstrates that they cannot be accommodated within a town centre or edge of centre location. In addition, the use should be accredited in accordance with the Eat Well Croydon scheme.
18. These policies are generally consistent with the relevant London Plan policies. London Plan Policy SD6 in relation to town centres and high streets states that the adaptation and diversification of town centres should be supported, the management of vibrant daytime, evening and night-time activities should be promoted. London Plan Policy SD7 states that in considering development proposals, boroughs should apply a sequential test to applications for main town centre uses, giving a preference to town centres, then edge of centres, with out of centre sites only being considered if it is demonstrated that there are no sites available that are more centrally located. London Plan Policy E9D states that Boroughs should carefully manage the over-concentration of A5 hot food takeaway uses within town centres and other areas through the use of locally-defined thresholds in development plans.
19. The Council has provided a survey of the 21 units that make up the identified shopping parade. Of those, 11 are currently in uses that do not fall within the former use class A1, taking the number of A1 uses slightly below 50%. There is a relatively large Co-op food store opposite the junction of Lower Addiscombe Road with Cherry Orchard Road, a very short distance from the appeal site, but this appears to fall outside the designated shopping parade. Looking solely at the shopping parade therefore, the use takes the proportion of former A1 uses below 50%, which is harmful to the retail function of the shopping parade. Although the use is accredited with the Eat Well Croydon Scheme, this does not override the harm to the retail function of the shopping parade.
20. No evidence has been provided to demonstrate that the use could not be accommodated on a site that is either within a town centre or edge of centre location. The Council advises that the provision of hot food takeaways in the ward exceeds the national average and therefore conflicts with CLP Policy DM8. I accept that the use is now accredited in accordance with the Eat Well Croydon Scheme, but that does not override the need to maintain the vitality and viability of town centres by applying the sequential test to the location of hot food takeaway uses.

21. I therefore find that the site is not a suitable location having regard to its out-of-centre location in a shopping parade. It is therefore in conflict with CLP Policies DM6 and DM8, and London Plan policies SD6, SD7 and E9D, insofar as they seek to maintain the vitality and viability of shopping parades and town centres and avoid an overconcentration of A5 uses.

Location in relation to schools

22. Policy E9D of the London Plan seeks to restrict A5 hot food takeaway uses within 400 metres walking distances from the entrances and exits of primary and secondary schools. The site is within 400 metres of Ark Blake Academy and Ark Oval Primary Academy.
23. The reasoned justification for the policy explains that this is due to the importance of creating a healthy food environment for school children. Hot food takeaways generally sell food that is high in calories, fat, salt and sugar, and low in fibre, fruit and vegetables. I note that the occupier has achieved the Eat Well Croydon Scheme and supporting information explains that a healthy menu is offered by the occupiers. If I were minded to allow the ground (a) appeal I could impose a suitable condition to ensure ongoing compliance with the scheme. On this basis, I am satisfied that the development does not conflict with London Plan Policy E9D insofar as it seeks to restrict A5 uses within walking distance of schools.

Hours of use

24. The upper floors of the appeal site and neighbouring properties appear to be in residential use as flats. From the evidence before me it appears that the premises were open until 1am at times. It would be reasonable to assume that the use gives rise to activity that could result in noise and disturbance being experienced by local residents through customers coming and going at the front of the property, and staff using the yard and access to the rear of the property. However, the appellant has indicated that the premises now close at 9.30pm, with no opening on Sundays. I agree with the Council that this is a matter that could be controlled through a planning condition, if I were minded to allow the appeal. Subject to this, I am satisfied that the use is not harmful to the living conditions of neighbouring residents through the hours of use. It is therefore not in conflict with CLP Policies DM10.6 and DM23 or London Plan Policy D14, insofar as they seek to ensure that the potential adverse impacts of noise are mitigated and minimised.

Planning balance and conclusions

25. Although I have found that some of the matters could be adequately controlled through conditions, this does not override the harm that is caused by the conflict with policies in relation to the location of the use, and the effects of the vertical ducting flue on the living conditions of neighbouring occupiers.
26. The appellant has put forward a number of considerations in support of the development. I note that the appellant is willing to provide a level threshold to the entrance to improve the accessibility of the premises, although compliance with access requirements is a neutral consideration. The use has been successfully operating and providing employment throughout the Covid-19 pandemic. It is primarily a family business that supports the appellant as well as the local community, aiming to provide a high level of customer service. The

appellant explains that the business has a diverse workforce, and gives opportunities and support to young people while providing inspiring and positive role models for young black people. The takeaway provides Afro-Caribbean food in a sustainable neighbourhood centre location which serves the local population. I give these considerations moderate weight as I have seen no evidence that the benefits could not be provided in a way that accords with the provisions of the development plan.

27. My decision may affect those with protected characteristics that are protected by the Equality Act 2010. Under the 2010 Act I am subject to the Public Sector Equality Duty (PSED) in my determination of the appeal and I must have due regard to the three equality principles set out in section 149.
28. The impact of my decision will be that the enforcement notice is upheld and the appellant will have to comply with the requirements of the notice. This will result in the business having to close or relocate. It may result in up to 10 members of staff losing their employment. It may also mean that local customers can no longer access Afro-Caribbean takeaway food in their community. This is likely to affect disproportionately and adversely those with a protected characteristic.
29. I give the benefits outlined by the appellant significant weight, and I have had due regard to the equality implications of my decision, in particular with regard to the need to advance equality of opportunity and foster good relations between those who share a relevant protected characteristic and those who do not. However, in the particular circumstances of the case, these considerations do not outweigh the need to ensure that the living conditions of neighbouring occupiers are adequately protected, and that the vitality and viability of the shopping parade and town centre are maintained, and I therefore conclude that the appeal on ground (a) should fail and the deemed planning application should be refused.

Appeal on ground (f)

30. The ground of appeal 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, or as the case may be, to remedy any injury to amenity which has been caused by any such breach.
31. In this case, the notice seeks the cessation of the use and the removal of the vertical ducting flue, and the Council confirms that the purpose of the notice was to overcome injury to amenity as other parts of the development were not required to be removed, as set out in the Officer's Report. The appellant has not put forward any lesser steps in relation to ground (f). I do not consider that there are any obvious alternatives that would achieve the purposes of the notice with less cost and disruption. The appeal on ground (f) therefore fails.

Appeal on ground (g)

32. The ground of appeal is that the period for compliance with the requirements of the notice is too short. The period for compliance is one month, but the appellant seeks 12 months due to the need to find suitable alternative premises and to end the current lease at the appeal site. Otherwise, the appellant would

have to terminate employment, which would cause economic hardship, especially during the Covid-19 pandemic.

33. It would be reasonable to extend the period for compliance to four months, which would allow additional time for the appellant to look for alternative premises. To this limited extent the appeal on ground (g) succeeds and I shall vary the notice accordingly.

Conclusion

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

N Thomas

INSPECTOR