
Appeal Decisions

Site visit made (unaccompanied) on 22 March 2022

by C Sherratt DipURP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 June 2022

Land known as 28 and 30 Castle Lane, BEDFORD, MK40 3US

Appeal A - Ref: APP/K0235/C/21/3287399

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
- The appeal is made by Mr Alom Nahibur¹ against an enforcement notice issued by Bedford Borough Council.
- The enforcement notice was issued on 3 November 2021.
- The breach of planning control as alleged in the notice is failure to comply with conditions imposed on a planning permission ref 11/01275/FUL granted on 30 August 2011.
- The development to which the permission relates is "Change of use from A1 to A3 and internal/external alterations".
- The conditions in question are nos 2 and 3 which state:
Condition 2: 'This permission extends to the preparation of cold food or the reheating of pre-prepared food only and does not include the primary cooking of unprepared food on the premises.'
Condition 3: 'The land and premises shall not be used as a café before 9am on weekdays and Saturdays and 10am on Sunday and Bank Holidays nor after 9.30pm on Weekdays, Saturdays, Sundays or bank holidays.'
- The notice alleges that the conditions have not been complied with in that: It appears to the Council that these conditions have not been complied with because the land and premises have been used for the primary cooking of unprepared food and the land and premises have been in use as a restaurant after 9.30pm on weekdays, Saturdays, Sundays and bank holidays.
- The requirements of the notice are to:
 - i) Cease the primary cooking of unprepared food on the land and premises.
 - ii) Cease the use of the land and premises as a restaurant after 9.30pm on weekdays, Saturdays, Sundays and bank holidays.
- The periods for compliance with the requirements are:
 - i) 3 months.
 - ii) 3 months.
- 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.

¹ Although spelt 'Nahibir' on the appeal forms, I have adopted the spelling used in the application form which the appellant's agent has confirmed to be correct.

Appeal B - Ref: APP/K0235/W/21/3287019

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Alom Nahibur against the decision of Bedford Borough Council.
 - The application Ref 21/01185/S73, dated 25 April 2021, was refused by notice dated 25 August 2021.
 - The application sought planning permission for Change of use from A1 to A3 and internal/external alterations without complying with conditions attached to planning permission Ref 11/01275/FULL, dated 30 August 2011.
 - The conditions in dispute are Nos 2 and 3 as set out above.
 - The reasons given for the conditions are as set out above.
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Decisions

Appeal A - Ref: APP/K0235/C/21/3287399

1. It is directed that the enforcement notice is varied by the deletion of 3 months and the substitution of 6 months as the period for compliance in sub-section 6 (i) and (ii). Subject to this variation, the enforcement notice is upheld.
2. The appeal is dismissed.

Appeal B - Ref: APP/K0235/W/21/3287019

3. The appeal is dismissed.

Applications for costs

4. An application for costs was made by Mr Nahibur against Bedford Borough Council. This application is the subject of a separate Decision.

Reasons

Appeal A - Ground (a), the deemed planning application and Appeal B

5. The main issue is whether conditions 2 and 3 remain reasonable and necessary, having regard to the living conditions of the occupiers of nearby properties particularly by reason of potential odour and noise and disturbance.
6. Specifically, Appeal B seeks the removal of condition 2 and that condition 3 be varied to read: The premises shall not be open to customers before 9am on weekdays and Saturdays and 10 am on Sundays and Bank Holidays nor after 23.00 hrs on weekdays, Saturdays, Sundays or bank holidays.
7. The appeal site is located on the north-western side of Castle Lane and comprises of a restaurant situated at ground floor level with flats above. It forms part of the wider mixed-use development at Castle Lane granted planning permission in December 2006 (LPA ref. 06/01766/MAF). At ground floor level, the wider development consists of restaurant, retail and live/work units together with a heritage display comprising of a historic Lime Kiln. Above

the retail units are 3 storeys of flats which together with a residential tower to the rear provides some 104 flats.

8. The development plan for the area consists of the Bedford Borough Local Plan 2030 (BBLP) and the saved policies of the Allocations & Designations Plan 2013 ADP). I have been referred to a number of policies of relevance. In particular, BBLP Policy 32 requires development proposals to ensure that they minimise and take account of the effects of pollution and disturbance. It states that planning applications should give particular attention to a number of considerations, including (i) Noise, vibration, smell, harmful emissions, impact on water quality, light glare or other disturbance or pollution which is likely to be generated by the development.
9. Despite previous requests from the Council, the full technical specification² of the existing extraction system being used were not forthcoming. The Council did not therefore consider it had sufficient information³ to be satisfied that the living conditions of occupiers of the flats would not be unduly compromised now or in the future should condition 2 be removed and hours of operation extended. Condition 2 of planning permission 11/01275/FUL was imposed to prevent disturbance to neighbouring residents in the absence of a suitable extraction system. It is not for the local planning authority to measure the performance of the existing equipment to determine whether improvements are necessary or practical. Rather it is for the appellant to provide sufficient information to assure the local planning authority that a suitable extraction system is, or can be, put in place to ensure that the living conditions of those living nearby are not unduly compromised when food is prepared on the premises and later opening hours permitted. I agree that the confirmation provided by the appellant that the existing equipment has been installed correctly is not sufficient to make an assessment of its mitigating impact.
10. The appellant has referred me to a number of other restaurants in the immediate vicinity of the site and is critical of the Council for not providing evidence of significant harm arising from the cooking of unprepared food in the kitchen, or by opening beyond 9.30 in the evenings – complaints received by the Council are, the appellant claims, limited despite the 'extensive period of operation as a restaurant'.
11. However, the Council has not raised any objections to the continued use as a restaurant with later opening hours provided that the appellant can demonstrate that suitable measures can be put in place to ensure that the living conditions of the occupiers of flats above and to the rear, will not be unduly compromised as a result of cooking odours or noise and disturbance. The Council clearly sets out that if the appellant were to submit information relating to the extraction system to allow an accurate assessment to be carried out, the hours of opening could be re-considered. It is acknowledged by the Council that restaurants on the southern side of Castle Lane are permitted to open until midnight, albeit they do not have residential units attached.
12. As endorsed by case law referred to in the Council's statement "there is a clear distinction to be drawn between the existence of a statutory noise nuisance on

² To include the specific noise level of the apparatus; what noise / vibration mitigation (if any) is in place and what filtration media are in place to restrict odour, if there is a flue in place to vent above the roofline and if not, where the system is venting to. Ideally, a schematic should also have been provided.

³ Whilst limited details of the current ventilation system/extraction system were provided, these were not considered sufficient to allow the Council to make a full assessment of the current system.

the one hand, and on the other the existence of an impact on residential amenity from noise which has not reached the level of a statutory nuisance or to which there may be some defence available to the creator of the nuisance. The later (sic) may well be highly material to the planning system without reaching the level of a statutory nuisance. In other words, the standard required of an impact on amenity for instance from noise so as to justify the refusal of planning permission can be lower than would be necessary in order to demonstrate a statutory nuisance.” It is the impact on residential amenity I am concerned with in this appeal, rather than statutory nuisance.

13. The appellant accepts that there is a difference between the regimes but highlights that in this case, at the time of the appeal, there has been “over 10 years of operation as a restaurant” and that the Council has no substantive evidence of either a lower level of harm to amenity through noise, or a statutory nuisance. This information was informed by various freedom of information requests made by the appellant.
14. Currently, there is no condition that requires either the installation of a particular ventilation and extraction system in accordance with details provided, or, requiring details to be submitted, to ensure odour and noise can be satisfactorily mitigated now and in the future. It is open to me to substitute such a condition should that be found to be necessary.
15. Even if it is the case that the restaurant has operated without complaint for a number of years, that is not to say it will always be operated in the same way in the future, should it change hands for example. If the local planning authority had not enforced within the time limits for doing so, then any future control over the cooking of unprepared food and later opening hours and a need for the installation and maintenance of suitable equipment if that were to continue, would be lost. Indeed, the Case Officer explained clearly, that regardless of how long the system has been in operation, a plan would always be requested that could then be approved or refused⁴. The appellant’s own evidence suggests that a noisy fan may have been the reason for complaints in the past, demonstrating the need for control. It is therefore necessary to assess what is required and how it will be achieved and thereafter maintained in the future. This is critical and entirely reasonable given the close proximity to residential properties.
16. However, a condition should not be imposed unless there is some degree of confidence it can be complied with. It is therefore regrettable that the appellant has not provided the detailed information already requested by the Council. If I were to simply impose a condition requiring such details to be provided, in substitution for condition 2, it remains uncertain whether a suitable scheme of mitigation could be imposed. Reliance on freedom of information requests and details provided therein provides no such objective assessment.
17. Nor has such a condition been suggested by the appellant as an alternative. Indeed, it appears the appellant has considered it unnecessary to provide such details to date. Without these, condition 3, restricting the hours of opening also remains necessary to ensure no undue harm to amenity arises or conflict with relevant policies in the development plan that seek to protect residential amenity.

⁴ As set out in an email from the local planning authority dated 29 June 2021 (Appendix 1)

18. To conclude, given the lack of any detailed information that is sufficient to enable me to make an assessment of the feasibility and suitability of any system to mitigate against undue harm to living conditions and ensure the approved system is maintained or that any future replacement is first agreed with the local planning authority, I do not consider any mechanism is before me that would support the removal or variation of the conditions in dispute. It remains the case that operation as a restaurant with food preparation on site, without the prior approval of the extraction system could compromise the living conditions that the occupiers of nearby properties can reasonably expect to enjoy, contrary to the development plan. The appeal on ground (a) and Appeal B therefore fail.

Appeal A, Ground (f)

19. The purpose of the notice is to remedy the breach of planning control through compliance with the disputed conditions. No lesser steps are suggested by the appellant that would also achieve this outcome. Much of the case presented under ground (f) is more appropriately related to ground (a) and has already been considered above. In the absence of an alternative that can remedy the breach, the appeal on ground (f) must fail.

Appeal A - Ground (g)

20. The appellant argues that the period for compliance with the notice (3 months) is too short. Whilst I consider in practical terms the requirements set out in both (i) and (ii) can be carried out comfortably in these timescales, it appears that there remains some potential to resolve matters through the submission of appropriate information to demonstrate how odours and noise can be satisfactorily mitigated now and in the future. A further application seeking a variation of the existing conditions would be required, supported by details of the equipment required to satisfactorily mitigate against any detrimental impact on living conditions arising from potential odours and noise. In conjunction, a request to also extend the hours of opening could be made.

21. I agree with the appellant that securing the necessary planning permission in addition to designing and potentially installing an alternative fume extraction and odour filtration system as well as obtaining any necessary agreement of the landlord (the Council) to fit any alternative externally fitted fume extraction and odour filtration system should that be preferred, in three months, is too short. I therefore intend to extend the period for compliance to 6 months to allow an opportunity for a further application to be made. The appeal on ground (g) succeeds to this limited extent.

Overall Conclusions

22. In respect of Appeal A, for the reasons given above, I conclude that the period for compliance with the notice falls short of what is reasonable. I shall vary the enforcement notice prior to upholding it. The appeal on ground (g) succeeds to that extent.

23. For the reasons given above I conclude that Appeal B should be dismissed.

C Sherratt

INSPECTOR

Appendix 1

List of those who have appealed

Reference	Case Reference	Appellant
Appeal A	APP/K0235/C/21/3287399	Mr Alom Nahibur
Appeal B	APP/K0235/W/21/3287019	Mr Alom Nahibur