



Appeal Decisions

Site visit made on 11 January 2023

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 January 2023

Appeal Ref A: APP/K5600/C/21/3285923 **271 Kensal Road, London W10 5DB**

- 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 Anilash Prabha Sudhakaran against an enforcement notice issued by The Council of The Royal Borough of Kensington & Chelsea.
 - The enforcement notice was issued on 21 September 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the installation of extract ducting and associated fan exhaust at ground floor level, to the rear of the property.
 - The requirements of the notice are:
 - i) Remove in full all extract ducting and associated fan exhaust installed to the rear of the property;
 - ii) Remove from the land any resultant debris;
 - iii) Cease all cooking of hot food so as not to cause detriment to the amenity of adjoining properties and immediate area by reason of odour.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (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.
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Appeal B Ref: APP/K5600/W/21/3286890 **271 Kensal Road, London W10 5DB**

- 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 Anilash Prabha Sudhakaran against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref PP/21/03496, dated 27 May 2021, was refused by notice dated 13 September 2021.
 - The development proposed is the installation of extraction flue and related equipment to the rear.
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Decisions

Appeal A:

1. It is directed that the enforcement notice is varied by:
 - Deletion of requirement 3 under section 5 (What you are required to do).

2. Subject to the variation, 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.

Appeal B:

3. The appeal is dismissed.

Procedural Matters

4. As set out above there are two appeals on this site. The appeal on Ground (a) is that planning permission should be granted for the matters stated in the notice. Since the planning appeal is against refusal of permission for a similar development, the considerations in that appeal are also similar, and I have treated both cases together to avoid duplication, except where otherwise indicated.
5. During my site visit, I also visited 273 Kensal Road. I shall return to this matter later in my decision.

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

Main Issues

6. Whilst the enforcement doesn't refer to concerns regarding outlook, this is included within the reasons of refusal of the planning application and is clearly a material consideration for both appeals. I have therefore determined the appeals on the basis.
7. As such, the main issues are:
 - The effect of the extraction equipment on the living conditions of neighbouring occupiers of the upper floor residential flat at 271 Kensal Road, with particular regard to outlook.
 - The effect of the extraction equipment on the living conditions of neighbouring occupiers of 271 and 273 Kensal Road, with particular regard to noise, nuisance, and odour.

Reasons

Living conditions of neighbouring occupiers of the upper floor flat at 271 Kensal Road, with regard to outlook

8. The appeal site relates to a ground floor commercial unit within a three storey mid terrace property. The upper floors of the property are in use as self-contained residential flat. In an acknowledgement that the existing extraction system at ground floor (the subject of appeal A) is causing nuisance to neighbours, the appellant has submitted a planning application for a new extraction system rising to first and second floor level (appeal b).
9. The proposed extract duct would rise between two existing windows at first floor level at No 271. Whilst the appellant states that neither of these are habitable room windows, no floor plans have been provided to illustrate the uses of the rooms within the upper floor flat at No 271 Kensal Road. Therefore, insufficient evidence has been submitted to demonstrate that the proposed extraction system would not harm the living conditions of No 271. Furthermore, the rear of 271 contains a number of windows at first and second

floor level, all in close proximity to the proposed extraction flue, and it is likely that a number of these windows serve habitable rooms.

10. The appellant states that the proposed extraction duct would be brick clad and designed as slim as possible. Nevertheless, the height, scale, and size of the extraction system would result in a visually intrusive, dominant, and unneighbourly form of development, built close to the existing first and second floor windows of No 271. This would result in harm to the living conditions for the occupiers of this neighbouring flat, with regard to outlook.
11. Therefore, the development would fail to provide acceptable living conditions for occupiers of the upper floor flat at 271 Kensal Road, with regards to outlook. Accordingly, the development is contrary to policy CL5 of the Royal Borough of Kensington and Chelsea Local Plan, 2019 (Local Plan). Amongst other things, these require that all development ensures good living conditions for occupants of new, existing, and neighbouring buildings, and that there is no harmful increase in the sense of enclosure to existing buildings and spaces.

Living conditions of neighbouring occupiers of 271 and 273 Kensal Road, with regard to noise, nuisance, and odour

12. The existing (appeal A) and proposed extraction system (appeal B) is located in the rear courtyard at No 271, in close proximity to the upper floor residential flats of 271 and 273 Kensal Road and the ground floor office at 273 Kensal Road. The appellant accepts that the existing equipment is not sufficient and has resulted in complaints being received from neighbouring occupiers in relation to noise and odour. Noise and odour from the extraction system is likely to be particularly more harmful during summer months when neighbouring occupiers are more likely to have their windows open for ventilation. In recognition of these complaints the appellant proposes to upgrade the extract flue (the subject of appeal B) and provide this within 3 months and has also suggested conditions in relation to noise and anti-vibration mounts to overcome any harm to the living conditions of neighbouring occupiers.
13. I acknowledge the findings of the submitted noise report, and that by upgrading the equipment on the ground floor, together with the installation of a new extract flue (with brick cladding) and adhering to conditions in relation to noise and anti-vibration measures would overcome issues of noise, nuisance, and odour. However, I have already found above, that the proposed extract duct (appeal b) would be unacceptable in relation to the outlook for occupiers of No 271. As such, given this objection, it is not possible to implement the proposed scheme (appeal b), since it would result in harm to the living conditions of the neighbouring residential occupiers at No 271.
14. Therefore, in the absence of an acceptable extract duct, the extraction equipment fails to provide acceptable living conditions for the neighbouring occupiers of 271 and 273 Kensal Road, with regard to noise, nuisance and odour, contrary to policies CL5 and CE6 of the Local Plan. Amongst other things, these require the aforementioned aims and also states that the Council will resist all applications for noise and vibration generating development and plant that would have an unacceptable noise and vibration impact on surrounding amenity.

Conclusion on Ground (a), the Deemed Planning Application and Appeal B

15. 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 harm to the living conditions for the neighbouring occupiers of No 271 and 273. I appreciate that the existing appeal terrace is one where commercial premises operate alongside to residential properties. However, for the reasons outlined above, the existing and proposed extraction equipment would not be compatible within this setting. Therefore, there are no material considerations that would lead me to a decision other than in accordance with the development plan in this case.
16. For the reasons given and with regard to all other matters raised, I conclude that the appeal on ground (a) and the deemed planning application should fail, and Appeal B should be dismissed.

Appeal A on ground (f)

17. 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".
18. The steps that are required by this enforcement notice are to:
- Remove in full all extract ducting and associated fan exhaust installed to the rear of the property;
 - Remove from the land any resultant debris; and
 - Cease all cooking of hot food so as not to cause detriment to the amenity of adjoining properties and immediate area by reason of odour.
19. The purpose of the notice therefore clearly comes under S173(4)(a) of the 1990 Act which amongst other things states, remedying the breach by restoring the land to its condition before the breach took place.
20. The appellant states that upgrading the equipment on the ground floor and installation of new flue, with brick cladding, within 3 months would remedy the breach, and therefore the removal of the entire extract system is excessive. However, I have already considered this under the ground (a) appeal and have found that the proposed extraction scheme would not be sufficient to overcome the harm identified and would not remedy the breach which is the purpose of the notice.
21. The appellant also states that the appeal site is a working restaurant, where the cooking and serving of hot food is permitted, and therefore requirement 3 above, is excessive and unnecessary. The Council state that this requirement does not require the cessation of the cooking of all hot food, but to cease hot food *"so as not to cause detriment to the amenity of adjoining properties and immediate area by reason of odour"*. They further state that oven cooked hot food would be acceptable as opposed to deep fat frying.
22. However, requirement 3 is subjective, and it is unclear how this or how this would be measured by the Council. Furthermore, requirement 3 goes beyond

remedying the breach of planning control, which is the operational development, constituted by the extract duct and associated fan exhaust. The breach of planning control would be addressed through compliance with requirements 1 and 2 only. This would achieve the purpose of the notice which is to remedy the breach. Therefore, the third requirement on the notice is excessive and clearly goes beyond what is necessary to remedy the breach of planning control.

23. The appeal on ground (f) succeeds to that extent only, and I will vary the notice to remove this excessive requirement.

Appeal A on Ground (g)

24. The appeal on this ground is that any period specified in the notice falls short of what should reasonably be allowed. The appellant asks that the time for compliance is not achievable and is extended from 3 months to at least 1 year to find other solutions with the Council for cooking hot food within the premises without harming the neighbouring amenities.
25. I have already identified under the ground a) appeal that the existing extract duct results in harm to the living conditions of neighbouring occupiers in relation to noise, nuisance, and odours. As such, the existing unauthorised windows harm their living conditions and therefore the 12 months requested by the appellant to comply with the notice is disproportionately excessive to complete the requirements.
26. The key question for ground (g) is what is 'reasonable'. Following the successful appeal under ground (f), the varied requirements of the notice are to remove the extract ducting and associated fan exhaust and resultant debris from the land. The three months given would be a reasonable and proportionate time to carry out these works, whilst also seeking planning permission for an alternative scheme.
27. On this basis, the appeal on ground (g) fails.

Conclusions

28. **Appeal A:** 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.
29. **Appeal B:** For the reasons given above, and having regard to all other matters raised, I conclude that the Appeal should be dismissed.

R Satheesan

INSPECTOR