



Appeal Decision

Site visit made on 17 September 2024

by Stephen Hawkins MA, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 October 2024

Appeal Ref: APP/R5510/C/23/3314079

598 Uxbridge Road, Belmore Parade, Hayes UB4 0RY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mrs Satheeswary Kothayan against an enforcement notice issued by the Council of the London Borough of Hillingdon.
 - The notice was issued on 24 November 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the change of use from a baker's shop to a takeaway with new installation of external flue ducting to the rear.
 - The requirements of the notice are: (i) Cease the use of the premises as a takeaway (*sui generis*). (ii) Demolish and remove the external flue ducting erected to the rear of the premises. (iii) Remove from the land all debris, items, fixtures and fittings, plant and machinery resulting from compliance with points (i) and (ii) above.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b) and (c) 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. It is directed that the enforcement notice be corrected by deleting the following in the allegation at paragraph 3 '*...change of use from a baker's shop to a takeaway (sui generis) with...*' with consequential variations to the requirements in paragraph 5 by deleting step (i), re-numbering steps (ii) and (iii) to steps (i) and (ii) respectively and deleting '*and (ii)*' from the re-numbered step (ii). Subject to the above correction and variations the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under Section 177(5) of the 1990 Act as amended.

Preliminary Matters

2. There is no defect in the enforcement notice. The requirement in paragraph 5 to remove the external flue duct installed is sufficiently clear and unambiguous. The appellant can have little real doubt as to what they have to do to comply with the notice in this respect. Neither does the step purport to require the removal of any lawful development, the external flue duct attacked by the notice being clearly separate from and unrelated to the much smaller external vent nearby.
3. My decision in the ground (a) appeal takes into account the revised National Planning Policy Framework, published on 19 December 2023.

Ground (b) appeal

4. The ground of appeal is that the matters alleged in the notice have not occurred as a matter of fact. In this ground and in the ground (c) appeal below, the onus is firmly on the appellant to show why their appeal should succeed, the relevant test of the evidence being on the balance of probability.
5. The appeal premises are on the ground floor of a three-storey building. Residential living accommodation is on the upper floor levels. The premises form part of a shopping parade, with mainly retail uses at ground floor level and living accommodation above. The notice alleges the change of use of the premises to use as a hot food takeaway.
6. In the customer area at the front of the premises is an L-shaped chilled display counter, containing cold food items including cooked meat, fish, fruit, vegetables, pulses and rice as well as salad. A number of packaged, mostly dried, food items along with some bread products are displayed on wall-mounted shelves towards the rear of the customer area. Behind this area are two rooms of similar size laid out as kitchens, in use for preparing, cooking and storing food items, with a further storage area beyond.
7. The appellant explained that most fresh food items are displayed for sale cold, after being prepared and cooked on the premises. They estimated that 90% of food sales were from cold display, with 10% of food being sold hot. During my visit, I observed several customers calling at the premises, each of whom purchased a range of cold food items selected from the chilled display counter. As far as I could see, none of the customers were purchasing any hot food items. The customers were purchasing their items and then leaving the premises more or less straight away. There were frequent customer comings and goings, with no-one obviously waiting for food to be cooked or re-heated.
8. Whilst no detailed records were supplied showing the proportion of cold versus hot food sales at the premises, the appellant's description of the use is sufficiently clear and precise. From my own observations, there is little to suggest that the appellant's evidence is not accurate. Nor is there any firm evidence which might indicate that the appellant might have used the premises other than as described. There is little to distinguish the use described by the appellant from the previous use as a baker's shop, where bread and other food items were most likely baked on the premises before being displayed for sale. The use described by the appellant is also not dissimilar to any other retail use which involves the display or retail sale of goods, other than hot food, principally to visiting members of the public.
9. The Council drew attention to the preparation and cooking of food on the premises and the extensive kitchen facilities. However, offering cold food items for sale that have been prepared and cooked on site, as opposed to items that have been imported in a pre-prepared state, does not necessarily preclude premises from being in retail use. A baker's shop or similar retail outlet could equally be preparing and cooking food items at their premises prior to displaying them cold for sale. The definition in Article 3 of the Town and Country Planning (Use Classes) Order 1987 (as amended) of a hot food takeaway refers only to the *sale* [my emphasis] of hot food for consumption mainly off the premises, not to the cooking of food items. Therefore, it is whether the primary use is for the sale of hot food, as opposed to the presence

of cooking facilities, which is the salient factor in determining whether the premises have been used as a hot food takeaway.

10. Neither is the marketing of the business as a 'takeaway' online and on social media greatly suggestive of how the premises have been used in practice. This could merely be a convenient shorthand used by the appellant to describe their business. The same might be said of the Food Standards Agency description of the business as a takeaway/sandwich shop. Moreover, the times when the premises are open for trading which, according to the Council, are 0800-2200 Monday to Sunday, do not reflect the extended late-night trading hours often associated with use as a hot food takeaway.
11. Therefore, on the evidence before me, as a matter of fact and degree and on the balance of probability, I find that there has been no change of use to the premises to a hot food takeaway, the primary use being for the sale of cold food items. It follows that the change of use alleged in the notice has not in fact occurred.
12. The notice also alleges the installation of an external flue duct at the rear of the premises. In this respect however, the matter has clearly occurred. A substantial stainless steel external flue duct has been installed on a single storey rear outrigger.
13. The consequences of the above findings are that the ground (b) appeal succeeds in part. Therefore, it is necessary to correct the notice by deleting reference in the allegation to change of use from a baker's shop to a takeaway, with consequential variations to the notice requirements. No injustice would be caused by making this correction and the variations. The Council is not prevented from serving a fresh enforcement notice in the event of a material change in the use of the premises to a hot food takeaway being drawn to their attention in future. The effect of these actions is that the alleged breach is narrowed down to the external flue duct, which falls to be considered in the outstanding grounds of appeal.

Ground (c) appeal

14. The ground of appeal is that the matters alleged in the notice do not constitute a breach of planning control.
15. The definition of development in s55(1) of the Act includes the carrying out of building, engineering, mining or other operations in, on, over or under land. Planning permission is required for the carrying out of any development of land, having regard to s57(1) of the Act.
16. Installing the external flue duct has involved carrying out building operations within the definition of development. No planning permission exists for the installation. The definition of a breach of planning control in s171A(1) of the Act includes carrying out development without the required planning permission.
17. Therefore, the appellant has been unable to show that installing the external flue duct does not constitute a breach of planning control. The ground (c) appeal fails.

Ground (a) appeal

Main Issue

18. The main issue in this ground of appeal is whether there are suitable living conditions for the existing and future occupiers of neighbouring residential property following installation of the external flue duct, having regard to noise, odours and outlook.

Reasons

Living conditions

19. Residential property in the vicinity of the premises includes dwellings in nearby streets in addition to the living accommodation on upper floors of the parade. There are a variety of retail and commercial uses in the parade, which is located on a busy thoroughfare with high levels of passing vehicle traffic. Accordingly, prior to installation of the external flue duct the occupiers of neighbouring residential property probably already experienced a certain amount of noise and disturbance, including from pedestrian and vehicular comings and goings at the front of the parade and from deliveries and other activity at the rear.
20. The external flue duct vents the kitchen extract system at the premises. Protruding well above the outrigger roofline, compared to the nearby external vent the external flue duct is of a considerable height. Even so, it has a relatively slender upright profile, stands a significant distance from the nearest windows of neighbouring residential property and is viewed in the context of other utilitarian built features at the rear of the parade. These factors mean that the external flue duct is not perceived as an especially dominant feature in outward views from neighbouring residential property, nor do the neighbouring occupiers experience a greater sense of enclosure by built form or a more oppressive feel. As a result, there has been no significant erosion in the levels of outlook enjoyed by neighbouring occupiers.
21. During my visit, sound emanating from the external flue duct, in the form of a continuous low hum, was clearly audible in the vicinity of neighbouring residential property. This was in the context of already considerable levels of background noise, from commercial activity in the parade and traffic on the main road. It is likely that noise from the external flue duct would be more apparent to neighbouring residential occupiers at other times of day when background noise levels might be lower, for example early in the morning and at weekends.
22. The manufacturer's specifications for the air filtration system, fan and silencer, do not show that the external flue duct satisfies good practice concerning the control of odour and noise from such installations. Components of the system can only function in accordance with the manufacturer's specification where they have been installed correctly and are being maintained properly. No detailed, site-specific technical assessment of the installation, carried out by a suitably experienced and qualified person, which includes recommending remedial measures where necessary, was supplied. Whilst the exhaust is angled away from living accommodation above the parade, that has meant it is directed more towards neighbouring residential property backing onto the service road at the rear of the premises.

23. In the absence of a detailed technical assessment, there is no reasonable assurance that the external flue duct is not exposing neighbouring occupiers to levels of noise at or above that indicative of adverse effects on health and quality of life. Representations were received from interested parties responding to the appeal, describing their experiences of high levels of noise emanating from the external flue duct. These representations reinforce my reservations set out above and support adopting a precautionary approach on this matter. Similarly, although strong smells from cooking on the premises were not especially evident, there is little assurance that the system is effectively filtering odours. It would not be appropriate to grant permission subject to a condition requiring the submission to and approval by the Council of further details of measures to control noise and odour emissions from the external flue duct, as it is unclear whether this would successfully address the objections set out above.
24. Therefore, the likely significant additional levels of noise, as well as odours, emanating from the external flue duct do not provide suitable living conditions for the existing and future occupiers of neighbouring residential property. This is in conflict with Policy BE1 of the Hillingdon Local Plan: Part 1 which, amongst other things, seeks to protect the amenity of surrounding residential properties. The adverse impact on the amenity of adjacent properties also conflicts with criterion in Policy DMHB 11 of the Hillingdon Local Plan Part 2: Development Management Policies.

Other Matters

25. There is no dispute that the external flue duct has not harmed the character and appearance of the surrounding area. The absence of such harm is a neutral factor, which weighs neither in favour nor against granting permission.

Conclusion-Ground (a) appeal

26. The external flue duct causes unacceptable harm to the living conditions of occupiers of neighbouring residential property, in conflict with the Development Plan taken as a whole. There are no material considerations that indicate the decision should be made other than in accordance with the Development Plan. Therefore, the ground (a) appeal does not succeed.

Overall Conclusion

27. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and variations and refuse to grant planning permission on the deemed application.

Stephen Hawkins

INSPECTOR