



Appeal Decision

Site visit made on 21 January 2025

by **D Hartley BA (Hons), MTP, MBA, MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 5 FEBRUARY 2025

Appeal Ref: APP/U2750/C/24/3349200

Land situated and known as Nisa Local, 8 Westfield Road, Tockwith, York, North Yorkshire, YO26 7PY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Dunelm Retails Ltd against an enforcement notice issued by North Yorkshire Council.
 - The notice was issued on 12 June 2024.
 - The breach of planning control as alleged in the notice is Installation of external air conditioning units.
 - The requirements of the notice are to cease the use of the air conditioning units sited on the flat roof near to the boundary with the adjacent property 6 Westfield Road and remove these units and all associated plant and machinery from the flat roof.
 - 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), (c), (d), (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. It is directed that the enforcement notice is corrected by deleting all the words in section 3 and replacing them with the words *'installation of external condensing units'*, and varied by deleting all the words in section 5 and replacing them with the words *'cease the use of the external condensing units sited on the flat roof near to the boundary with the adjacent property 6a Westfield Road and remove these units and all associated plant and machinery from the flat roof'*. Subject to the correction and variation, the appeal is dismissed, 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 Matter

2. The National Planning Policy Framework was revised in December 2024 (the 2024 Framework). This replaces the previous version of the National Planning Policy Framework published in December 2023. The 2024 Framework has not materially changed in terms of living condition considerations. Given the ground (a) appeal main issue, it has not therefore been necessary for me to seek comments from the main parties about the implications of the 2024 Framework.

Reasons

Appeal on ground (b)

3. The appeal on ground (b) is made on the basis that the matters comprising the alleged breach of planning control have not occurred.

4. There is common ground between the main parties that the breach of planning control relates to outdoor condensing units serving internal refrigerators/food chillers and not the *'installation of external air conditioning units'* as stated in the notice. In this regard, the matter comprising the alleged breach of planning control has not occurred and hence I conclude that the ground (b) appeal succeeds.
5. Notwithstanding the above, I have considered whether I could correct the breach of planning control so that it refers instead to the installation of external condensing units. In this case, the appellant's other legal grounds of appeal, and the deemed planning application made on ground (a) of section 174(2) of the Act, quite clearly relate to the installation of external condensing units.
6. Consequently, I shall correct the breach of planning control so that it refers to the *'installation of external condensing units'* and, in doing so, no injustice would be caused to the main parties. Given this correction, I shall also vary the requirements of the notice in section 5 of the notice so that it refers to *'cease the use of the external condensing units....'* Moreover, the adjacent property is 6a Westfield Road and not 6 Westfield Road (as agreed by the main parties on the site visit) and so the wording of section 5 of the notice shall also be varied to account for this error, and without injustice being caused to the main parties.

Appeal on ground (c)

7. The appeal made on ground (c) is that the matters alleged do not constitute a breach of planning control. The claim made by the appellant is that breach of planning control comprising four condensing units on the flat roof part of the building does not amount to development by virtue of section 55(2)(a)(ii) of the Act. This states that *'the carrying out for the maintenance, improvement or other alteration of any building of works which do not materially affect the external appearance of the building, and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground'*, does not amount to development.
8. As a matter of fact and degree, I find that the installation of the four condensing units does materially affect the external appearance of the building. The absence of public views of the development does not alter this finding. The breach of planning control therefore comprises an act of development. Such development is not permitted given the limitation imposed in A.1(e) of Class A (non-domestic extensions and alterations) of Part 7 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). This is because it states that development is not permitted by Class A if *'any alteration would be on article 2(3) land'*. The four condensing units fall within the Tockwith Conservation Area and hence article 2(3) land.
9. For the above reasons, I conclude that the matters alleged in the notice constitute a breach of planning control. Therefore, the ground (c) appeal fails.

Appeal on ground (d)

10. The appeal made on ground (d) is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. In an appeal against an enforcement notice on ground (d), the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is on the balance of probability.

11. The claim made by the appellant is that the external condensing units were installed more than twenty years ago by a previous tenant of the building (i.e., Costcutter). It is not entirely clear from the evidence if such external condensing units were installed in the same place as those that are the subject of the notice. Even if they were, the appellant asserts that he *'replaced the units with newer, quieter, energy-saving models'* in 2021. Consequently, the evidence is that new condensing units were installed in 2021 as opposed to a repair.
12. The notice was issued on 12 June 2024 and hence insufficient time has elapsed for the appellant to demonstrate that the breach of planning control is immune from enforcement action in accordance with the time limit imposed in section 171B(1) of the Act.
13. For the above reasons, I conclude that the ground (d) appeal fails.

Appeal on ground (a) and the deemed planning application

Main Issue

14. An appeal is made under ground (a) which is that planning permission ought to be granted in respect of the breach of planning control alleged in the notice. I have considered the reasons for issuing the notice and the main issue is the effect of the breach of planning control on the living conditions of the occupiers of 6a Westfield Road in respect of noise and disturbance.

Reasons

15. I was able to experience the noise from the condensing units as part of my site visit. The site visit was only a snapshot in time, but noise from the condensing units was audible. That said, I have not been provided with evidence of average background noise levels (particularly during the evening/unsociable hours) and indeed the level of noise that typically emanates from the condensing units when experienced from 6a Westfield Road. Such a neighbouring property includes a garden and first floor windows in very close proximity to the condensing units.
16. The evidence is that the Council has issued a section 80 abatement notice on the basis that the breakout of sound from the condenser units was having a substantial negative impact on the enjoyment of the occupiers the neighbouring residential property and was giving rise to a nuisance as defined by section 79(1)(g) of the Environmental Protection Act 1990. I have little information about the evidence which led to the section 80 abatement notice being issued, although I note that the local planning authority (LPA) states that the requirements of such a notice remain outstanding.
17. The above constitutes a separate enforcement regime and it is necessary that I determine this enforcement notice appeal based on the written evidence that is before me. The appellant says that the *'current noise levels are within industry standard for condensing units, e.g., general sound pressure level @ 10 m (-10 degrees C/+32 degrees C_ - 60 rps 3.9 31 dB(A))'*. I do not have any technical evidence from the appellant to support this claim and, in any event, the point at issue is whether the level of noise from the condensing units is acceptable with reference to the living conditions of the occupiers of the adjacent dwellinghouse.
18. In the absence of a noise assessment, which includes noise monitoring data with reference to background noise levels and the actual noise that comes from the

condensing units, when considered against the nearest noise sensitive receptor (i.e., 6a Westfield Road), I cannot conclude with certainty that the condenser units are, firstly, not causing harm to the living conditions of the occupiers the neighbouring property and, secondly, that the LPA's suggested condition, if I were minded to grant deemed planning permission, would be capable of being achieved, or would provide an acceptable residential living environment for occupiers of such a neighbouring property.

19. Put another way, I cannot be certain on the evidence that is before me whether the condenser units would be capable of not exceeding 5dB(A) over typical background levels and, in the absence of knowing what typical background levels are, I cannot reach an informed view in terms of whether 5dB(A) over typical background levels would be acceptable in this case. In this context, I do not find that the LPA's suggested condition would offer the necessary precision to ensure that the development would be acceptable. Indeed, it remains possible that such a noise condition would effectively negate an approval of planning permission.
20. For the above reasons, I cannot conclude that levels of sound emitted from the condenser units has an acceptable impact on the occupiers of 6a Westfield Road from a noise pollution point of view. In reaching this view, I have taken note of the representations made by the occupiers of 6a Westfield Road who comment that they have had to move out of the main bedroom owing to '*noise and disturbance*', that it is '*preventing us from being able to function normally in our home*', and that it is causing '*sleep deprivation*'.
21. I do not know if mitigation would be needed to achieve acceptable noise levels and, if so, what affect this might have on the appeal property and conservation area from a planning merits point of view. I acknowledge that as part of the ground (f) appeal the appellant has suggested that the outdoor condenser units could be relocated to the '*far end of the roof*', that insulated jackets could be fitted, and that timers could be fitted to those condensers that do not need to run at night (i.e., those associated with refrigerators containing soft drinks).
22. I have not been provided with a detailed scheme which shows where the condenser units would be located '*to the far end of the roof*' and, in any event, that would not relate to the breach of planning control. In addition, it is noteworthy that not all the condenser units would be turned off at night. Moreover, in the absence of noise monitoring data (i.e., as part of a completed noise assessment), I do not know whether, if needed, the suggested mitigation measures would result in a satisfactory environment for occupiers of the neighbouring residential property, whether that be when they are inside their home and/or using their garden/patio.
23. The above is an important consideration and needs to be fully assessed in conjunction with a submitted noise assessment. This is because the evidence from the occupiers of the neighbouring residential property appears to be suggesting that exposure to noise from the four condenser units has resulted in a change in their behaviour, attitude, and other psychological responses, and hence a change in their quality of life. In the absence of technical evidence from the appellant, I do not know if the 'no adverse effect' level boundary has been exceeded as identified in the noise exposure hierarchy table in the Planning Practice Guidance (PPG).
24. For the above reasons, I cannot conclude that that the development accords with the amenity requirements of policy HP4 of the adopted 2020 Harrogate District

Local Plan 2014-2035, paragraphs 135(f), 187(e), 198(a) of the 2024 Framework, and the PPG, in terms of ensuring that noise and disturbance from the condenser units is not at such a level that it causes material harm to the living conditions of the occupiers of 6a Westfield Road.

Other considerations

25. The appellant states that the loss of the condensing units on the roof, which cools the refrigerators in the shop, would have a negative impact on the use of the property as a shop. It is not necessarily an inevitable consequence of upholding the notice that the property would not be capable of accommodating some condensing units. I recognise that the option of potentially locating the condensing units elsewhere may mean that they are more visible in the public domain and hence some form of screening may be needed. However, that may be something that could be explored by the appellant arising from compliance with the requirements of the notice, and in discussion with the LPA.
26. I do not know if it would be possible to have condenser units in the current position without harm being caused to the living conditions of the occupiers of neighbouring residential property. This would largely depend on whether the appellant can suitably demonstrate with technical evidence, and perhaps with mitigation, that such condenser units can operate without unacceptable harm being caused to the occupiers of the neighbouring residential property. In the absence of sound technical evidence to justify that this would be possible, it is necessary that planning permission is refused. In this context, I find that the loss of the condensing units is justified and proportionate and the possible adverse impact on the business does not outweigh such a finding.

Ground (a) appeal conclusion

27. In the absence of a noise assessment, including possible mitigation, I do not know if it would be acceptable to have some form of condenser units in the location that they are now, or elsewhere on the land. It is open to the appellant to consider this matter further including, if necessary, discussion with the LPA and the Council's Environmental Protection service.
28. A ground (g) appeal has not been lodged by the appellant. In any event, I find that the compliance period of three months is reasonable and proportionate as it strikes an appropriate balance between bringing the development to an end in the public interest and affording time for the appellant to remove the unauthorised development. It is nonetheless noteworthy that section 173A (1) (b) of the Act allows the LPA to "*waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9)*". I raise this only in so far that the appellant may decide to submit a further planning application for condenser units on the land and given any possible associated implications in terms of running the business.
29. For the above reasons, I cannot conclude that the unauthorised development does not have a harmful impact on the occupiers of 6a Westfield Road from a noise and disturbance point of view. This is a matter of overriding concern and is not outweighed by the other considerations outlined above. Therefore, I conclude that the ground (a) appeal fails.

Appeal on ground (f)

30. The appeal made on ground (f) 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 or to remedy any injury to amenity which has been caused by any such a breach.
31. The claim made by the appellant is that his suggested noise mitigation matters, as considered as part of my assessment of the ground (a) appeal, would overcome the planning harm identified in enforcement notice. In this regard, he considers that the requirements of the notice are excessive.
32. For the reasons identified as part of my ground (a) appeal assessment, I do not find that the evidence sufficiently demonstrates that the mitigation measures would result in an acceptable planning outcome. The purpose of the notice is to remedy the breach of planning control. The requirements of the notice are not excessive as they remedy the breach of planning control. Therefore, the ground (f) appeal fails.

Conclusion

33. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and 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).

D Hartley

INSPECTOR