



Appeal Decision

Site visit made on 19 March 2025

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 March 2025

Appeal Ref: APP/D1590/C/23/3319503

96 - 98 West Road, Shoeburyness, Essex SS3 9DS

- 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 Thambirajah Satkunarajah against an enforcement notice issued by Southend-on-Sea Borough Council.
 - The enforcement notice was issued on 3 March 2023.
 - The breach of planning control as alleged in the notice is without planning permission, the installation of an extraction flue to the rear.
 - The requirements of the notice are:
 - (a) Remove the unauthorised extraction flue to the rear; and
 - (b) Remove from site all materials resulting from compliance with (a) above
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) and (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 the postcode "SS0 8NU" under section 2 (The Land Affected) and its replacement with "SS3 9DS".
 - Varied by deleting steps a) and b) under section 5 (what you are required to do) and substituted therefor by the following steps:
 - "(a) Remove the unauthorised extraction flue to the rear; or
 - (b) Carry out the development and the installation of the extract duct strictly in accordance with planning permission ref: 20/00263/FUL, so as to comply with the terms of this permission, including its conditions and limitations; and
 - (c) Remove from site all materials resulting from compliance with steps (a) and (b) above."
2. Subject to this correction and 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.

The Notice

3. The appellant highlights that the postcode, SS0 8NU, stated on the Notice under Section 2 (The Land Affected) is incorrect and should be SS3 9DS. A correction is necessary which can be achieved by using my powers under s176(1)(a) of the Act without causing injustice. I have applied the correct post code in the banner heading above.

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

Main Issue

4. The main issue is the effect of the extraction equipment on the living conditions of neighbouring residential occupiers located on West Road, with particular regard to noise, disturbance, vibration, odour and fumes.

Reasons

5. The site relates to a ground floor restaurant and takeaway unit within a three-storey building. The Building comprises commercial units on the ground floor with residential flats above on the first and second floors. The site is identified on the policies maps as a Primary Shopping Frontage. To the rear is a service area for the commercial units and access is also provided for the flats on the upper floors of the building. The extraction flue, the subject of this appeal, extends upwards to the rear of No 96b West Road (a residential flat), and extracts out above the main roof.
6. In May 2020 planning permission was granted for the "change of use from restaurant (Class A3) to mixed use restaurant and takeaway (Class Sui Generis) and install replacement extraction flue to rear elevation (Part Retrospective)¹". However, the extraction flue, as built (and the subject of this appeal), does not accord with this permission in so far as it extends approximately 1m higher than the consented scheme. On 19 October 2020, an application to discharge Condition 4 of planning permission ref: 20/00263/FUL (details of the maintenance schedule for the ventilation and extraction equipment) was refused². A statutory abatement notice was served on the operators of the appeal site in September 2020 due to noise arising from the kitchen extract system.
7. Planning permission to regularise the current 'as built' extract duct³ was subsequently refused in March 2022 following advice from the Council's Environmental Health Officer (EHO). In particular, the EHO raised an objection that the extract duct was unacceptable due to its effect on odours, fumes, noise, vibration and disturbance on the amenity of occupiers at 96B West Road. In particular, the flue terminates approximately 1m from the balcony of the flat at 96B and is located close to a habitable room window of this flat.
8. Serious concerns were also raised by Regulatory Services under the Health and Safety Work Act, 1974, to the appellant about the risk of scalding and burns from direct contact with the flue and other parts of the ductwork. This is because the ductwork becomes hot during use and is easily within reach of the external amenity areas of the flats on the second and first floor. The Council's

¹ Council Ref: 20/00263/FUL.

² Council Ref: 20/01433/AD.

³ Council Ref: 22/00172/FUL.

EHO have expressed ongoing concerns about these risks and the position of the flue.

9. Whilst the appellant states that all the mitigation measures⁴ outlined in the approved Noise Impact Assessment, submitted with the 2020 permission, have now been installed, there is little clear evidence before to demonstrate that this extract duct is no longer causing an environmental nuisance. I therefore give greater weight to the expert advice provided by the Council's Environmental Health Team, who have identified the above serious harms. On the evidence available, I am not convinced that these harms could be satisfactorily addressed by conditions.
10. I appreciate that the extract duct, replaced a previous flue used by a former restaurant. However, it is clear that it is the current flue, in use by the current business, which is causing the environmental nuisance. As such, the former flue does not justify the current harms.
11. Therefore, based on all the evidence before me, the development fails to provide acceptable living conditions for residential occupiers of West Road, with particular regard to noise, disturbance, vibration, odour and fumes. Accordingly, the development is contrary to Policies KP2 and CP4 of the Southend on Sea Core Strategy, 2007 (CS), and Policies DM1 and DM3 of the Southend on Sea Borough Council Development Management Document, 2015 (DMD). Amongst other things, these require requires new development to enhance the amenity value of the environment; secure good relationships with existing development, and protect the amenity of immediate neighbours, and surrounding area.
12. The Council also refer to Policy KP1 of the CS and Policy DM11 of the DMD. However, these appear to relate to the Council's spatial strategy and employment areas which is not relevant to the current appeal. I therefore find no conflict with these policies.

Conclusion on Ground (a) and the Deemed Planning Application

13. 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. The development harms the living conditions of the neighbouring occupiers with regard to noise, disturbance, vibration, odour and fumes in conflict with the development plan taken as a whole. Therefore, there are no material considerations that would lead me to a decision other than in accordance with the development plan in this case.
14. For the reasons given and with regard to all other matters raised, I conclude that the appeal on ground (a) should fail, and the deemed planning application should be refused.

The appeal on Ground (f)

15. 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

⁴ Installation of an Acoustica CP01-445-060 Silencer; Lag of at least 2m of the ductwork with Muftilag-R102; Mount the extraction system on resilient rubber feet to minimise structure sound transmission.

- 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".
16. The enforcement notice requires the removal of the unauthorised development, and therefore, the purpose of the notice is to remedy the breach of planning control rather than only remedy any injury to amenity.
 17. The appellant states that the current requirement is excessive since planning permission was previously approved for an extract under planning permission 20/00263/FUL. Furthermore, condition 4 of this permission relating to details of the maintenance schedule for the ventilation and extraction equipment has been approved in June 2022. The appellant's submission that the previous 2020 permission was implemented, prior to the current unauthorised development, has not been disputed by the Council. Indeed, paragraph 2.2 of the Council's appeal statement confirms that the approved extract duct was installed, and therefore as a matter of fact and degree this planning permission remains extant.
 18. Caselaw has established that enforcement should be remedial rather than punitive. The breach of planning control could also be addressed through compliance with an alternative requirement that requires the development to accord with the terms and conditions of the approved planning permission ref: 20/00263/FUL. This would achieve the purpose of the notice which is to remedy the breach. Therefore, I will add an requirement to make the development comply with the extant planning permission which would also remedy the breach of planning control, in line with s173(4)(a) of the Act. Varying the notice on this basis would cause no injustice to either party, as it would not make it more onerous.
 19. The appeal on ground (f) succeeds to that extent only, and I will vary the notice.

Conclusion

20. 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.

R. Satheesan

INSPECTOR