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GROUNDS OF APPEAL

LAND AT REAR OF 115-119 FINCHLEY ROAD LONDON NW3 6HY

1. INTRODUCTION

1.1 We are instructed by our client, Deliveroo Editions UK Ltd, t/a Deliveroo ("**the Appellant**"), to submit an appeal under section 174 of the Town and Country Planning Act (1990) against an Enforcement Notice served by London Borough of Camden Council ("**the Council**") in relation to an alleged breach of planning control at the Unit to the rear of 115 -119 Finchley Road NW3 6YH ("**the Site**").

1.2 The Enforcement Notice ("**the Notice**"), which forms part of the appeal documentation, was served by the Council on 23 April 2019 under reference: EN19/0359. The Notice has been served despite there being an ongoing appeal ("**the Live Appeal**") (reference APP/X5210/C/18/3206954) against an enforcement notice issued on 1 June 2018 (**"the First Notice"**). This approach is considered to be wholly disproportionate given that the Live Appeal is at an advanced stage with the Public Inquiry due to open on 30 July 2019.

1.3 Accordingly, this appeal is pursued jointly with the Live Appeal and we request that the Planning Inspectorate conjoins the two. The Notice alleges the same breach of control as set out in the First Notice, but omits reference to the existing use of the site being a light industrial use (Class B1). The decision to issue the Notice for this singular reason duplicates the request made by the Council as part of the Live Appeal for the inspector to vary the First Notice; this is unreasonable in the Appellant's view and the Appellant has been put to unnecessary additional cost.

1.4 We understand that the omission from the Notice of the reference to the existing use of the site is on the basis of the Council's allegation in its Statement of Case provided in respect of the Live Appeal that the planning history of the Site does not establish that the lawful use of the Site is Class B1. This arises from the Council having undertaken a full audit of the planning history of the Site and having made historic plans and documents available which the Appellant was previously informed were destroyed and unavailable. The Appellant is currently reviewing these documents further to their late disclosure and intends to set out further details relating to the use of the Site in its evidence. The Appellant has been left in the unenviable position of trying to establish in an unreasonably short timescale the sequence and nature of occupation of the Site over the 10 years preceding the Notice in order to establish the lawful use – a period well before it entered into occupation – which it previously thought was not in contention.

1.5 The matters alleged to constitute a breach of planning control are set out in Section 3 of the Notice and are as follows:

''Without planning permission: use of the premises as a Commercial Kitchens and Delivery Centre (Sui Generis); and installation of external plant including three (3) extract ducts, four (4) flues, three (3) air intake louvres, one (1) rooftop extract and three (3) air condenser units.''

1.6 Section 4 of the Notice sets out seven reasons for issuing the Notice. These are:

1. The breach of planning control has occurred within the last 10 years.

2. The high volume of vehicle deliveries serving the property results in a significant noise nuisance and a harmful loss of amenity to adjacent occupiers contrary to Policy A1 of the Camden Local Plan 2017.

3. The use of the Property, in the absence of measures to control unauthorised hours of operation, litter, storage, waste, recycling, servicing and delivery results in nuisance and a

harmful loss of amenity to adjacent occupiers contrary to Policy A1 of the Camden Local Plan 2017.

4. ***The delivery vehicles and parking of these resulting from the unauthorised use of the Property has a harmful impact on highway safety in the vicinity of the site, causing difficulty for vulnerable users and neighbouring occupiers contrary to policy D1 of the Camden Local Plan 2017.***

5. ***The extract plant and associated equipment, by virtue of their siting and visual impact, cause harm to the character and appearance of the Property and the context of the local area contrary to Policy D1 of the Camden Local Plan 2017.***

6. ***A suitably comprehensive acoustic survey and a risk based odour control and impact assessment demonstrating that all plant equipment, when operating at full capacity, would be capable of doing so without causing harm to local amenity has not been provided. As a result, the plant and equipment that have been installed at the Property are contrary to policies A1 and A4 of the Camden Local Plan 2017.***

7. ***The plant equipment facilitates the unauthorised use of the Property, and whilst their operation and appearance maybe controlled by planning condition, the use is unacceptable in principle and the associated operational development is therefore unacceptable. "***

1.7 Section 5 of the Notice requires the following to be undertaken within a period of four months of service of the Notice:-

- Cease operation of the premises as a Commercial Kitchen and Delivery Centre;
- Remove all external extraction, ventilation and refrigeration plant, machinery and ductwork; and
- Reinstate the brick flank wall and make good the exterior of the Property following the completion of the above works.

1.8 Schedules 5 and 6 set out the time period for compliance with the Notice and the date when the notice takes effect, as follows:

- When the Notice takes effect – **4 June 2019**
- Time for compliance– **four months**

1.9 This Appeal has been submitted to the Planning Inspectorate before the effective date of the Notice. A copy of the 'Grounds for Appeal' and Appeal Form have also been provided to the Council.

1.10 This Written Statement of Appeal has been submitted in accordance with Regulation 6 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002. It should be read in conjunction with the Appeal Form and adopts the following format:

- Section 2 sets out the grounds of appeal;
- Section 3 justifies the choice of the proposed procedure; and
- Section 4 sets out the fee to be paid.

1.11 The Appellant submitted a planning application for the installation of the external plant including 3 no extract ducts, 4 no flues, 3 no air intake louvres, 1 rooftop extract and 3 no air condenser units (north, south, and west elevations) ("**the Plant**") on 22 August 2017 (**Ref No 2017/4737/P**). The application was refused on 11 May 2018 on two grounds:

1. ***The extract ducts and rooftop plant equipment, by virtue of their siting and visual impact, would cause harm to the character and appearance of the host building and local area contrary to Policy D1 (Design) of Camden Local plan 2017.***

2. ***The applicant has failed to demonstrate by way of a suitably comprehensive acoustic survey and impact assessment and risk based odour control and impact assessment that all plant equipment, when operating at full capacity, would be capable of doing so without causing harm to local amenity, contrary to policies A1 and A4 of the Camden Local Plan 2017.***

1.12 In addition, an application for a Certificate of Existing Use or Development ("**the CLEUD Application"**) submitted on 20 February 2018 was refused and enforcement action authorised on 11 May 2018 **(Ref: 2018/0865/P**). The ground of refusal given was that:

"***The use as a commercial kitchen and delivery service is considered to be materially different to the previous use of the premises and therefore constitutes a material change of use. The applicant has failed to demonstrate, on the balance of probability, that the last lawful use of the premises was in the B1 use class, and that the use at the time of the application was also within the B1 use class. The change of use falls within the definition of 'development' as set out in section 55(1) of the Town and Country Planning Act 1990 (as amended), and would require planning permission. The use is therefore not lawful by reason of section 191(2)(a) of that Act."***

1.13 In light of the fact that the Notice alleges the same breach of control as set out in the First Notice (albeit omits reference to the existing use of the Site being a light industrial use (Class B1) for the reasons set out above), we have made reference to the Council's arguments set out in the Rule 6 Statement of Case associated with the Live Appeal (the '**Rule 6 Statement'**) where relevant.

2.0 GROUNDS OF APPEAL

2.1 The Appellant submits this appeal on the following four grounds:

- **Ground (c)** – That the use of the Site for Commercial Kitchens and Delivery Centre is not a breach of planning control;

- **Ground (a)** – If the appeal in respect of ground (c) is successful in respect of the use, that planning permission ought to be granted for the installation of the Plant. In the event of the alternative, that planning permission ought to be granted for the alleged change of use and the installation of the Plant;

- **Ground (f)** – The required steps set out by the Notice to be taken and activities required to cease exceed what is necessary to remedy any breach of planning control; and

- **Ground (g)** – The period of compliance of four months falls well short of what should reasonably be allowed.

i) Ground (c) – That there has not been a breach of planning control

2.2 The Appellant appeals on ground (c) on the basis that there has been no change of use as alleged in the Notice.

2.3 The Notice does not specify the existing '*lawful*' use of the Site from which the material change of use is alleged to have occurred. This is in contrast to the First Notice, which referred to the existing use as being Class B1 (light industrial) as defined by the Town and Country Planning (Use Classes) Order (1987) (as amended) ("**the UCO**"). As explained above, it was not until the receipt of the Council's Rule 6 Statement in respect of the Live Appeal in March 2019 that it became apparent to the Appellant that the existing lawful use of the Site was in dispute. Since receipt of the additional information provided by the Council in relation to the planning history of the Site, the Appellant has sought to review this and has also had to consider whether it can establish the lawful use of the Site through evidence of continuous use for the ten years preceding the alleged date of breach. This process remains on-going. Clearly, the question of the existing lawful use of the Site is integral to the appeal on ground (c).

2.4 The Council alleges in the Notice that there has been a material change of use to Commercial Kitchens and Delivery Centre (Sui Generis). Notwithstanding the on-going investigations into the existing lawful use of the Site, the Appellant contends that the use of the Site by the appellant for food preparation and delivery does not comprise a 'sui generis' use but rather falls into Class B1(c).

2.5 The Council argues within paragraphs 5.14-5.17 of the Rule 6 Statement that the Appellant's use of the Site cannot properly be considered to fall within Class B1(c) use, with the material difference being the "*frequent customer demand-led individual deliveries"* which form a ''*fundamental, integral, and non-severable part''* of the cooking/food preparation component. As such, the Council does not consider the use to constitute an 'industrial process'. It is noted in the Rule 6 Statement that ''*a characteristic of delivery from Class B1 light industrial use is that it is generally carried out in bulk and during working hours, which may be capable of being ancillary*'' such that *"the delivery element of the existing use is of a different nature to that of a B1 use as it is dictated by individual customer demand and by individual items rather than in bulk."*

2.6 The Appellant notes that, contrary to the Council's position, there is no provision within Class B1(c) as to what "*the normal scope*" for a light industrial use is or how it should operate. The only relevant considerations under the terms of the UCO for determining whether a use falls within Class B1(c) are, firstly, whether the use comprises an "*industrial process*" and, secondly, whether it "*can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit*".

2.7 The Appellant will demonstrate that the use of the Site for a commercial kitchen for the preparation and dispatch of food comprises an "*industrial process*" as it involves the making of an "*article*" in the "*the course of any trade or business*" and the delivery of the said finished "*article*".

2.8 The concept of making deliveries is inherent to many industrial uses (including Deliveroo Editions), as the purpose of making the article is to deliver it to the end user, in furtherance of the trade or business. Without the delivery element, there would be no commercial rationale to producing the article and it is, therefore, clear that delivery of articles made on site must be permissible within the permitted use. Contrary to the Council's assertion within paragraph 5.14 of the Rule 6 Statement, there is no specification within Class B1(c) as to '*the normal scope*' of deliveries. The principal test of Class B1(c) is whether the process involves the making of an article in the course of any trade or business, not the means by which the article is dispatched from the Site, the frequency of deliveries or to whom deliveries are made. As such, the Appellant respectfully submits that the Council's

conclusion is based on a clear misapplication of the UCO and that the Deliveroo Editions user clearly comprises an "*industrial process*".

2.9 The Council continues in the Rule 6 Statement to consider whether, notwithstanding the contention that the use does not constitute an *'industrial process'*, it can be carried out in any residential area without detriment to the amenity of that area. The Council notes at paragraph 5.23 that they will ''*demonstrate the extent and nature of the impact on residential amenity resulting from the development*".

2.10 The Appellant strongly refutes the allegations made by the Council in relation to the operation of the Site having a detrimental impact on residential amenity. The Appellant notes at paragraph 5.23 of the Rule 6 Statement that they intend to rely on technical observations made by the Council's Environmental Health officers and comments and objections made by neighbouring residential occupiers to demonstrate such impact. The Appellant maintains that any assertions of impact on the local area should be supported by technical evidence rather than supposition and observations. The Appellant contends that the Council has failed to make a proper assessment of the reports submitted by the Appellant as part of the CLEUD Application in relation to noise and transport, together with details of odour control, as well as the Operational Management Plan prepared by the Appellant. The Appellant has prepared updated assessments, including a Noise Impact Assessment, a Transport Impact Assessment and an Odour Assessment as part of the Live Appeal, which will present further evidence to demonstrate that the Deliveroo Editions use (when combined with suitable mitigation measures set out within the bespoke Operational Management Plan prepared and implemented by the Appellant) can operate without detriment to residential amenity.

2.11 In summary, for the reasons set out above, when assessed against the criteria set out within the UCO, it is plain that the Appellant's use of the site for food preparation and delivery falls within Class B1(c). The Appellant will set out further details relating to the existing lawful use of the Site in its evidence.

ii) <u>Ground (a) – That planning permission should be granted for what is alleged in the Notice</u>

2.12 If the appeal in respect of ground (c) in relation to the use is successful, the Appellant is appealing on ground (a) solely in respect of the installation of the Plant. However, in the alternative, the Appellant is appealing on ground (a) on the basis that planning permission ought to be granted for the alleged change of use and the installation of the Plant.

2.13 As noted at paragraph 1.10, the Plant application was refused by the Council on 11 May 2018 (reference 2017/4737/P) on grounds of both the alleged impact upon the character and appearance of the host building and local area (Design) and the alleged impact upon the residential amenities of neighbouring occupiers (Amenity). In the Notice, the Council refers to the Plant facilitating the unauthorised use; however, it acknowledges that its operation and appearance could be suitably controlled by planning condition. The Council also recognises that the Site already has a commercial character, with external plant present prior to the works subject of this Appeal. The service of an Enforcement Notice in respect of the Plant is inappropriate and contrary to conventional planning enforcement practice, particularly as all evidence submitted and subsequently reviewed by the Council concludes that the Plant is acceptable in amenity terms.

2.14 As set out in paragraph 2.10 above, the Appellant has commissioned the production of an updated Noise Impact Assessment and Odour Assessment (to supplement those already submitted with the CLEUD Application). The technical reports will demonstrate that the Plant can indeed be operated fully in accordance with policy and does not, in fact, cause any harm to the character or appearance of the host building and local area as alleged. This evidence will demonstrate that the Plant, when

operating at full capacity, is capable of doing so without causing detrimental harm as alleged and that (as acknowledged by the Council) any impacts could be controlled by planning condition attached to any planning permission, where necessary.

2.15 Further, with regard to whether planning permission ought to be granted for the alleged change of use, the technical evidence in the revised Assessments will demonstrate that the Appellant's operation (together with any appropriate management measures such as the continued implementation of the Operational Management Plan) does not cause harm (or that any harm which is caused is not significant and does not outweigh the benefits of the Appellant's operation) such that it operates in accordance with policy. In addition to providing evidence relating to noise and odour impacts, the Appellant will also provide technical evidence to demonstrate that highway safety is not compromised by the use (as alleged at paragraph 5.27 of the Rule 6 Statement) and, again, is compliant with policy.

2.16 The Appellant asserts that the existing, baseline conditions are relevant to the appeal on ground (c) in that consideration should be given to the impacts of a range of uses (e.g. food production and processing, necessitating similar plant and machinery, or a commercial launderette) which could (subject to the establishment of the lawful use of the Site) operate from the Site under Use Class B1(c).

2.17 Furthermore, the Appellant contends that the Council has failed to make a proper assessment of the planning balance and has failed to judge the Appellant's use of the Site in the full context of development plan policies in line with section 38(6) of the Planning & Compulsory Purchase Act (2004). Appropriate weight should be given to the socio-economic benefits associated with the Appellant's use of the Site for food preparation and delivery, including: improvement to and investment in existing industrial stock; the provision of significant employment; benefits for the local food supply chain and the expansion of restaurant businesses into the surrounding area.

iii) Ground (f) – 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

2.18 The Notice sets out that the Appellant is required to cease the use of the Site as Commercial Kitchens and Delivery Centre. In addition, the Appellant is required to remove all external plant and associated fixtures, and reinstate the existing building.

2.19 These measures are considered to be wholly excessive and are beyond what would be required to remedy the injury to residential amenity which is alleged to have taken place. The Notice alleges that the Appellant's use of the Site has resulted in a detrimental impact upon neighbouring residential amenity due to the "s*ignificant noise nuisance"* and "*absence of measures to control the operation…"* and "*highway safety in the vicinity of the site"*. However, the Council does not point to any technical evidence supporting this and, regrettably, it is clear that this conclusion is largely based on supposition rather than facts. On this basis, a fair and unbiased assessment of the impact of the use was not undertaken and therefore no account has been given to the use of mitigation measures that could be employed to effectively remedy any alleged injury to amenity rather than ceasing the use entirely.

2.20 Furthermore, in the Notice, the Council requires the removal of the Plant despite concluding that its operation and appearance could be suitably controlled by planning condition. This is considered entirely disproportionate and unreasonable. In isolation from the current use of the Site, the Council has not set out any reasons why the Plant should not be acceptable in this location.

iv) <u>Ground (g) – That the time given to comply with the notice is too short</u>

2.21 The requirement to cease operations and clear the Site within four months of the Notice taking effect is considered to be excessive and unreasonable.

2.22 It does not have regard to the Appellant's commitment to the Site and license arrangements with the land owner and restaurant partners. In addition, the Site is a significant generator of employment, including a site manager, chefs and preparation staff. It also generates work opportunities for delivery riders. The 4 month compliance period is not considered sufficient to allow a managed and orderly closure of the Site and the relocation of the business.

2.23 Furthermore, contrary to the Council's assertion in paragraph 5.39 of the Rule 6 Statement, it will take more time for the Appellant to make suitable arrangements for contractors to be appointed and make good the building where structures have been removed. It will also take longer than 4 months for the Appellant to find an alternative site as alleged in paragraph 5.42 due to the need for it to meet the operational requirements of the Appellant and for suitable commercial terms to be agreed.

2.24 It would be more reasonable to allocate 12 months to enable contracts to be honoured and ensure no detrimental impact on the associated businesses, employees and independent riders who operate in and around the site. This timeframe could also enable the Appellant to source a suitable replacement site so that the existing employment and business can be accommodated elsewhere.

3.0 CHOICE OF PROCEDURE

3.1 A public inquiry is considered to be most appropriate in determining this enforcement appeal, and has already been considered appropriate for the Live Appeal ref APP/X5210/C/18/3206954. As identified at paragraph 1.3, it is suggested that these appeals are joined given the similarity in the issues raised.

3.2 The assessment of this appeal involves complex planning issues relating to the interpretation of the UCO, particularly as to whether the proposed use comprises an "*industrial process*" and "*can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit*". This will need to be explored in detail through extensive legal submissions.

3.3 Furthermore, the Council alleges that there is "*noise and disturbance*" and "*odour nuisance*" arising from the on-site operation. The Appellant strongly refutes this, particularly given that the Council's reasoning appears to be based on supposition rather than actual evidence or fact. In order to fully assess this, the Appellant strongly contends that it is necessary to explore and test the evidence on both sides - the only way in which they can do this is by making legal submissions on the UCO and the grounds of appeal. The evidence involved is highly technical and includes not only noise and odour survey data, but also transport evidence relating to the movements from deliveries to and from the site in order to feed into the noise impact assessment. The conclusions, methodologies and assumptions used for undertaking such surveys by both the Appellant and the Council will need to be explored and tested and the Appellant strongly contends that this can only take place through the formal cross examination of expert witnesses by an advocate.

3.4 In summary, the Public Inquiry procedure is considered to be the most appropriate route to determine this enforcement appeal for the following reasons:-

- It involves complex planning issues;

- There will need to be extensive legal submissions in relation to the UCO and the grounds of appeal;

- The evidence involved is highly technical (noise, odour, transport); and

- There is a clear need for evidence to be tested and the most effect way is through the cross examination of expert witnesses by an advocate.

3.5 The above is clearly in line with the criteria for the Public Inquiry procedure set out in the "*Procedural Guide – Enforcement Notice Appeals – England*" (March 2016).

3.6 In order to fully address all aspects raised by the Notice and the appeal, the Appellant would seek to call on up to five expert witnesses. It is also considered that three days should be afforded to an inquiry to cover the relevant topics. In addition, it is expected that there will be extensive legal submissions dealing with the requirements in law imposed on the contents and requirements of the Notice.

4.0 FEE FOR DEEMED PLANNING PROCEDURE

4.1 A requisite deemed planning application fee of £924 was set out by the Council on the Notice, should the appeal be allowed under Ground (a).

4.2 Whilst a fee has already been paid to the Council in respect of both the operational development, under planning application reference 2017/4737/P, which remains undetermined, and appeal ref APP/X5210/C/18/3206954, a cheque for the full amount (£924) as specified on the Notice has been sent in the post along with the associated documents as directed.