The Planning Inspectorate

Appeal Decision

Site visit made on 10 March 2020

by Jean Russell MA MRTPI

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 14 April 2020

Appeal ref: APP/X5210/C/19/3240844
Land at 4 New College Parade, Finchley Road, London, NW3 5EP

- The appeal is made by Mr Elton Shyti o/b Toni's Pita Ltd under section 174 of the Town and Country Planning Act 1990 against an enforcement notice (ref: EN19/0242) issued by the Council of the London Borough of Camden on 30 September 2019.
- The breach of planning control as alleged in the enforcement notice is *without planning permission: the erection of kitchen extract flue on the rear elevation.*
- The requirements of the notice are to: *1. Permanently remove the existing kitchen flue OR 2. Fully implement planning permission dated 03/09/2019 for; installation of flue ductwork and plant equipment on the rear elevation and lower ground floor, (Ref: 2019/0230/P).*
- The period for compliance with the requirement is: one (1) month.
- The appeal is proceeding on the grounds set out under section 174(2)(b), (c) and (f) of the Town and Country Planning Act 1990.

FORMAL DECISION

1. The enforcement notice is quashed.

REASONS FOR THE DECISION

2. An Inspector may, under s176(1)(a) of the Town and Country Planning Act 1990 (TCPA90), correct any error, defect or misdescription in an enforcement notice, so long as doing so would cause no injustice to the Council or appellant. I explain below that the appealed notice does not properly describe the breach of planning control and cannot be corrected without causing injustice to the appellant.

The Site and the '2019 Planning Permission'

3. The alleged flue serves a restaurant. The Council officer's Enforcement report states that '*the site has been used for many years as a restaurant although it has never had planning permission*' – suggesting that the use is either immune from enforcement action or 'tolerated' by the Council. Whether or not that is right, the notice expressly relates only to the flue and not also the restaurant use.

4. In 2018, the appellant opened a new restaurant business and installed a new fume extraction system with a flue on the rear elevation of the building. The report says that nearby residents made complaints about '*smell and noise nuisance….[with] the flue expelling grease onto neighbouring balconies and terraces*. *Environmental Health officers have issued abatement notices against odour and noise*'.

5. The appellant made what he described in his appeal statement as a 'retrospective' planning application (ref: 2019/0230/P) for the works. The Council granted permission on 3 September 2019 for the '*installation of flue ductwork and plant equipment on the rear elevation and lower ground floor*' of the building. Eight conditions were imposed on 'the 2019 permission' including:

   3) The development hereby permitted shall be carried out in accordance with the following approved plans…and…Odour Risk Assessment Report JO353/1/F1…

8) The current use shall not proceed other than in accordance with the approved Odour Risk Assessment dated 12th August 2019 reference JO353/1/F1…submitted as part of this planning application.

6. The decision notice affirms that the 2019 permission was part retrospective; the 'reasons for granting permission' state that: '*…the proposed flue has already been put in place apart from [an] additional section which goes over the roof of the building…*' The Council's appeal statement similarly describes in paragraph 1.2 that the application:

'*…included retention of what had already been installed and proposals to stop any further nuisance to neighbouring residential occupiers…extending the flue further onto the flat roof…and technical details and recommendations on running the kitchen extract system contained within the…Odour Risk Assessment (ORA) Report. Planning permission was granted…the ORA Report is included in the approved drawing nos…[and subject to] condition 3…and condition 8…*'

7. The Council's appeal statement shows in paragraph 1.3 that some, but not all of the works required by condition have been carried out since the grant of the 2019 permission: '*the flue has been extended onto the roof but the recommendations in the Odour Mitigation section of the ORA report…have not been followed…*'

8. Paragraph 3.1.1 of the ORA report noted that '*abatement systems offering a high level of odour control may include: 1. fine filtration or electrostatic precipitator (ESP) followed by carbon filtration…or 2. fine filtration or ESP followed by a UV ozone system…'*; paragraph 3.1.2 of the ORA report described these as the '*recommended mitigation measures*'. The Council's appeal statement says that '*the appellant has not implemented either of these two options…*'; paragraph 3.2.

9. The Enforcement report refers to the ORA and associated condition(s), and then states that the enforcement '*notice is required to ensure that the modifications are made to the kitchen extract flue as soon as possible'*. The reason for taking enforcement action as set out in the notice is that '*the current kitchen flue causes smell and odour nuisance to neighbouring residential occupiers…*'

The Breach of Planning Control

10. The appellant's submissions on ground (c) included that '*full planning permission has been granted'*. It likewise appears to me that, if there has been a breach of planning control, it would be that conditions 3) and 8) imposed on the 2019 permission were not complied with. However, the notice does not state or even imply that there has been a breach of conditions; rather, it expressly alleges: '*without planning permission: the erection of kitchen extract flue…'*

11. The requirements of the notice are to remove the flue or 'fully' implement the 2019 permission. When that second step is considered alongside the allegation, it must mean that the Council considers the alleged flue to be materially different to what was permitted; that is the only way it could be 'without planning permission'.

12. It is possible, even when permission is granted retrospectively, for development on the ground to remain so out of step with imposed conditions that it is 'without planning permission'. However, there is no suggestion that the alleged flue does not accord with the plans. The notice was issued to secure the installation of a filtration system which would mitigate the effect of the approved development. I find that the flue does have planning permission and the Council ought to have enforced against a breach of conditions 3) and 8).

13. In principle, a notice which alleges that there has been development without planning permission can be corrected to allege a breach of condition[1]. However, the nature of the appeal and the wording of conditions 3) and 8) mean that any such correction would cause injustice in this case.

The Implications of Correcting the Notice

14. The appellant has appealed against the notice on grounds (b), (c) and (f). Even if I had given the parties an opportunity to comment on the implications of correcting the notice, it would be too late for the appellant to introduce ground (a) and pay the fee to make a deemed planning application.

15. The appellant's representations included that he has installed what another odour consultant said would be an equally effective but lower cost filtration system than the types recommended by the ORA. That claim is irrelevant to grounds (b), (c) and (f) but highly pertinent to planning merits. I cannot assume that the appellant would not have pleaded ground (a) to seek the discharge of conditions 3) and 8) if the notice had alleged a breach of those conditions in the first place. I make no comment on whether the conditions should be varied or removed; my point is that depriving the appellant of an opportunity to make that case would cause injustice.

16. Another issue is that where a notice alleges a breach of conditions, it should require that those are complied with before the end of a period to be proscribed. The appealed notice could be corrected to require works in line with conditions 3) and 8) rather than removal of the flue or implementation of the 2019 permission, but then a question would need to be asked about what is a reasonable period for compliance, given that the conditions were drafted without regard to the fact that the approved development was begun before permission was granted.

17. In order to be enforceable, conditions 3) and 8) ought to have included a timescale for implementation of outstanding works, and some sort of sanction to come into effect if the works were not completed as required. Instead, condition 3) requires that '*the development hereby permitted shall be carried out in accordance*' with what was submitted despite the fact that the 'installation of flue ductwork and plant' had at least been started. Condition 8) requires '*the use shall not proceed other than in accordance with the approved Odour Risk Assessment*…' and that is hopeless because no 'use' was subject to the permission.

18. The enforcement notice as it stands gives one month for compliance with the requirements. It would cause injustice for me to correct the allegation and require compliance with conditions 3) and 8) within one month – or even some longer period – when there is nothing in conditions 3) or 8) to justify that.

Conclusion

19. Another point, albeit only for the record, is that there are different periods for immunity from enforcement action for unauthorised development and breaches of condition[2]. Had that been the only consequential issue, I could have corrected the notice without causing injustice, because the appellant has not pleaded ground (d) or otherwise argued that it was too late for the Council to take enforcement action.

20. However, that finding does not alter the seriousness of it being too late for the appellant to introduce ground (a); and of the notice being more onerous than conditions 3) or 8) in terms of the period for compliance. I conclude that the

[1] This would mean correcting not only paragraph 3 of the notice, but also paragraph 1 – to state that there has been a breach of planning control under s171A(1)(b) rather than (a).
[2] No enforcement action may be taken within four years of the date of substantial completion of operational development under s171B(1) of the TCPA90, or ten years of the date of a breach of a condition under s171B(3).

enforcement notice does not specify the alleged breach of planning control with sufficient clarity, and the error could not be corrected without causing injustice. The notice is invalid and will be quashed. In these circumstances, the grounds of appeal set out in s174(2)(b), (c) and (f) of the TCPA90 do not fall to be considered.

21. I shall finally note, for completeness, that I have had regard to the letters and emails from nearby residents – but their objections go to the planning merits of the alleged flue. The claimed effects of the fume extraction system cannot alter my finding that the notice is fatally flawed.

Jean Russell

INSPECTOR