



Appeal Decision

Site visit made on 2 February 2022

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 June 2022

Appeal Ref: APP/X5210/C/21/3273198

Land at: 262 Kilburn High Road, London, NW6 2BY

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Z Butt against an enforcement notice issued by London Borough of Camden.
 - The notice, numbered EN20/0761, was issued on 5 March 2021.
 - The breach of planning control as alleged in the notice is, without planning permission: Installation of extraction vent on the rear elevation of the two-storey rear addition.
 - The requirements of the notice are to:
 1. Completely remove the extraction vent on the rear elevation of the two-storey rear addition.
 2. Removal of any debris and make good as a result of the works.
 - The period for compliance with the requirements is six (6) months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (f) and (g) 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 replacing 'vent' with 'flue' in paragraph 3.
2. Subject to the correction the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Town and Country Planning Act 1990 as amended (the 1990 Act) for the development already carried out, namely the installation of extraction flue on the rear elevation of the two-storey rear addition at land at 262 Kilburn High Road, London, NW6 2BY, as shown on the plan attached to the notice and subject to the following condition:
 - (i) The extraction flue hereby permitted shall be removed and all resulting materials shall be removed within three months of the date of failure to meet any one of the requirements set out in a) to e) below:
 - a) Within four months of the date of this decision:
 - An acoustic report in accordance with Camden Local Plan 2017 Appendix 3 and Camden Planning Guidance on Amenity shall have been submitted for the written approval of the local planning authority and shall include a scheme of measures to mitigate noise and vibration as required and a timetable for their implementation.
 - An odour assessment shall have been submitted for the written approval of the local planning authority which shall include a

scheme of upgraded extraction equipment and other mitigation and maintenance measures as required, and a timetable for their implementation.

- b) If within eight months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
- c) If an appeal is made in pursuance of b) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
- d) The approved scheme shall have been carried out and completed in accordance with the approved timetable.
- e) All equipment installed as part of the approved schemes shall thereafter be operated and maintained in accordance with the approvals and retained for so long as the use continues.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

The Alleged Development

- 3. The alleged development is the installation of an extraction vent. However, it is more accurately described as an extraction flue. As it is described as such by the appellant and interchangeably so by the Council I am able to correct the allegation accordingly and without injustice to any party. Although this correction to the allegation logically suggests a consequential correction to the requirements, doing so would serve no purpose as I am quashing the notice.

The Appeal on Ground (d)

- 4. An appeal under ground (d) is that at the time the enforcement notice was issued, it was too late to take enforcement action. In order to succeed on ground (d), it is for the appellant to demonstrate, on the balance of probabilities, that the extraction vent was substantially completed four years before the date of the enforcement notice. The material date in this case is 5 March 2017¹.
- 5. The extraction vent is positioned to the rear of a restaurant/ takeaway fronting onto Kilburn High Road. Planning permission was granted on appeal² in 2000 for a change of use of the premises from A2 (financial and professional services) to A3 (food and drink) with extraction flue on the rear elevation. The appellant explains that the unit was occupied by 'Planet Pizza' between 2008 to 2016 and that the extraction flue was retained as originally installed during that period. Nevertheless, it is acknowledged that it was repositioned following the addition of a first floor extension at the rear of the building in 2017. However, no details are provided as to when that extension was approved and implemented, so as to assist in ascertaining when the flue was repositioned.

¹ s171B(1) of the 1990 Act

² Appeal Ref: T/APP/X5210/A/00/1037244/P8

6. The appellant accepts that relocating the flue amounted to a breach of planning control. That therefore marks a new chapter in its planning history and the immunity period must be considered in relation to its current position. The time spent in its pre-existing position does not assist the appellant's case under ground (d).
7. The appellant has provided an image of the flue in its previous position. Although not verified, the stated date is 24 October 2016. The appellant points to photographic evidence which shows Pizza Planet closed in October 2016, *'with the works carried out after this date'*. On that basis, to have gained immunity, the extension would have had to have been built and the flue subsequently relocated in less than five months between the end of October 2016 and the material date. No evidence is provided to that effect.
8. The appellant has provided a copy of the lease on the premises dated 14 November 2017. Although it is stated that no changes have been made to the flue since that date, that does not assist the appellant's case as it is more recent than the material date.
9. It is also pointed out that the lease agreement states that no alterations can be made by the tenant. On that basis the appellant submits that changes to the building took place between tenants and prior to his use of the unit. Reference is also made to the owner of the building having identified that the works took place over four years ago, in early 2017. Be that as it may, no dates or evidence are provided as to when the flue was repositioned.
10. Drawing all of the above together, I find that the appellant's evidence lacks sufficient precision and is ambiguous. Accordingly, it has not been demonstrated, on the balance of probabilities, that the relocation of the flue was substantially completed four years before the date of the enforcement notice so as to have gained immunity through the passage of time. The appeal on ground (d) does not succeed.

Main Issue

11. The main issue is are the effect of the extraction flue on the living conditions of the occupiers neighbouring properties, with particular regard to odour and noise.

Reasons

12. The extraction flue exits the rear of No 262 at first floor level and runs up between the second floor windows and above the roof line of the recent extension to the building.
13. The Council refers to comments made by its Environmental Health Officer, that *'based on subjective evidence compiled during various site visits and complaints received from residents in the area, it is clear that the noise from the extract is causing a material change in behaviour. People are being forced to keep windows closed most of the time and they are having difficulty getting to sleep. The noise levels experienced are clearly noticeable and disruptive. If assessed against local policy the extract would require significant mitigation measures to comply with the required noise levels required to protect residential amenity.'* Reference is also made to complaints being received from various parties with regards to odour being emitted from the vent.

14. I have no reason to doubt those submissions, but, as I have not been provided with the complaints referred to, I am unable to ascertain the relative location of the complainants in respect of the flue. Nevertheless, the premises is currently occupied by 'Meaty Buns' and its menu items, including chicken, steaks and burgers, are very likely to cause cooking fumes and odours. In such circumstances, paragraph 6.22 of the Camden Local Plan 2017 (LP) states that the Council will require all development likely to generate nuisance odours to install appropriate extraction equipment and other mitigation measures.
15. I appreciate that in granting planning permission for the change of use of the premises, the Inspector was satisfied that a fume extraction and ventilation system was capable of acceptably mitigating noise and odour and that a condition was imposed to that effect. It is not suggested that the condition wasn't complied with or that the Council did not agree the required details.
16. However, there have been a number of material changes in circumstances since the installation of the flue in its original position, including the building of a six storey flatted development to the rear of No 262. I accept that development would have been designed having regard to its surroundings, nevertheless, it includes balconies facing the flue and it is a reasonable expectation for occupants of the flats to be able to open windows for ventilation purposes. Moreover, being six storeys, many balconies and windows are higher than the termination point of the flue. There are also residential properties above the restaurant and potentially within the recent extension which necessitated the relocation of the vent.
17. Consequently, there are receptors in close proximity to the emission source with the potential for odour exposure on a daily basis. Although the appellant states that relocating the vent has not had any impact on the way the equipment functions and mitigates harm, that is not evidenced by way of an odour assessment. The effectiveness of the plant may have diminished over its lifetime, particularly if it hasn't been properly maintained and the filtration system is not operating as it should.
18. Noise from such mechanical plant also has the potential to affect existing noise sensitive occupants located in close proximity to that source. Excessive noise can have a significant effect on the health and wellbeing of residents. In the absence of an acoustic report, I cannot conclude the system operates within acceptable noise parameters.
19. I appreciate that Kilburn High Road is a vibrant area that includes ground floor evening time uses such as pubs, restaurants and takeaways. Those uses, as well as the busy main road, are likely to result in noise disturbance to the residential properties above the commercial properties along Kilburn High Road. However, the flue is positioned to the rear of the three/ four storey scale buildings that front onto the main road. Consequently, the residential properties closest to the flue are likely to be shielded from the worst effects of those noise sources.
20. I therefore find that, in the absence of sufficient information to demonstrate otherwise, there is potential for unacceptably harmful effects to the living conditions of occupants of neighbouring residential properties from odour and noise effects being emitted from the extraction flue. That is contrary LP Policy A1, which states, amongst other things, that planning permission will be granted for development unless it causes unacceptable harm to amenity.

21. However, I am very mindful that the vent serves an existing and established restaurant premises and that it is vital to its operation. I also appreciate that the COVID-19 pandemic may have frustrated the appellant's ability to submit an odour and noise survey in support of the appeal. In any case, the appellant has confirmed that he would be happy to accept a condition requiring the submission of the survey information and the implementation of mitigation measures if required.
22. The Council also raises no in principle objection to resolution by way of condition. Indeed, it would address its concerns insofar as the relevant information would be provided on the current effectiveness of the system in terms of odour mitigation and its associated operational noise levels. I also see no reason why, if found to be required, the extraction system cannot be upgraded to address any identified operational shortcomings, rather than be removed completely. On that basis, I am satisfied that the condition would ensure that standards of amenity are protected in accordance with LP Policy A1.

Conditions

23. Condition (i) is therefore necessary to ensure that the required assessments and appropriate mitigation measures are submitted, approved and implemented so as to make the development acceptable in planning terms. It includes a strict timetable for compliance because permission is being granted retrospectively, and so it is not possible to use a negatively worded condition to secure the approval and implementation of any mitigation measures (if required), before the development takes place.
24. I will include details of what the scheme should comprise in the interests of precision and to ensure the right outcome. The Council will be able to assess the acoustic report against its noise thresholds in Appendix 3 of its Local Plan and any noise and vibration mitigation measures as appropriate. Similarly, the Council will be able to consider the odour assessment and any requirement for additional/upgraded extraction and other mitigation measures.
25. The condition will also ensure that the development can be enforced against if the required details are not submitted for approval within the period given by the condition, or if the details are not approved by the local planning authority or the Secretary of State on appeal, or if the details are approved but not implemented in accordance with an approved timetable.
26. The Council has not suggested any other conditions and I consider none are necessary.

Conclusion

27. For the reasons given above, the appeal succeeds on ground (a). I shall grant planning permission for the development as described in the notice, as corrected.
28. The appeal on grounds (f) and (g) do not therefore fall to be considered

Richard S Jones

INSPECTOR