

Enforcement Delegated Report	Receipt date:	26/09/2022
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Officer	Enforcement Case
Gary Bakall	EN22/0777
Breach Address	Photos & Other material
51 Fairfax Road	See below

Authorised Officer Signature



26/10/2022

Alleged Breach

Erection of air conditioning unit on flat roof at 2nd floor level, rear of property.

Recommendation(s): That the Borough Solicitor be instructed to issue an Enforcement Notice under Section 172 of the Town and Country Planning Act 1990 as amended to permanently remove the air conditioning unit on the flat roof, 2nd floor level, rear elevation and officers be authorised in the event of non-compliance, to commence legal proceedings under Section 179 or other appropriate power and/or take direct action under Section 178 in order to secure the cessation of the breach of planning control.

Site Description

The site is a four storey building with lower ground floor visible at the rear, which forms part of a long and continuous terrace on the western side of Fairfax Road. The application site relates to a ground and basement floor. The site forms part of the Fairfax Road Neighbourhood Centre, which in addition to the terrace also includes properties on Fairhazel Gardens. The upper floors at this site and the surrounding area are predominantly residential. There are two passages through the terrace to allow access to the rear where in addition to servicing areas for the commercial units are a number of residential properties. The site is not a listed building and is not within a conservation area.

Investigation History

The case was opened in September this year and a number of site visits, including one by the Council's Out of Hours Noise Service were carried out. The operator informed the Council that the unit had been disconnected however it still appears to be running. It is audible in neighbouring residential properties and although it is not a statutory nuisance it does not meet Council noise standards and is causing loss of amenity to neighbouring residential occupiers. The operator of Habibas Deli claims the unit is turned off at 9pm when the premises closes.

Relevant policies / GPDO Category

Relevant Policies

National Planning Policy Framework 2021
London Plan March 2021
Camden Local Plan 2017
Policy A1 Managing the impact of development
Policy A4 Noise and vibration

Policy CC1 Climate change mitigation
Policy CC2 Adapting to climate change
Policy TC3 Shops outside of town centres)
Policy TC4 Town centre uses

Camden Planning Guidance 2021 - Amenity

Assessment

Planning history:

Recent History

2015/3916/P: Planning permission granted conditional permission at 51 Fairfax Road on the 05/04/2016 for the 'Change of use and subdivision of mixed A1/A3 to form an A3 unit at 51. Alteration to the shopfront and the installation of an extract duct from first floor to roof level on the rear elevation'

Approval of details application 2017/1755/P (dated 08/05/2017) fully discharged outstanding conditions 5, 9, and 10, and partially discharged conditions 11 and 13 attached to the above permission. Conditions 11/13 (duplicated) required the submission of a noise report for plant equipment and external noise levels following by a post-completion report to confirm the success of attenuation measures.

Subsequent approval of details application 2017/3860/P (dated 17/11/2017) sought to discharge the final outstanding condition (11/13 post-installation noise report). This application was refused and an enforcement notice served.

Reason for refusal:

(1) The submitted details fail to demonstrate that the installed plant/machinery/equipment complies with the acceptable noise thresholds as secured by conditions 11 and 13 of application 2015/3916/P, resulting in noise and disturbance to the detriment of the residential amenities of adjoining occupiers contrary to policies CS5 and CS7 of the London Borough of Camden Local Development Framework Core Strategy, policies DP26, DP28 and DP12 of the London Borough of Camden Local Development Framework Development Policies

2017/4528/P Variation of condition 4 of planning permission 2015/3916/P dated 05/04/2016 "Change of use and subdivision of mixed A1/A3 to form an A3 unit at 51. Alteration to the shopfront and the installation of an extract duct from first floor to roof level on the rear elevation" to allow customers to be on the premises between 08:00 to 21:30 on any day.

Refused & Warning of Enforcement Action 23/11/2017- The proposed variation to extend permitted hours for customers to have vacated the site would result in an increase in evening activity, noise and disturbance to the detriment of the amenity of local residents contrary to policies A1 and A4 of the London Borough of Camden Local Plan 2017.

Other Relevant Planning History

2013/7370/P: Planning permission refused at 51-53 Fairfax Road for the 'Change of use at ground and basement levels from retail (Class A1) to a mixed use of retail and restaurant uses (Class A1/A3), including the installation of rear kitchen extract duct from first floor to roof level'.

Reason for refusal:

1) The proposed restaurant would result in an increase in late night activity, noise and disturbance to the detriment of the amenity of local residents contrary to policy CS5 and CS7 of the LDF Core Strategy and DP12 and DP26 of the LDF Development Policies.

This development was subsequently Allowed at appeal (APP/X5210/A/14/2216988) on the 18/08/2014. The inspector did however raise concerns in terms of impact upon nearby residents from late night noise and disturbance but considered that the following conditions were necessary and would address this concern:

- no customers on site after 21:00 on any day;
- limiting noise emission levels from plant;
- restricting number of covers (45);
- rear doors to be kept shut outside of specific hours;
- rear windows to be kept shut at all times;
- no outdoor tables after 19:00

- no servicing/deliveries after 19:00
- that no loud music shall be played;

2013/3896/P: Planning permission refused at 51 Fairfax Road for “Retention of replacement air-conditioning unit, installation of additional replacement air-conditioning unit, and installation of acoustic baffles to both units, all on rear elevation of premises”. The reason for refusal was:

Reason for refusal: The proposed air conditioning units by virtue of their close proximity to neighbouring residential properties and the proposed duration of their operation are likely to cause noise disturbance and harm to the amenity of nearby residents. This is contrary to Core Strategy policy CS5 and Development Policies DP26 and DP28 of the Camden Local Development Framework.

This permission was allowed at appeal (APP/X5210/A/13/2210931) on the 11/04/2014. During the course of the appeal a Noise Impact Assessment was submitted that noise levels resulting from the use of plant and machinery set out in Table E of Policy DP28 of the Camden Development Policies (DP) 2010-2025 would not be exceeded.

2012/5787/P: Planning permission refused at 51 Fairfax Road for “Installation of air conditioning unit on rear elevation at first floor level in connection with existing retail unit (Retrospective)”

Reason for refusal: 1) The air conditioning unit is detrimental to the amenity of neighbouring properties due to noise nuisance and failing to meet the required standard for noise emission near to sensitive receptors. This is contrary to Core Strategy policy CS5 and Development Policy DP28 of the Camden Local Development Framework

2011/5949/P: Planning application (Ref: 2011/5949/P) submitted at 51 Fairfax Road for ‘Change of use from retail (Class A1) at ground and basement to coffee shop/restaurant (Class A3) including installation of extract flue from first floor to roof level on rear elevation and alterations to shopfront’. This was heard at committee on 28 June 2012 where there was a resolution to grant but with a section 106 legal agreement to cover a number of aspects relating to neighbouring amenity. The applicant subsequently resolved not to enter into such an agreement and appealed against non-determination.

Reason for refusal: 1) The proposed restaurant would result in an increase in late night activity, noise and disturbance to the detriment of the amenity of local residents contrary to policy CS5 and CS7 of the LDF Core Strategy and DP12 and DP26 of the LDF Development Policies.

The subsequent appeal (APP/X5210/A/12/2185091) was Dismissed on the 06/03/2013. The main issue under consideration was the effect of the proposed development on the living conditions of surrounding occupiers in terms of noise and disturbance and whether a closing time of 21:00 was necessary / reasonable. The inspector concluded that the proposed development later evening opening hours would be harmful to the living conditions of surrounding occupiers in terms of noise and disturbance.

2011/0962/P: Planning permission was refused at 51-53 Fairfax Road on the 10/11/2011 for the ‘Change of use from retail use (Class A1) at ground floor and basement level to a mixed retail (Class A1) and restaurant use (Class A3) including installation of extract flue from first floor to roof level on rear elevation’.

Reason for refusal: 1) The proposed restaurant would result in an increase in late night activity, noise and disturbance to the detriment of the amenity of local residents contrary to policy CS5 and CS7 of the LDF Core Strategy and DP12 and DP26 of the LDF Development Policies.

Enforcement History

EN20/0827 Noise from plant exceeding conditions attached to 2015/3916/P, resolved

EN20/0751 Early morning bin collections, resolved

EN20/0486 Report of noisy fan in rear wall which was resolved

EN17/1279 Enforcement notice issued following the refusal of a post-installation noise report application 2017/3860/P (see above). Previous occupier closed and notice has not been complied with.

EN17/0732 – Complaint received in relation to an Air conditioning units installed at the rear ground floor A3 unit without express permission. Following officer advice equipment was removed.

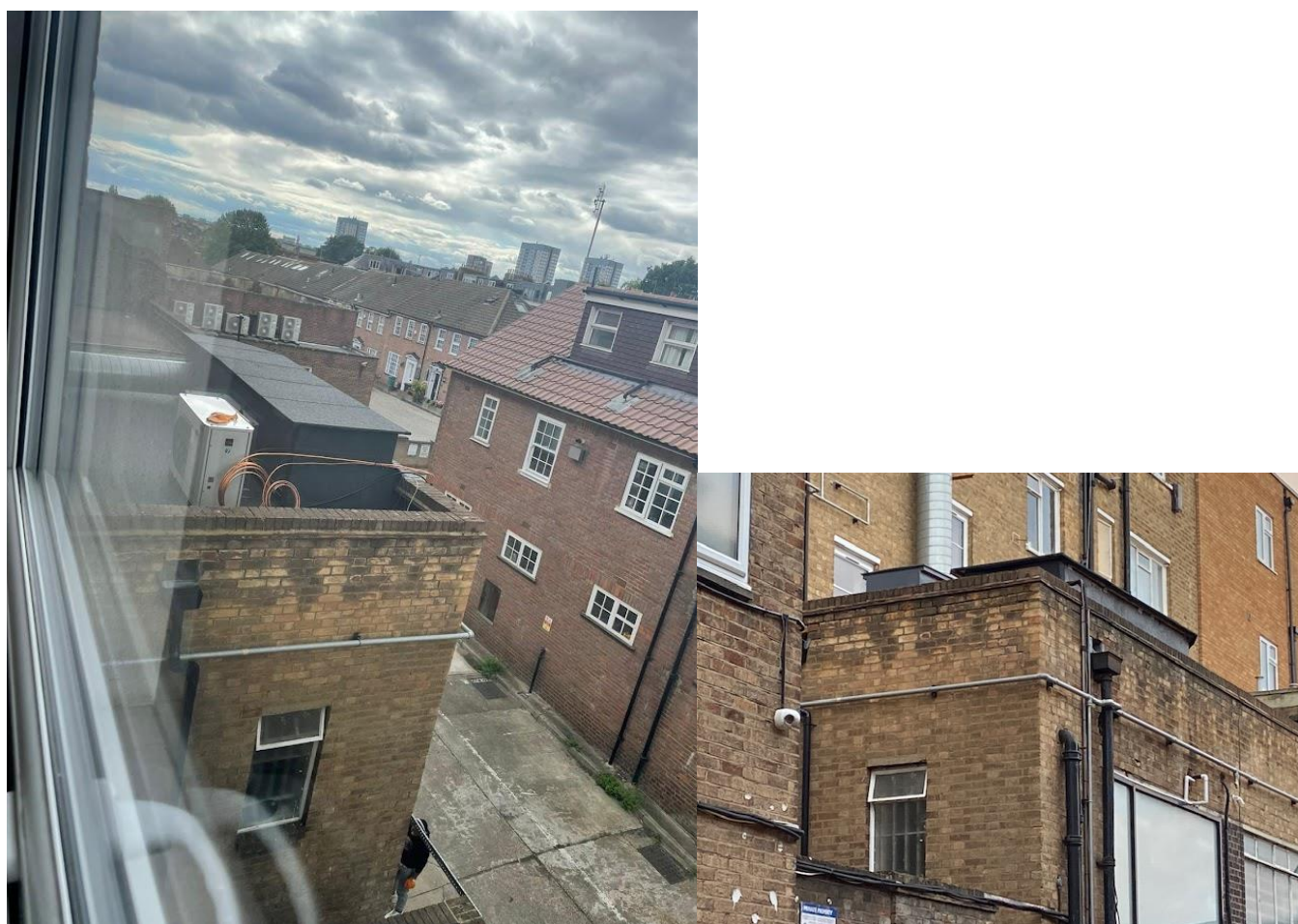
EN17/0227 - Complaint received in relation to Non-compliance with conditions 7 (Servicing) and 12 (Hours of Use) attached to 2015/3916/P. Breach of Condition Notice was served.

Issues:

The unit is not readily visible from the public realm and is located in a service road. Given its size and location adjacent to existing plant, it is not considered it harms the character and appearance of the host building.

The main issue relate to this close proximity of residential occupiers to the rear of the property where the air conditioning unit is located and noise nuisance from operation of the unit.

The unit belongs to Habibas Delicatessen which is situated at GF/LGF level of this four storey building which forms part of a long and continuous terrace on the Western side of Fairfax Road. This site is densely surrounded by residential accommodation, not only featuring three storeys of residential accommodation above, directly next to the unit, but also featuring a separation distance of only 6m between the rear of the unit and the terrace of dwelling houses to the rear of the site along Fairfax Place as can be seen from the photograph below. The motor and fan for the existing flue is contained in the larger box structure at the rear of the roof. This new single air conditioning unit (see below left) has recently been boxed in (see below right).



Despite the strikingly residential nature of the wider local area, this terrace includes a parade of GF commercial units, which the Council has sought to protect by designating as a Neighbourhood Centre. As outlined by Local Plan policy TC2, Neighbourhood Centres cater for the day-to-day shopping and service needs of their local populations and reduce the requirements for long journeys for facilities of daily use, helping to encourage sustainable communities. Neighbourhood centres are predominately of benefit to local communities due to their convenience shopping offer, however adopted policy allows for some range in uses, including food, drink and entertainment uses, provided that such uses minimise the impact on local residents and the local area.

Although the entire parade is designated as a Neighbourhood Centre a clear distinction can be made between the quieter Northern section of the parade, where this unit is located and which predominately features a range of retail uses and Southern part of the parade which features a greater level of activity, is closer to the roundabout junction and is host to several restaurants. The break in the frontage where an access way to Fairfax Place is the defining point of this alteration in character. This distinction has been a repeating consideration for both LPA planning officers as well as planning inspectors who have upheld this view.

As outlined in the planning history section of the report, the application site as well as the wider centre has been subject to extensive assessment and discussions relating to the level of acceptable provision of food uses within both the Northern and Southern sections of the frontage as well as necessary controls to mitigate impacts associated with such uses. The Council has continuously sought to protect the existing quiet character of the Northern frontage and allow for the numerous households adjoining this area to continue to enjoy a high standard of amenity by repeatedly objecting to developments involving noisy uses which would involve late night/evening operation. With specific reference to the application unit, this approach has been consistently applied, with the Council either refusing subsequent applications or attempting to secure limited opening hours for proposed restaurant uses (see 2011/0962/P refused on the 10/11/2011; 2011/5949/P dismissed on the 06/03/2013; and 2013/7370/P refused on the 01/04/2014). Although the principle of the use of nos.51-53 for food/A3 purposes was established when an appeal against refused application 2013/7370/P was allowed in 2014, the above consideration was still upheld by the inspector who found that it was both necessary and reasonable for the premises to be restricted to be closed by no later than 21:00. In the Inspectors decision, they state that *“having regard to the semi-residential nature of the site’s surroundings... and bearing in mind the location of the appeal site situated towards the northern end of the parade of shops away from the roundabout, I also consider that outdoor tables and seating should be removed by 19:00, and that the premises should close to customers by 21:00”*.

Policy A1 seeks to protect the quality of life of occupiers and neighbours by only granting permission to development that would not cause harm the amenity of residents. Policy A1 states that the Council will also seek to ensure development contributes towards strong and successful communities by balancing the needs of development with the needs and characteristics of local areas and communities. Policy A4 states that the Council will seek to ensure that noise and vibration is appropriately controlled and managed to avoid undue harm. It states that the development should have regard to Camden’s adopted Noise and Vibration Thresholds and that the Council will not grant planning permission for development likely to generate unacceptable noise and vibration impacts. The above two policies are supported by the guidance outlined in CPGs 5 (Town Centres, retail and employment) and 6 (Amenity).

In this instance environmental health have witnessed noise breakout from the unit audible from residential properties in Fairfax Place. This was not deemed a statutory nuisance but clearly did not meet planning conditions applicable to other plant in this location that state it must operate 5db below background noise levels. In the absence of an acoustic assessment the Council cannot be satisfied the units would meet Camden’s noise criteria. This is reflected by the findings on site and accordingly the unit has a detrimental impact on the amenity of neighbouring occupiers.

Paragraph 154 of the NPPF states that planning policies should seek to avoid increased vulnerability to the range of impacts arising from climate change. When new development is brought forward in areas which are vulnerable, care should be taken to ensure that risks can be managed through suitable adaptation measures, which can help to reduce greenhouse gas emissions, such as through its location, orientation and design. More sustainable options should always be explored first before resorting to solutions involving active cooling – this approach is referred to by the London Plan policy SI 4 (managing heat risk) as the ‘cooling hierarchy’.

LP Policy CC2 expects developments to be resilient to climate change and include measures to reduce the impact of urban and dwelling overheating, according to a cooling hierarchy. This policy is not restricted only to major developments. The supporting text to the policy sets out that the Council will discourage the use of air conditioning and excessive mechanical plant as, in addition to increasing the demand for energy, such measures expel heat from a building making the local micro-climate hotter. In this case, we understand the chiller unit is serving a business, these types of units tend to function for a chilled display unit rather than providing cooling to the building. On that basis the Council does not consider that thermal modelling is required.

Recommendation: That the Borough Solicitor be instructed to issue an Enforcement Notice under Section 172 of the Town and Country Planning Act 1990 as amended to permanently remove the air conditioning unit from the flat roof at rear, second floor level and officers be authorised in the event of non-compliance, to commence legal proceedings under Section 179 or other appropriate power and/or take direct action under Section 178 in order to secure the cessation of the breach of planning control.

The notice shall allege the following breaches of planning control:

Erection of air conditioning unit and housing on flat roof at 2nd floor level, rear of property.

What are you required to do

Permanently remove the air conditioning unit and housing, make good any resulting damage.

Period of Compliance: 1 month

REASONS WHY THE COUNCIL CONSIDER IT EXPEDIENT TO ISSUE THE NOTICE:

The air conditioning unit is causing loss of amenity to neighbouring residential occupiers through noise nuisance and in the absence of an adequate noise and vibration assessment, the applicant has failed to demonstrate the development does not generate unacceptable noise and vibration impacts contrary to the aims of policies A1 (managing the impact of development) and A4 (Noise and Vibration) of the Local Plan.