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## Appeal Decision

Site visit made on 22 February 2021

**by Stephen Brown MA(Cantab) DipArch RIBA**

**an Inspector appointed by the Secretary of State**

**Decision date: 15 March 2021**

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**Appeal Ref: APP/B5480/C/19/3243459**

**Land at 38 Corbets Tey Road, Upminster, RM14 2AD**

- 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 Act).
  - The appeal is by John Hoggett against an enforcement notice issued by the London Borough of Havering.
  - The enforcement notice ref. ENF/705/15/3500, was issued on 22 November 2019.
  - The breach of planning control alleged in the notice is the erection and installation of an externally protruding ventilation extraction fan, air condition unit, kitchen container and raised patio to the rear and side of a commercial premises.
  - The requirements of the notice are to:
    - (i) Remove in full from the property the extraction fan from the rear of the property;
    - (ii) Remove in full from the property the air condition unit;
    - (iii) Remove in full from the property the kitchen container on the side of the property;
    - (iv) Remove the raised patio from the sitting area on the side of the property;
  - AND
  - (v) Remove from the land, in the area shown outlined in black on the plan attached to the notice, all materials, rubble, machinery, apparatus and Installations used in connection with or resulting from compliance with steps (i), (ii), (iii) and (iv).
  - The period for compliance with the requirements is 3 months.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (d) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a) the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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### Decision

1. The appeal is allowed on ground (g), and I direct that the enforcement notice be varied by:
  - DELETION of *3 months*; and,
  - SUBSTITUTION of *6 months* as the period for compliance.Subject to this variation the enforcement notice is upheld.

### Preliminary matters

1. I note that the reasons for issue of the enforcement notice include reference to the Conservation Area in Reason 4. However, the appellant says that the site is not within a conservation area, as do the Council in their officers' report. There is nothing else to suggest that it might be, and I have not therefore considered conservation area interests in my determination.

## **Background**

2. The appeal property is a two-storey building on the north-western corner of the junction of Corbets Tey Road with Stewart Avenue. It is within a parade of predominantly retail/commercial premises and now has a café on the ground floor. I understand it was previously a print shop before a period of vacancy.
3. A 2015 planning application for change of use of the premises from Use Class A1 to Use Class A3 was withdrawn<sup>1</sup>. A further application for the same development remains, pending determination<sup>2</sup>. The Council say the reason for non-determination was the appellant's refusal to provide further information. I understand the primary reason for not being able to permit the scheme was in relation to the extract flue, and that as a result no enforcement action was taken against the change of use itself.
4. The external ventilation extraction fan was no longer there at the time of my visit. Photographs from January 2018 show that it comprised a large diameter galvanized steel duct fixed to the western elevation of the rear outshot to the building, coming out of the wall just below first floor level and terminating with a right-angled bend at approximately the ridge-height of the outshot, and with the exhaust facing towards the adjacent house no. 2a Stewart Avenue. In photographs from June and September 2019 it can be seen that the lower part of the duct had been removed.
5. Furthermore, the raised patio was no longer there. A Google Street View image – dated August 2018 – shows a raised timber seating area covered with a green material – probably artificial grass – with timber posts around the three open sides. The platform appeared to be in the region of 250mm high. I saw that in its place there are now white planting boxes with spiky plants surrounding the seating area.
6. Although the external ventilation equipment and the raised patio have been removed, they were on site when the enforcement notice was issued and remain part of the allegation. If I were to vary the notice by omitting them from the requirements it would have the effect of granting planning permission for these items as a result of the provisions of s.173(11) of the Act. I have therefore continued to consider these items.
7. The air-conditioning unit is fixed to the southern flank of the building at about first floor level. The kitchen container stands within the fenced yard to the south of the building with gates onto Stewart Avenue. It is a black-painted steel container some 600mm higher than the enclosing fence. There is an extract duct protruding from its roof with the exhaust pointing towards no. 2a Stewart Avenue.

## **The appeal on ground (d)**

8. This ground is that the alleged breach is immune from enforcement action as a result of the passage of time. The matters alleged to be in breach are operational development that would gain immunity if substantially complete four or more years before the enforcement notice was issued on 22 November 2019. In a case on ground (d) - known as a 'legal' ground – it is long-standing

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<sup>1</sup> Application ref. P0859.15, withdrawn 7 August 2015.

<sup>2</sup> Application ref. P1762.15, received by the Council on 4 December 2015 but un-determined.

- law that the burden of proof is on the appellant to show that this is the case on the balance of probabilities.
9. Furthermore, the courts have found that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make an appellant's version of events less than probable, there is no good reason to refuse the application, provided the appellant's evidence alone is sufficiently precise and unambiguous to justify the case on the balance of probability.
  10. It is apparent from the Council's photographs and Google Street View images that in August 2015 none of the items enforced against had been installed or constructed. Street View images from August 2017 show the extract duct and the container, and the raised patio with surrounding posts partly completed, but no air-conditioning unit. Council photographs from January 2018 show a similar situation, with the raised patio complete but surrounded by posts with ropes between. Later photographs from June 2019 show the air-conditioning unit and container, but with the extract duct partly dismantled. At this stage the raised patio was in what I understand to be its final form with white-painted slats between the posts.
  11. It is conceivable that the extract duct and container were installed between August 2015 and the critical date of 23 November 2015. However, the extract duct had been partly dismantled by June 2019, so could not have been substantially complete for 4 or more years. Furthermore, the air-conditioning unit was not installed until some time after January 2018 and that too could not have been in place for the requisite 4 years. As to the raised patio, this cannot be regarded as substantially complete until it was in its final form – that is between January 2018 and June 2019. Again, this fails to achieve the necessary 4-year period.
  12. Although the kitchen container and its extract ventilation were in place by June 2018, there is nothing to indicate the actual time when they were introduced. In a case of this sort, I would expect to see documentary evidence to demonstrate the time of installation - such as receipts for building works, purchases of equipment, photographs of works in progress, and possibly affidavits and installation certificates from contractors. No such material has been put in, and I regard the appellant's evidence as far from precise in this respect.
  13. The appellant argues that the details of the ventilation extract duct were included in the 2015 planning applications, and that the Council are fully aware of this. That may be so, but inclusion on a drawing does not demonstrate that the equipment had already been installed, and with regard to the first application on 7 August 2015 the photographic evidence is that the duct was not yet there. Although it appeared to be complete by August 2017, as noted above it had been partly dismantled by June 2019. On this basis it cannot be said that this installation had been substantially complete for any 4-year period.
  14. I conclude that on the balance of probabilities no part of the development enforced against was substantially complete for a four-year period prior to issue of the enforcement notice on 22 November 2019. The appeal on ground (d) therefore fails.

### **The appeal on ground (a) and the deemed planning application**

15. This ground is that planning permission should be granted for the matters alleged in the enforcement notice. From all that I have seen and read I consider the main issue to be:
- The effect of the external ventilation extraction fan, the air-conditioning unit, the kitchen container and the raised patio on the character and appearance of the street scene and the area in the vicinity of the appeal site.
16. This part of Corbets Tey Road is a broad street with parades of shops on both sides, and wide tree-lined pavements. Stewart Avenue is a relatively quiet residential street of predominantly semi-detached houses, and again is lined with trees. Buildings in the vicinity of the appeal site are in a uniform and quite limited range of materials – mainly red brick, red roof tiles and white or cream-painted render. The corner position of no. 38 means that the southern side of the building is prominent in views from the south along Corbets Tey Road and from the west along Stewart Avenue.
17. The ventilation duct on the exterior of the back of the building was close to the south-western corner, and was highly conspicuous from the street, as well as from the rear gardens of adjacent Stewart Avenue dwellings, as a result of its height, bulky form and incongruous industrial type construction. In the context of the well-maintained domestic style buildings and the relatively uniform constructional materials it appeared as an alien and intrusive feature. Similarly, the air-conditioning unit is a substantial intrusive feature attached to the southern side of no. 38, readily visible above the black kitchen container and fenced compound. While there are other examples of extract ducts and air-conditioning units in the vicinity, I do not know the planning status of these. Furthermore, I saw several that are in very much less conspicuous positions than that on the appeal property.
18. As regards the kitchen container, this has an extract exhaust attached to the roof and facing towards 2a Stewart Avenue. It appears as a bulky industrial type construction largely filling the space of the fenced compound. The fencing and container together create an intrusive mass at the side of the building. This is quite out of place particularly when seen in the context of the broad pavements of Corbets Tey Road, and the open garden spaces to the fronts of the Stewart Avenue houses. Although the impact of the fencing is mitigated to some extent by the artificial foliage attached to its eastern face, this does not significantly lessen the bulky appearance of this part of the development. I also note that although the Council object to the fence itself it is not a part of the development enforced against.
19. The raised timber patio to the southern side of the appeal premises was enclosed by timber posts with white cross-rail slats. Although the materials are in themselves quite inoffensive the overall form of structure had a dominant effect in this prominent corner position and appeared as an encroachment onto the wide pavement, limiting its spacious character in a harmful manner.
20. I conclude on the main issue that the external ventilation extraction fan, the air-conditioning unit, the kitchen container and the raised patio cause, or caused significant harm to the character and appearance of the street scene and the area in the vicinity of the appeal site.

21. The Council also object to the kitchen container and extract system on the basis that there is inadequate information to show how the mechanical ventilation system controls noise transmission and vibration, and the potential harmful effect on amenity for occupiers of residential and other property. Very little information has been provided by the appellant on this aspect of the development, and I am unable to make a clear judgement on this question. However, in my experience without adequate controls installations of this sort are likely to produce noise, vibration and odours that could cause significant nuisance. Adopting a precautionary approach and in the absence of information to indicate otherwise, I take the view that this equipment is likely to cause significant harm to amenity as a result of noise transmission, vibration and odours. This adds significant weight to my conclusion on the main issue.
22. The development does not accord with the development plan - in particular with respect to the London Plan Policy 7.4, which seeks to protect local character and ensure high quality design, and with Policies DC23, DC52, DC55 and DC61 of the London Borough of Havering Core Strategy and Development Control Policies Development Plan Document of 2008. These seek to control food and drink uses that will have an impact on the area as a result of disturbance and harm to amenity; to restrict development that causes significant harm to air quality; to prevent development that would result in exposure of residential accommodation to noise or vibrations, to protect the character and appearance of local areas, and ensure development respects distinctive local building forms.
23. I appreciate that use of the appeal premises as a café - when it had been vacant for a period - would be likely to contribute to the vitality of the area. I can also well understand that extract equipment and air-conditioning may be integral to this type of business. However, these installations can be accommodated without causing harm to the character and appearance of the area, and possibly to amenity. Furthermore, an outdoor seating area can be provided without constructing a raised patio.
24. The appeal on ground (a) therefore fails.

### **The appeal on ground (g)**

25. This ground is that the compliance period is too short. The appellant argues that a period of 3 months is inadequate, and that 6 months should be allowed.
26. In normal circumstances I consider that the 3-month period would be adequate to remove the items enforced against - particularly since the extract duct and raised patio have already been removed. However, at the present time, with severe restrictions on most activities as a result of the Covid-19 pandemic, I consider it would be reasonable to extend the compliance period to 6 months. This would also give the appellant the opportunity to make alternative arrangements for the necessary facilities to enable his business to continue, including if necessary making a planning application.
27. The appeal therefore succeeds to the limited degree on ground (g) and I will vary the enforcement notice accordingly.

## **Conclusions**

28. For the reasons given above I conclude that the appeal succeeds to the limited extent on ground (g) and that a reasonable period for compliance would be 6 months. I am varying the enforcement notice accordingly, prior to upholding it.

*Stephen Brown*

INSPECTOR

