

REPORT FOR DECISION

DECISION OF:	PLANNING CONTROL COMMITTEE
DATE:	2nd SEPTEMBER 2014
SUBJECT:	PLANNING APPEALS
REPORT FROM:	DEVELOPMENT MANAGER
CONTACT OFFICER:	JOHN CUMMINS
TYPE OF DECISION:	COUNCIL
FREEDOM OF INFORMATION/STATUS:	This paper is within the public domain
SUMMARY:	<p>Planning Appeals:</p> <ul style="list-style-type: none"> - Lodged <p>Enforcement Appeals:</p> <ul style="list-style-type: none"> - Decided
OPTIONS & RECOMMENDED OPTION	The Committee is recommended to the note the report and appendices.
IMPLICATIONS:	
Corporate Aims/Policy Framework:	Do the proposals accord with the Policy Framework? Yes
Statement by the S151 Officer: Financial Implications and Risk Considerations:	Executive Director of Resources to advise regarding risk management
Statement by Executive Director of Resources:	N/A
Equality/Diversity implications:	No
Considered by Monitoring Officer:	N/A

Wards Affected:	All listed
Scrutiny Interest:	N/A

TRACKING/PROCESS

DIRECTOR:

Chief Executive/ Strategic Leadership Team	Executive Member/Chair	Ward Members	Partners
Scrutiny Committee	Committee	Council	

1.0 BACKGROUND

This is a monthly report to the Committee of the Planning Appeals lodged against decisions of the authority and against Enforcement Notices served and those that have been subsequently determined by the Planning Inspectorate.

Attached to the report are the Inspectors Decisions and a verbal report will be presented to the Committee on the implications of the decisions on the Appeals that were upheld.

2.0 CONCLUSION

That the item be noted.

List of Background Papers:- Copy Appeal Decisions attached

Contact Details:-

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**Planning Appeals Lodged
between 21/07/2014 and 20/08/2014**



Application No.: 57456/FUL

Appeal lodged: 28/07/2014

Decision level: DEL

Appeal Type: Written Representations

Recommended Decision: Refuse

Applicant: Mr Rohall Nawaz

Location 73 Bury Old Road, Prestwich, Manchester, M25 0FG

Proposal Retrospective application for front porch, two storey/first floor extension at side and single storey extension at rear

Application No.: 57654/FUL

Appeal lodged: 13/08/2014

Decision level: DEL

Appeal Type: Written Representations

Recommended Decision: Refuse

Applicant: Mr Dean Jackson

Location 528 Holcombe Road, Greenmount, Bury, BL8 4EJ

Proposal Two storey extension at side/rear, first floor rear extension and garage conversion; Porch/single storey extension at front; Decking and balustrade at rear; Bin store at front

Total Number of Appeals Lodged: 2

Details of Enforcement Appeal Decisions
between 16/06/2014 and 20/08/2014



Location: Former Waterloo Hotel, 155 Manchester Road, Bury, BL9 0TD **Case Ref:** 13 / 0301

Issue: The erection of five metal flues to the side and rear elevations of the property.

Appeal Decision: Dismissed 11/08/2014

Location: Former Waterloo Hotel, 155 Manchester Road, Bury, BL9 0TD **Case Ref:** 13 / 0301

Issue: The erection of five metal flues to the side and rear elevations of the property.

Appeal Decision: Dismissed 11/08/2014

A copy of the Planning Inspectorates Report and Decision is attached below

Appeal Decisions

Site visit made on 23 July 2014

by David Murray BA (Hons) DMS MRTPI

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

Decision date: 11 August 2014

Appeal A - Ref: APP/T4210/C/14/2214475 155 Manchester Road, Bury, BL9 0TD.

- 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 appeal is made by Mr Denis Sutherland against an enforcement notice issued by Bury Metropolitan Borough Council.
- The Council's reference is 13/0301.
- The notice was issued on 27 January 2014.
- The breach of planning control as alleged in the notice is the change of use of the property to two hot food takeaways.
- The requirements of the notice are to permanently cease the use of any part of the property as a Hot Food Takeaway.
- The period for compliance with the requirements is 60 days.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b) and (e) of the Town and Country Planning Act 1990 as amended.

Summary of the Decision: the appeal is dismissed, planning permission is refused and the notice is upheld.

Appeal B - Ref: APP/T4210/C/14/2214481 155 Manchester Road, Bury, BL9 0TD.

- 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 appeal is made by Mr Denis Sutherland against an enforcement notice issued by Bury Metropolitan Borough Council.
- The Council's reference is 13/0301.
- The notice was issued on 27 January 2014.
- The breach of planning control as alleged in the notice is the erection of five metal flues to the side and rear elevations of the property.
- The requirements of the notice are to a) dismantle and permanently remove from the property the five metal flues together with all associated fixtures, fittings and brackets; b) following step a) make good the concrete block, render, and mortar to the side and rear elevations using materials of a similar size, type and colour.
- The period for compliance with the requirements is for step 5(a) – 60 days and for step 5(b) – 90 days.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (e) of the Town and Country Planning Act 1990 as amended.

Summary of the Decision: the appeal is dismissed, planning permission is refused and the notice is upheld.

Background

1. The site comprises a three storey building located on the end of a terrace of residential properties and within an area which is generally residential in

character. It is apparent from the planning history of the site that the premises were previously a public house- 'The Waterloo Hotel' and there remains a sign to this effect on the front of the building. The notice refers to No. 155 Manchester Road, and the appellant says that the public house also occupied No. 153. At the time of my site visit I noted from the outside that the ground floor of the main building had been sub-divided into two premises. No.155 was called 'Jamalicious', whereas No. 155a had a fascia sign saying 'Waterloo Diner' but the premises appeared to be closed. I also noted that two of the high external flues to the side and rear of No.155a, as shown in photograph 1 as attached to the notice, had been removed.

2. The appeals are made by the operator of No.155.

The Notices

3. The appellant's agent submits that both notices are fundamentally flawed as they relate to the overall premises and the Notice in appeal A alleges a material change of use to two hot food take-aways, whereas the appellant Mr Sutherland is only the operator of one unit. Likewise the Notice in Appeal B alleges the construction of 5 metal flues whereas Mr Sutherland is only responsible for 3 flues on his property. Therefore it is submitted that the appellant can never comply with the part of the alleged use relating to the premises now known as No. 155a and the related flues on the south side of the building.
4. Although the ground floor of No. 155 appears to now be subdivided into two separate planning units in different tenancies, there is no reason in principle why this cannot be tackled in one enforcement notice. This is subject to the proper serving of a copy of the notice on any person with an interest in the land which I will deal with under ground (e) below. Further, although the appellant says he cannot be held responsible for complying with the requirements in respect of No. 155a it appears that these have or are being complied with. Mr Sutherland has therefore not suffered any injustice as a result of the nature of the notices referring to the overall property.
5. I conclude on this initial aspect that the notices are not flawed and there is no error to correct.

Appeals A and B - Appeal on ground (e)

6. The appellant submits that the notices were served incorrectly and not in accordance with s172 of the Act.
7. The Council have submitted evidence to show that before the notices were issued, details of the people with an interest in the land were received from a Land Registry search and from local enquiries made. Further, a Planning Contravention Notice was sent to the known owner of the property and when completed and returned the Council say it did not make reference to the people now operating the premises called 'Jamalicious' and Waterloo Diner'.
8. It is apparent that the copy of the notices was served on Nakia Brown and Denis Sutherland at No. 153 and Abdul Jafar at No. 153a, as opposed to 155 and 155a. Nevertheless, it is clear that Mr Sutherland received a notification and he was able to lodge his appeal in time.

9. On the evidence provided by the Council, I am satisfied that the Council took reasonable steps to find out who had an interest in the land and served the notices on these people appropriately. Although the reference to the wrong property number is regrettable, this error in the administration of the serving of the notice did not cause Mr Sutherland substantial prejudice. The appeals on this ground therefore fail.

Appeal A – appeal on ground (b)

10. The appeal on this ground is that the alleged breach of planning control has not occurred as a matter of fact as the appellant says there has been no material change of use of the premises. It is submitted that the use undertaken is as a restaurant/café for the sale of food and drink for consumption on the premises, and not as a hot food takeaway for the sale of hot food for consumption off the premises.
11. The appellant refers to a survey of the use he undertook over a week in February 2014 where 111 customers ate inside the premises and 25 took their food away. The appellant's agent says this degree of take-away use at about 20% is *de minimus* and does not result in a material change from a restaurant. He says this is a similar split to that of other national chain diners like 'KFC' and 'McDonalds'.
12. The Council refer to a site visit where a Council officer visited the premises, purchased a meal and then left with it to eat it elsewhere, and to 5 other observations at the site. The Council also refer to the advertising of the premises which features the take-away facility and the option to have food delivered to the customer's home.
13. At my site visit I noted the overall layout of the premises which featured a counter for the serving of hot food and which subdivides the food preparation area from the public side. To the front of the counter were three tables with seats and bars that customers could stand at. At the time of my visit there were customers sitting at tables and also another person who took away hot food. However, given this relatively short snapshot of time for a pre-planned visit, I cannot place much weight on these comings and goings. Nor do I consider it relevant as to whether customers stand up or sit down at tables, or the lack of waiter service or cutlery on the tables as the Council suggests.
14. It appears to me that the main criterion as to whether a material change of use is involved, as indicated in the difference between Classes A3 and A5¹, is whether the operation is designed primarily for hot food to be eaten on or off the premises. From my observations at my site visit, including the advertisements displayed on and within the unit, it appeared to me that the overall nature and appearance of the premises displayed the characteristics of food being prepared and wrapped mainly to be taken away for consumption elsewhere. The appellant says that 20% take-away is an ancillary level to a café/restaurant, but this is at odds with the Council's evidence. From the character of the premises that I saw on site it appears to me that the take-away of food is the principal function rather than being only of a *de minimis* level. Accordingly, I find, as a matter of fact and degree, that the use undertaken is materially and substantially different to that of a hotel/public

¹ As defined in the Town and Country Planning (Use Classes) Order 1987.

house and that a material change of use has taken place. The appeal on this ground therefore fails.

Appeals A and B – Appeal on ground (a)

Main Issues

15. The main issue in Appeal A is the effect of the change of use to two hot food take-aways on the living conditions of the occupiers of residential properties near the site by reason of cooking fumes and noise disturbance, and in Appeal B the main issue is the effect on the character and appearance of the area and on the living conditions of neighbours through causing noise disturbance.

Reasons

16. In terms of the nature of the use, the buildings to the side and rear of the premises are residential houses. The cooking of hot food on a commercial basis could reasonably be expected to give rise to odour and smells coming from the kitchen which could harm the living conditions of people living in houses nearby the site.
17. Although some extensive flues have been installed, there is no evidence before me to demonstrate that these ventilation systems mitigate the extent of odour and smells to an acceptable level. Further, the ventilation systems themselves are likely to be mechanically driven but no information has been submitted to establish that the systems will not cause a noise problem as the Council alleges. A written objection submitted by a neighbour refers to the smells from cooking coming from the premises and to the loud noise coming from the flues early in the morning till late in the evening.
18. In terms of the visual appearance of the flues, although the two larger ones had been removed at the time of my visit, the nature of all of the flues is shown in the photographs attached to the notice in Appeal B. I consider that due to the size, position and materials of the flues, individually and collectively they harm the appearance of the surrounding area and the host building. Even though they are or were attached to the side and rear of the building, they are clearly visible from the public realm.
19. For these reasons, I consider the use as hot food take-aways and the erection of the metal flues cause the environmental harm that I have described and do not accord with the requirement of saved policies EN1/2, EN7/1, EC4/1 and S2/6 of the Bury Unitary Development Plan, 1997 (UDP). Although the UDP is of some age, the policies mentioned generally accord with the National Planning Policy Framework which places an emphasis in securing high quality design and a good standard of amenity, and should be given due weight.
20. I have also taken into consideration the many factors put forward in support of the proposal in the bullet points on page 7 of the appellant's Statement, but these factors do not outweigh the conclusion I have reached that the nature of the use has a harmful effect on the living conditions of neighbours and the appearance of the area. This harm could not be mitigated by the imposition of reasonable conditions on a planning permission.
21. For the reasons given, I conclude that planning permission should not be granted in both cases and the appeals on this ground fail.

Conclusions

22. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Decisions

Appeal A - Ref: APP/T4210/C/14/2214475

23. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B - Ref: APP/T4210/C/14/2214481

24. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

David Murray

INSPECTOR