

Reference:	19/00068/UNAU_B
Ward:	West Shoebury
Breach of Control:	Unauthorised extraction flue to rear
Address:	96 – 98 West Road, Shoeburyness, Essex, SS3 9DS
Case opened:	12 th March 2019
Case Officer:	Mark Broad
Recommendation:	AUTHORISE ENFORCEMENT ACTION



1 Site location and description

- 1.1 The site is an established restaurant/takeaway unit within the West Road shopping area. This three-storey building contains commercial units at ground floor and self-contained residential accommodation at first and second floors.
- 1.2 At the rear of the building is a service area which adjoins terraced housing at Seaview Road. The service area is also an access for the flats above the site which are deck accessed and where external plant is mounted on the rear elevation of the building running from ground floor up to first floor level.
- 1.3 The site is not located within a conservation area and does not contain a listed building.

2 Lawful Planning Use

- 2.1 The lawful planning use of the ground floor of the premises is as a restaurant/ takeaway regarded as Sui Generis for the purposes of the Town and Country Planning Use Class Order 1987 (as amended).

3 Relevant Planning History

- 3.1 18/01190/FUL – Replace existing shopfront and install security roller shutters to front elevation – Granted 16.8.2018
- 3.2 18/01316/ADV – Install two internally illuminated fascia signs and one internally illuminated hanging signs – Granted 27.11.2018
- 3.3 19/00704/FUL – Install replacement extraction flue to rear elevation (Retrospective) – Refused 25.7.2019
- 3.4 19/00705/FUL – Change of use from restaurant (Class A3) to restaurant with hot food takeaway (Sui Generis) (Part Retrospective) – Refused 25.7.2019
- 3.5 20/00263/FUL – Change of use from restaurant (Class A3) to a mixed-use restaurant and takeaway (Sui Generis) and install replacement extraction flue to rear elevation (Part Retrospective) (Amended Proposal) – Granted 26.5.2020
- 3.6 20/01433//AD- Application for approval of details pursuant to condition 4 (maintenance schedule of ventilation and extraction equipment) of planning permission 20/00263/FUL – Refused 19.10.2020
- 3.7 22/00172/FUL – Replace external extraction flue to rear (Retrospective) – Refused 31.3.2022
- 3.8 22/00756/AD – Approval of details pursuant to condition 4 (maintenance schedule of ventilation and extraction equipment) of planning permission 20/00263/FUL dated 25.5.2020 – Granted 22.6.2022

4 The alleged planning breach and the harm caused

- 4.1 Without planning permission, the installation of an extraction flue to the rear.
- 4.2 It has been found through the determination of a planning application that the development is unacceptable and contrary to the objectives of the relevant development plan policies and guidance, on the basis that associated noise and odour impacts are materially harmful to the amenity of surrounding residential occupiers. For the above reasons, the development is unacceptable and fails to comply with planning policy.

5 Background and efforts to resolve breach to date

- 5.1 In March 2019 an enforcement case was raised about an extraction flue having been installed to the rear of the property without planning permission.
- 5.2 There followed a series of planning applications either solely, or partly, including an extraction flue.

Planning application 19/00704/FUL was retrospectively submitted seeking to retain the flue then in position. It was refused for the following reason:

- 1. The development has led to materially harmful odour and noise nuisance to nearby occupiers including those within the residential area. The information otherwise submitted with the application does not demonstrate that the proposed development would not materially harm the amenity of nearby residents in these regards.

- 5.3 In May 2020, application 20/00263/FUL included a proposal to install a replacement extraction flue to the rear elevation. That was approved. The new extract system would be 8.3m high with vertical extraction, as opposed to the downward design then in situ. The application was supported by a Noise Impact Assessment which stated that the extraction would be modified in full accordance with the submitted Noise Impact Assessment recommendations.

- 5.4 The 2020 permission was not implemented. An extraction flue was installed, but of a different detailed design and, at 9.3m height, significantly taller than that approved. The latest planning application 22/00172/FUL sought to retain that unauthorised flue currently in place. That application was refused for the following reason:

- 1. The application has failed to address the potentially harmful impacts to neighbours' residential amenity arising from noise, disturbance, vibration, odour and fumes. This is unacceptable and contrary to the National Planning Policy Framework (2021), Policies KP1, KP2 and CP4 of the Core Strategy (2007) and Policies DM1, DM3 and DM11 of the Development Management Document (2015).

5.5 In their report for 22/00172/FUL the case officer found that:

“A Statutory Abatement Notice was served on 09/11/2020 under Section 80 of the Environmental Protection Act 1990 due to the noise from the extraction equipment in situ but prior to extension of its flue termination point resulting in the development subject of the current application. It is evident that there are unacceptable odours and fume, vibration, noise and disturbance arising from the development. In the absence of a noise, odour and vibration impact assessment and any suggested mitigation, it has not been reasonably demonstrated that the development would not be detrimental to the residential amenity of neighbours. It would not be reasonable to secure mitigation of these matters through conditions in this instance given that the application is retrospective in nature and previously imposed conditions were not discharged. The Council’s Environmental Health service raised an objection.....

5.6 In the round, due to the history, ambiguity of the application and the lack of information supplied, it has not been reasonably demonstrated that the development would not significantly harm the residential amenity of neighbours. This is unacceptable and contrary to policy.”

6 Harm caused by the breach as assessed against relevant planning policies and justification for enforcement action

6.1 The officer’s report for planning application 22/00172/FUL setting out the reason for refusal is attached at Appendix 1.

6.2 The unauthorised extraction flue harms residential amenity.

6.3 Staff consider that it is proportionate and justified in the circumstances of the case that an enforcement notice should be served as this will bring further focus to the need for the breach to be regularised and the identified harm to be remedied. Service of an enforcement notice carries its own right of appeal and also does not fetter the owner in seeking to gain planning permission for a different proposal which remedies the identified harm albeit an acceptable alternative flue has already been approved but not implemented.

6.4 Taking enforcement action in this case may amount to an interference with the owner/occupier’s human rights. However, it is necessary for the Council to balance the rights of the owner/occupiers against the legitimate aims of the Council to regulate and control land within its area.

Equality and Diversity Issues

6.5 The Equality Act 2010 (as amended) imposes important duties on public authorities in the exercise of their functions and specifically introduced a Public Sector Equality Duty. Under this duty, public organisations are required to have due regard for the need to eliminate unlawful discrimination, harassment and victimisation, and must advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. Officers have, in considering this enforcement case and preparing this report, had careful regard to the requirements of the Equalities Act 2010 (as amended).

They have concluded that the recommended enforcement action will not conflict with the Council's statutory duties under this legislation

7 Recommendation

- 7.1 Members are recommended to AUTHORISE ENFORCEMENT ACTION to
- a) Remove the unauthorised extraction flue to the rear; and
 - b) remove from site all materials and debris resulting from compliance with requirement (a) above.
- 7.2 The authorised enforcement action to include (if/as necessary) the service of an Enforcement Notice under Section 172 of the Act and the pursuance of proceedings whether by prosecution or injunction to secure compliance with the requirements of the Enforcement Notice.
- 7.3 When serving an Enforcement Notice the local planning authority must ensure a reasonable time for compliance. In this case a compliance period of 3 months is considered reasonable for the above works.

Appendix 1 – Officer Report application reference 22/00172/FUL

Reference:	22/00172/FUL
Application Type:	Full Application
Ward:	West Shoebury
Proposal:	Replace external extraction flue to rear (retrospective)
Address:	98 West Road, Shoeburyness
Applicant:	Mr Thambirajah Satkunarajah
Agent:	Mr Anthony Merry of Design associates
Consultation Expiry:	10th March 2022
Expiry Date:	31st March 2022
Case Officer:	Kara Elliott
Plan Nos:	04/B
Recommendation:	REFUSE PLANNING PERMISSION

1 The Site

- 1.1 The application site is an established restaurant/takeaway unit within the shopping area on West Road. The host building is a three-storey mid-twentieth century building with commercial units at ground floor and two storeys of flats at first and second floors. The site is identified on the policies map of the Development Management Document as Primary Shopping Frontage.
- 1.2 At the rear of the building is a service area which adjoins terraced housing at Seaview Road. The service area is also an access for the flats above the site which are deck-accessed. The service area and flats contain external plant mounted on the walls of the building. Planning permission was granted for an extraction flue unit to the rear, ref 20/00263/FUL some 8.3m in height, extracting upwards. This was installed but has recently been replaced with a 9.3m high flue extracting upwards.

2 The Proposal

- 2.1 The application retrospectively seeks planning permission for the aluminium flue. The application is not supported by technical specifications for the flue, any noise impact assessment or assessments with regard to the control of pollution/odour etc.

3 Relevant Planning History

- 3.1 20/00263/FUL: Change of use from restaurant (Class A3) to mixed use restaurant and takeaway (Class Sui Generis) and install replacement extraction flue to rear elevation (part-retrospective) (Amended Proposal) – Granted.
- 3.2 20/01433/AD - Application for approval of details pursuant to condition 04 (maintenance schedule of ventilation and extraction equipment) of planning permission 20/00263/FUL dated 26.05.20 – Refused.
- 3.3 19/00705/FUL: Change of use from restaurant (Class A3) to restaurant with hot food takeaway (sui generis) (Part-Retrospective). Refused.
- 3.4 19/00704/FUL: Install replacement extraction flue to rear elevation (Retrospective). Refused.
- 3.5 18/01316/ADV: Install two internally illuminated fascia signs and one internally illuminated hanging signs. Consent granted.
- 3.6 18/01190/FUL: Replace existing shopfront and install security roller shutters to front elevation. Approved.

4 Representation Summary

Environmental Health

- 4.1 Object – Unacceptable likely impact from noise and odour on the amenity of occupants at 96B West Road, concerns about harm through contact with flue due to its proximity with amenity space of flats. A statutory abatement notice was served on the business operator at 98 West Road on 11 September 2020 for noise arising from the kitchen extract system.

Public Consultation

- 4.2 20 neighbouring properties were consulted and a site notice was displayed. No letters of representation were received.

5 Planning Policy Summary

- 5.1 National Planning Policy Framework (2021), Planning Practice Guidance and National Design Guide (2021)
- 5.2 Core Strategy (2007) Policies KP2 (Development Principles), CP1 (Employment Generating Development), CP3 (Transport and Accessibility) and CP4 (Environment & Urban Renaissance)
- 5.3 Development Management Document (2015) policies DM1 (Design Quality), Policy DM2 (Low Carbon Development and Efficient Use of Resources), DM3 (The Efficient and Effective Use of Land), DM10 (Employment Sectors), DM11 (Employment Areas), DM13 (Shopping Frontage Management outside the Town Centre), DM15 (Sustainable Transport Management)

- 5.4 Design & Townscape Guide (2009)
- 5.5 Community Infrastructure Levy (CIL) Charging Schedule (2015)

6 Appraisal

Principle of Development

- 6.1 The principle of providing facilities in association with an existing commercial use is considered acceptable and in line with local and national planning policy and guidance which support commercial uses in town centre locations. The principle of the development was found acceptable in previous applications which are similar proposals. Other material planning considerations are discussed in the following sections of this report.

Design and Impact on the Character of the Area

- 6.2 Good design is a fundamental requirement of new development to achieve high quality living environments. Its importance is reflected in the NPPF, in Policies KP2 and CP4 of the Core Strategy and also in Policy DM1 of the Development Management Document. The Design and Townscape Guide also states that the Council is committed to good design and will seek to create attractive, high-quality living environments.
- 6.3 The flue is functional in appearance, and prominently visible. Whilst increased in height, on balance it is considered that it is not significantly more visually dominant than the earlier established arrangement; it would result in a 1m increase in flue height. The appearance of the development is considered acceptable, given its similarity in appearance and scale to the established form. A refusal of planning permission on the basis of its appearance alone would be unlikely to be sustained at appeal. On balance, the application is acceptable and policy compliant in the above regards.

Impact on Residential Amenity

- 6.4 Policy DM1 of the Development Management Document requires all development to be appropriate in its setting by respecting neighbouring development and existing residential amenities and also: "having regard to privacy, overlooking, outlook, noise and disturbance, sense of enclosure/overbearing relationship, pollution, daylight and sunlight."
- 6.5 The Design and Townscape Guide also states that the Council is committed to good design and will seek to create attractive, high-quality living environments.
- 6.6 A Statutory Abatement Notice was served on 09/11/2020 under Section 80 of the Environmental Protection Act 1990 due to the noise from the extraction equipment in situ but prior to extension of its flue termination point resulting in the development subject of the current application. It is evident that there are unacceptable odours and fume, vibration, noise and disturbance arising from the development. In the absence of a noise, odour and vibration impact assessment and any suggested mitigation, it has not been reasonably demonstrated that the development would not be detrimental to the residential amenity of neighbours.

It would not be reasonable to secure mitigation of these matters through conditions in this instance given that the application is retrospective in nature and previously imposed conditions were not discharged. The Council's Environmental Health service raised an objection.

- 6.7 In the round, due to the history, ambiguity of the application and the lack of information supplied, it has not been reasonably demonstrated that the development would not significantly harm the residential amenity of neighbours. This is unacceptable and contrary to policy.

Other Matters

- 6.8 There are no highways or parking issues associated with the development.
- 6.9 The development is not liable for a payment under the Community Infrastructure Levy Regulations 2010 (as amended).

Equality and Diversity Issues

- 6.10 Equality Act 2010 (as amended) imposes important duties on public authorities in the exercise of their functions and specifically introduced a Public Sector Equality Duty. Under this duty, public organisations are required to have due regard for the need to eliminate unlawful discrimination, harassment and victimisation, and must advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. Officers have in considering this application and preparing this report had careful regard to the requirements of the Equalities Act 2010 (as amended). They have concluded that the decision recommended will not conflict with the Council's statutory duties under this legislation.

7 Conclusion

- 7.1 For the reasons outlined above the development is found to be unacceptable and contrary to the relevant planning policies and guidance. As there are no other material planning considerations which would justify reaching a different conclusion, it is considered that any public benefits of the development, which have not been identified in the application, would not overcome the identified harm. It is recommended that planning permission is refused.

8 Recommendation

- 8.1 REFUSE PLANNING PERMISSION for the following reason:**

- 01 The application has failed to address the potentially harmful impacts to neighbours' residential amenity arising from noise, disturbance, vibration, odour and fumes. This is unacceptable and contrary to the National Planning Policy Framework (2021), Policies KP1, KP2, and CP4 of the Core Strategy (2007) and Policies DM1, DM3 and DM11 of the Development Management Document (2015).**

Positive & Proactive Statement

The Local Planning Authority has acted positively and proactively in determining this application by identifying matters of concern with the proposal and determining the application within a timely manner, clearly setting out the reason(s) for refusal, allowing the Applicant the opportunity to consider the harm caused and whether or not it can be remedied by a revision to the proposal. The detailed analysis is set out in a report prepared by officers. In the circumstances the proposal is not considered to be sustainable development.

Informative

- 01 The applicant is reminded that failure to regularise the unauthorised development is likely to lead to the Local Planning Authority considering expediency of Enforcement Action to seek to remedy the identified harm.**



