

**GROUNDS OF APPEAL**

**Section 174(2) Town and Country Planning Act 1990**

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**Relating to an Enforcement Notice (Reference Number: E19/0270)**

**Issued by London Borough of Camden**

**Land at Basement and Ground Floors 46 Birchington Road London NW6 4LJ**

**Appeal by Mr Neritan Cela**

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## Introduction and Background

1. This appeal relates to an Enforcement Notice issued in respect of the land at basement and ground floors 46 Birchington Road London NW6 4LJ (“the Site”).
2. The Appellant was granted a 20 year lease of the Site by Union Pension Trustees Limited and Benjamin Baker on 9 July 2015. The lease is registered under title number NGL952674. Copies of the title register and plan are attached at **Appendix 1**.
3. The Appellant is in occupation of the Site where he operates Vila Ronel Bar and Restaurant.
4. The Site is not in a designated Conservation Area or any other designated planning policy area.
5. The freehold owner of the Site applied for and was granted Planning Permission (Reference 2014/5696/P) for the “change of use of [the] ground floor and basement from shop (Class A1) to restaurant (Class A3) including extract duct to roof and rear” on 23 December 2014. A copy of that Planning Permission is attached at **Appendix 2**. The permitted hours of operation are 09.00 to 23.30 Mondays to Saturdays and 09.30 to 22.30 on Sundays and Bank Holidays. The red line boundary extended to the forecourt area and the Council recognises that the restaurant use could be extended to the forecourt area.
6. In 2016 an application (Reference: 2016/0652/P) was made (and subsequently withdrawn) for the “erection of [a] timber enclosure and decking to forecourt to restaurant”. In 2016 a further application (Reference: 2016/5627/P) was made which was refused by London Borough of Camden (“the Council”) and which was subsequently refused on appeal.
7. The Appellant subsequently made an application in 2017 (Reference: 2017/3702/P) for the “erection of raised terrace in front forecourt bounded with brick walls/piers, metal railings and associated platform lift to restaurant”. This application was again refused by the Council.
8. The Appellant then made amendments to the forecourt and submitted an application (Reference: 2018/2505/P) for the “creation of an elevated dining terrace area within existing street level forecourt including planters, new boundary walls with piers and glass balustrade and a disabled lift for the ancillary use of the restaurant”. This application was again refused by the Council on 26 December 2018.
9. Each of the determined applications have included revisions to the forecourt scheme in attempts to alleviate concerns of the Council whilst also maintaining an attractive area where customers of the restaurant can eat and drink during the opening hours of the business.
10. On 23 May 2019 the Council served an Enforcement Notice (Reference EN19/0270) (“the Notice”) relating to an alleged breach of planning control. The alleged breach was “without

*planning permission: unauthorised installation of timber decking and associated timber enclosure to front forecourt area” (“the Development”).*

11. The Notice requires the Appellant to remedy the breach as follows:

- i) Totally remove the timber decking and associated enclosure located on the front forecourt area, and make the development comply with the planning permission granted on 12 February 2014
- ii) Make good any damage as a result of the above works

12. The Notice is stated to take effect on 4 July 2018 and provides the Appellant with one month to comply with the requirements of the Notice.

13. Since the Notice was served the Appellant has made adjustments to the height of the western boundary. A plan showing the Development as it is now is attached at **Appendix 3**.

14. The Appellant appeals the Notice on the following grounds:

- i) That planning permission ought to be granted for the Development (including the timber decking and associated enclosure) (“Ground ‘a’)
- ii) That there is no breach of planning control in respect of the southern, part of the western and the eastern boundary fencing (Ground ‘c’)
- iii) That the steps required (to remove all of the associated enclosure) exceeds what is necessary to remedy any breach of planning control (Ground ‘f’)
- iv) That the Appellant consider that a period of one month is insufficient to carry out the works required by the Notice (“Ground ‘g’)

#### **Ground ‘a’**

15. The Appellant has submitted a Ground ‘c’ appeal in respect of the south, part of the western and eastern parts of the enclosure. The ground ‘a’ is advanced in the first instance on the basis that the Inspector has allowed the ground ‘c’ appeal in respect of those parts of the enclosure benefiting from the Permitted Development Rights. Therefore the ground ‘a’ relates to those elements of the Development which do not benefit from those rights, principally the part of the western and eastern enclosure exceeding the height permitted, the awning posts and the decking (including the decking access ramp).

16. In the alternative, if the Inspector does not consider that the eastern and/or western and/or south parts of the enclosure benefit from permitted development rights, then the Appellant advances the Ground ‘a’ in respect of all parts of the enclosure, awning posts and the decking (including the decking access ramp)

17. The Appellant’s ground ‘a’ argument is advanced on the basis that the design of the Development is of high quality and not detrimental to the character of the area as asserted in the Notice. The Development enables customers to dine outside of the restaurant thus supporting the business run by the Appellant.

## Relevant Planning Policies

18. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires planning applications to be determined in accordance with the development plan unless material considerations indicate otherwise.
19. The Development Plan for the Council includes:
  - a. Camden Local Plan (adopted 2017) (“Local Plan”)
  - b. Camden Planning Guidance – Design
  - c. Camden Planning Guidance – Town Centres and Retail
20. National policy in the form of the National Planning Policy Framework (February 2019) (“NPPF”) is material to the determination of the ground ‘a’ appeal.
21. The Expediency Report (**Appendix 4**) refers to policies A1 (managing impact of development), A4 (noise and vibrations), C6 (access for all) and D1 of the Local Plan. The Expediency Report also refers to Camden Planning Guidance – Design (Chapters 1 & 5) and Paragraphs 127 and 130 of the NPPF.
22. The Appellant considers the Town Centre policies (TC1, TC2 and TC4 of the Local Plan) to be relevant to the appeal. The Site is located within the Kilburn High Road Town Centre designated area and policies TC1-TC4 aim to support the vibrancy of the Town Centres within Camden.
23. The main concern of the Council relates to the design of the decking and terrace area. The Enforcement Notice at paragraph 4b provides the following reason for issuing the notice:
  - a. The timber decked area and associated enclosure due to its size, design and location is considered to be an incongruous addition, which has a detrimental impact on the character and appearance of the host building, existing streetscene and the surrounding area contrary to policy D1 Local Plan
24. Paragraph 4b gives a further reason for issuing the Notice:
  - a. The terrace area by reason of its proximity to the windows of the residential dwellings located on the upper floors and hours of use, is likely to result in noise nuisance at unsociable hours to the detriment of the amenity of neighbouring occupiers and is thereby contrary to policy A1 Local Plan.
25. It is considered that concerns relating to potential noise impacts and hours of use could and indeed should be dealt with by way of condition. Such an approach was recognised as being acceptable by the Inspector in the 2016 Appeal Decision (**Appendix 5**).
26. The Development consists of a wooden enclosure, second accessibility ramp to access the decking area, timber decking and awning post. The Appellant contends that the

Development is de minimis simply being laid on the surface of the forecourt and in any event a large part of the elements of the whole are permitted under existing permitted development rights.

27. The Site is located within the Kilburn High Road Town Centre designated area (Camden CPG – Town Centres and Camden Policy Map March 2019) and neighbours Lloyds Bank to the east and a pet food shop to the west. This part of the street is commercial in nature and not residential. **Appendix 6a and 6b** illustrate the variety of frontages along Kilburn High Road and West End Lane. West End Lane is situated within a Conservation Area and clearly wooden enclosures appear to be a common feature.
28. Beyond the pet shop to the east is predominantly residential in nature. The Site is opposite a commercial building which is used by Iceland Foods Ltd (“Iceland”) and which presents with a high two storey blank wall. There is a permanent market stall adjoining Iceland and close to Kilburn High Road. The Site is 20 metres away from Kilburn High Road and 20 metres away from the nearest residential property.
29. The pet store to the east has a 2.87 metre high boundary fence between itself and 42 Birchington Road.

#### Design

30. The front (south) elevation of the enclosure consists of a fluctuating design which varies the height of the wooden panelling but no higher than 0.90m. The western elevation is of a stepped design of a maximum height of 1.37m, whilst the eastern elevation is consistently 1.47m high across that elevation.
31. The west and south elevations of the enclosure are of a “planter” design which enables the Appellant to plant seasonal flowers and ferns to create an attractive presence on the street scene.
32. The west and south elevations are painted white. With the top panelling being varnished in a medium oak colour. The east elevation is of a dark horizontal panelled wood.
33. The intention is to create a mediterranean type feel to complement the cuisine served by the restaurant. If the Inspector considers the paint or varnish to not be in keeping with the character of the area then the Appellant would be open to a condition being imposed to require the wood to be varnished or painted a different colour (subject to input). The attached photographs at **Appendix 6a and 6b** show a wide variety of restaurant forecourt seating areas which show that a restaurant forecourt for public seating is a common feature of the Kilburn High Road Town Centre and the nearest shopping centre in the borough at West End Lane.

34. The west and east elevations also each have a wooden post (oak colour) which protrudes to a height of 2.6metres. These posts support the awning (when open) which enables the terrace to be used in all weather conditions.
35. Policy G1 Local Plan provides that the Council will support development “that makes best use of its site, taking into account quality of design, its surroundings, sustainability, amenity, heritage, transport accessibility and other considerations relevant to the site”.
36. The development permits al fresco dining (when the weather permits) whilst providing an attractive street scene feature by way of the planting enclosure. The NPPF provides that development should contribute to the achievement of sustainable development. One strand of that is the “economic objective”. Paragraph 80 of the NPPF states that “significant weight should be placed on the need to support economic growth...taking into account... local business needs”. Further, the NPPF places an emphasis on planning policies supporting the role of town centres (Paragraph 85) and this development supports a town centre restaurant use. Policy TC2 of the Local Plan recognises the importance of town centres having a range of food uses to provide “variety, vibrancy and choice”. The Development goes some way to meeting the requirements of sustainable economic development by supporting a small local business and the town centre whilst effectively utilising the space available to the Appellant.
37. Policy C6 encourages “access for all” and confirms that the Council expects “all buildings and places to meet the highest practicable standards of accessible and inclusive design”. The development includes two ramped accesses. One which enables access to the restaurant itself permitted under Planning Permission Reference 2014/5696/P whilst the other ensures access by wheelchair to the terraced area (subject to enforcement). The development therefore encourages access for all and is compliant with this Policy C6.
38. Policy D1 Local Plan relates to design and is aimed to ensure a high quality design in development. The policy provides that the Council will require development to:
  - a. Respect local context and character
  - b. Preserve or enhance the historic environment and heritage assets in accordance with Policy D2 Heritage
  - c. Be sustainable in terms of design and construction, incorporating best practice in resource management and climate change mitigation and adaptation
  - d. Be of sustainable and durable construction and adaptable to different activities and land uses
  - e. Comprise details and materials that are of high quality and complement the local character
  - f. Integrate well with surrounding streets and open spaces, improving movement through the site and wider area with direct, accessible and easily recognisable routes and contributes positively to the street frontage
  - g. Be inclusive and accessible for all
  - h. Promote health

- i. Be secure and designed to minimise crime and antisocial behaviour
- j. Respond to natural features and preserve gardens and other open space
- k. Incorporate high quality landscape design and maximise opportunities for greening
- l. Incorporate outdoor amenity space
- m. Preserve strategic and local views

39. The residential area of Birchington Road is characterised by low walls with bricked steps up to the front doors. Some of the brick walls for the residential properties have been painted white. **Appendix 7** illustrates the various heights and materials used in enclosures and walls in the local area and immediately adjacent to the restaurant. These clearly illustrate a wide variety of colourful and varied means of enclosure and amongst this variety of heights, colours and finishes, the terrace is entirely acceptable in its design and appearance.
40. The Site does not abut or adjoin the residential areas of Birchington Road. It neighbours two commercial property uses (shop and bank) and is opposite a large commercial building which houses Iceland. A fruit and vegetable market stall is erected on the corner of Birchington Road and Kilburn High Road and operates Monday to Saturday. The Site is in policy terms and physically more naturally considered an extension to Kilburn High Road rather than included the residential element of the road.
41. The enclosing boundary varies in height however the south, west and east elevations are smaller in height than the brick pillar at Lloyds Bank and the 2.8m high wall boundary between the pet shop and 42 Birchington Road. Whilst the residential part of Birchington Road is similar in design at upper floors, the commercial end (including the Site) has no consistent design. The Lloyds Bank boundary is slightly elevated with a simple metal rail fence and brick pillar, the pet shop has no fencing as such on the southern elevation but is bordered to the east by a tall white wall to separate it from the adjoining residential property. The Iceland store is a substantial brick building with no fenced boundary and fully occupies its site. Accordingly, with no defining characteristic the timber enclosure cannot be said to be “out of character”, particular with reference to the more commercial uses. Plainly a bank will not require a similar enclosure or fence as a restaurant or café.
42. The Site is not close to any heritage assets or listed buildings.
43. The planter enclosure provides additional greenery and positively impacts the street scene. It is considered that the Development is of high quality design and enhances the character of this part of Birchington Road and provides an attractive space for both customers and passers-by.
44. The Inspector will note below that the Appellant is advancing a Ground ‘c’ argument on the basis of the Class A Part 2 of Schedule 2 Town and Country Planning (General Permitted Development) (England) Order 2015. This Class A does not specify materials which an enclosure or wall should be made of. It is submitted that the use of timber for the enclosure and decking is not harmful to the area but increases flexibility over the colour of the material used. If the Inspector considers that the timber should be painted or varnished a

specific colour to reduce any harm then the Appellant will be open to such a condition. It is also submitted that the forecourt enclosures serving restaurants in Kilburn High Road and West End Lane are virtually all constructed of timber.

45. The Council alleges the timber enclosure is an incongruous addition within its immediate context but the restaurant is in fact the only such facility in the vicinity of Birchington Road. It is desirable to make this use welcoming and for it to be noticeable in the street scene. **Appendix 8** details the lack of planting within the local area and also reveals that timber features have been added to the front walls of two of the houses in Birchington Road. There is no reason development should not have variety reflecting the cosmopolitan nature of Kilburn and the relatively standard residential/commercial development existing in the area is in the Appellant's view supplemented and enhanced by the bold appearance of the restaurant frontage.

#### Impact on Amenity

46. Policy A1 (Managing the impact of development) provides that the "Council will seek to protect the quality of life of occupiers and neighbours. [The Council] will grant permission for development unless this causes unacceptable harm to amenity". The policy then goes on to confirm how the Council will assess the amenity impact and provides various factors which will be considered including *inter alia*:

a. Visual privacy/outlook

The Site neighbours two commercial buildings. There is a residential flat above the restaurant. Due to the distance of the Site from the nearest residential dwellings residents are unlikely to be impacted visually. Indeed, the redevelopment of the forecourt area with planting provides a more pleasing outlook than what was previously there (concrete forecourt). The flat above the restaurant is not particularly impacted either as the sight lines from the windows look out beyond the forecourt area. The introduction of planting to the forecourt area provides some greenery which was otherwise not present. The outlook of residential properties is therefore improved. Visual privacy is not impacted by the development which is at ground floor level.

b. Sunlight, daylight and overshadowing

The enclosure does not result in any decrease in sunlight or daylight or increase potential for overshadowing. The fence on the east elevation is much lower than that on the eastern boundary of the pet shop.

c. Artificial lighting levels

The development itself does not introduce any artificial lighting. There are existing security floodlights at the Site but these are not used as operational lighting. The Appellant would be content for these two lights to be either conditioned for hours of use or alternatively to remove them and to submit a lighting scheme for approval by the Council.



It is considered by the Appellant that any impact by lighting on the terrace could be mitigated by the imposition of a condition in line with what is suggested above. An example condition can be found below at Paragraph 50.

d. Noise and vibration levels

The expediency report raises concern over the potential harm to existing residential amenity by way of noise nuisance created by unsociable hours.

It is noted by the Planning Officer in his delegated report to Application 2018/2505/P notes that the use of the forecourt for informal use for tables and chairs can be done without further planning consent. It is therefore in the interests of the Council to be able to regulate the use of the forecourt area by customers which will be possible if planning permission is granted under this Ground 'a'.

The restaurant itself is subject to a condition on the hours of use (09.00-23.30 Mondays to Fridays and 09.30 to 22.30 on Sundays and Bank Holidays). It is submitted that any potential noise disturbance can be mitigated by the imposition of a similar condition.

47. It is submitted that the Development does not impact on amenity by reference to the other factors in Policy A1 Local Plan. The proposal has been changed since the previous refusal on appeal in 2017 and its main floor level is now 150mm above street level rather than the 970mm of the dismissed scheme. The solid line of the Site boundary is broken up by different heights and contrasting finishes giving a more characterful appearance of the restaurant frontage. Photographs showing the boundary as at 2017 and now are attached at **Appendix 9**.

48. Further, if the appeal under Ground 'c' is successful it is considered that the impact of the decking is minimal. The decking is not visible from the pavement or highway other than at the access to the decking area and ramp access thus there is no harm caused by the decking area in terms of visual impact. However removing the timber decking and ramps would reduce accessibility to the restaurant and decking area which would not comply with Policy C6 Local Plan.

49. For the reasons above it is considered that both the enclosure and the decking complies with local planning policy and planning permission should be granted.

**Proposed Conditions**

50. In order to mitigate the impact of the Development in terms of hours of use, noise and light levels the Appellant suggests the following conditions could be imposed should the Inspector consider them necessary:

- a. The development hereby permitted shall not be used by customers outside the following times 09.00 and 23.30 Mondays to Saturdays and 09.30 to 22.30 on Sundays and Bank Holidays  
*The Appellant is open to discussion over the hours of use of the forecourt area.*
- b. No amplified or other music shall be played on the decking or enclosed outdoor areas of the Site.
- c. No artificial lighting shall be constructed or used at the Site other than in accordance with a scheme submitted to and approved in writing by the Local Planning Authority. Thereafter the artificial lighting of the Site shall take place only in accordance with the approved lighting scheme, unless with the prior written consent of the Local Planning Authority.

### **Ground 'c'**

51. The Town and Country Planning (General Permitted Development) (England) Order 2015 ("the Order") allows certain development without the need to obtain formal planning permission from the local planning authority, here the Council.
52. Class A of Part 2 Schedule 2 of the Order provides parameters for when fencing or other means of enclosure can be erected without obtaining planning permission. No Article 4 Direction or other removal of permitted development rights is in evidence. The Appellant has the full ambit of permitted development rights at his disposal and national policy is that development within the limitations of these rights should not be objectionable or subject to enforcement action.
53. Where the wall or other means of enclosure is adjacent to the highway development is not permitted where the development exceeds 1 metre above ground level. Where the wall or enclosure is not adjacent to the highway the maximum height permitted is 2 metres.
54. The southern boundary at its highest point measures 0.90 metres. It is therefore below the maximum height permitted by the Order and planning permission is not required for its erection. Accordingly the Council is unable to take Enforcement Action against this aspect of the enclosure at the Site.
55. The recently amended western boundary fencing measures a maximum of 1.37 metres at its highest point. The majority of the fencing does not exceed 0.97metres. It is submitted in the first instance that the western boundary is not adjacent to the highway and therefore benefits from the upper threshold of 2 metres above ground level, the full length of this fencing falls within the permitted development limits and cannot be enforced against. In the alternative if the Inspector considers this elevation to be adjacent to the highway it is submitted that the majority of the fencing falls below the lower threshold of 1metre and those elements of the fencing on this elevation which are over the limits are so minor that it is disproportionate to take enforcement action in respect of them.

56. The eastern boundary is a consistent height of 1.47 metres. It is submitted that this boundary fencing is not adjacent to the highway and therefore complies with the conditions and limitations of Class A being below 2 metres. In the alternative the Appellant respectfully request that the Ground 'f' appeal is considered in respect of the additional 0.47 metres.
57. The Appellant contends that the Enforcement Notice cannot and should not deal with these aspects of the development. This is particularly concerning given that the expediency report gives authority to prosecute for failure to comply with the Enforcement Notice should it become extant.
58. It is respectfully requested that if the Inspector decides not to grant a specific permission for this Development that the Inspector amends the Enforcement Notice to remove the requirement to demolish the whole of the enclosure surrounding the Site. Such demolition should be limited to the part of western and/or eastern boundary which is beyond the thresholds, notwithstanding our submissions under Ground 'f' relating to that aspect of the development.

#### **Ground 'f'**

59. This ground is advanced on the basis that the Ground 'c' appeal is wholly or partly successful.
60. As advanced under Ground 'c' above, the southern boundary fencing accords with the requirements of Class A of Part 2 Schedule 2 of the Order. It is submitted that on the first instance that both the east and west boundaries also comply with the thresholds in the Order on the basis that neither boundary is adjacent to the highway and therefore is simply required to be below 2metres above ground level. If the Inspector finds that either the west or eastern boundary (or both) are adjacent to the highway it is submitted that the Council's position requiring all of the enclosure to be removed exceeds what is necessary.
61. The western boundary of the Site reaches a maximum height of 1.37 metres above ground level. The Council requires the complete removal of the enclosure which exceeds what is necessary. It is submitted that the maximum that the Council can require to be removed in respect of the fencing is 37cm to bring the fencing within the permitted development limits.
62. Similarly the eastern boundary reaches a maximum height of 1.47 metres above ground level. If the 1 metre height threshold applies it is submitted that the Council can only require the reduction in height of this boundary to 1metre.
63. It is therefore respectfully requested that the Inspector amends the Enforcement Notice to require the western boundary and/or eastern wall/fence to be reduced to 1 metre high at its highest point, where the Inspector considers the fencing to exceed the thresholds permitted by the Order and where the additional height is not considered to be acceptable for a grant of planning permission under Ground 'a'.

**Ground 'g'**

64. This ground 'g' is advanced on the basis that the appeals fail (whether whole or part).

65. The Notice grants one month from the date it takes effect to remove all of the Development. The Appellant considers that a period of three months would be more reasonable in the circumstances.

**Blandy & Blandy LLP**

**3 July 2019**