
Appeal Decision

Site visit made on 18 February 2020

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20th March 2020

Appeal Ref: APP/X5210/C/19/3232495

Basement and Ground Floors, 46 Birchington Road, London NW6 4LJ

- 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 Neritan Cela against an enforcement notice issued by the Council of the London Borough of Camden.
- The enforcement notice, numbered EN19/0270, was issued on 23 May 2019.
- The breach of planning control as alleged in the notice is without planning permission: unauthorised installation of timber decking and associated timber enclosure to front forecourt area.
- The requirements of the notice are:
 1. To 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 12/02/2014 (ref: 2014/5696/P); and
 2. Make good any damage as a result of the above works.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act also falls to be considered.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld in the terms set out below in the Formal Decision.

Preliminary Matter

1. The site visit was arranged for 18 February 2020 with representatives of the Council and appellant expected to be present. No representative of the Council arrived, so I proceeded with the site visit unaccompanied.

The Appeal on Ground (c)

2. An appeal on this ground is that “those matters” (the matters stated in the alleged breach of planning control) do not constitute a breach of planning control. The burden of proof for this ground is on the appellant, with the relevant test of the evidence being on the balance of probability.
3. There is no dispute that the enclosures and decking constitutes development within the meaning of Section 55 of the Act for which planning permission is required. No planning permission has been sought from or granted by the Council for the enclosures and decking.
4. The appellant suggests that the enclosures benefit from the planning permission available within Class A, Part 2, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015

- (GPDO). This states that enclosures constructed adjacent to a highway used by vehicular traffic must not exceed 1 metre above ground level. If they are away from the highway, they must not exceed 2 metres above ground level.
5. The term "adjacent" is not defined in the GPDO or in the Act. The dictionary definition of "adjacent" is being near or next to something else. There is no set minimum distance from the highway where an enclosure would no longer be "adjacent" to it; it is a matter of judgement, and of fact and degree in each case, as to whether an enclosure is "adjacent" to the highway.
 6. The front edge of the forecourt is contiguous with the back edge of the pavement; it is clear that part of the site is adjacent to the highway. The forecourt of the adjacent pet food shop is open apart from some posts separating the forecourt from the pavement edge. The bank to the other side has open metal railings around the area between the building and Birchington Road. It is not unusual for the forecourt of shops and restaurants to be open, similar to the pet food shop. Taking all these factors into account, I conclude that the whole of the terrace area in front of the restaurant should be considered "adjacent" to the highway in this instance. Consequently, if any part of the development is more than 1m in height, it would not comply with the GPDO.
 7. The enclosures subject of the enforcement notice surround the forecourt of the Vila Ronel restaurant. To the front they comprise substantial white painted timber planters of less than 1m in height. To the side adjacent to the pet food shop, the enclosure is in the form of a timber fence that is 1.47m in height from the edge of the pavement for its whole length. The enclosure extends back alongside the access path between the restaurant and bank, gradually rising up such that the rear part is up to 1.37m in height. Within the forecourt are further enclosures, alongside the access slope and across the path in front of the restaurant of a height that reflects that of the enclosure on the side of the property neighbouring the bank. Given the size and layout of the enclosures, decking and access ramp, they form a substantial structure that forms a single development.
 8. As the whole of the forecourt is adjacent to the highway, and sections of the enclosures are more than 1m in height, they do not benefit from the planning permission conferred by the GPDO. In addition, no evidence has been submitted to suggest that the decking and access ramp do not constitute a breach of planning control.
 9. I have concluded that no planning permission has been granted for the development. Consequently, on the balance of probability and having regard to all the evidence before me, I conclude that the development constitutes a breach of planning control.
 10. For these reasons, I conclude that the appeal under ground (c) should fail.

The Appeal on Ground (a) and the Deemed Planning Application

Main issue

11. The main issues are:

- the effect of the decking and enclosure on the character and appearance of the existing building and surrounding area; and

- the effect of the terrace area on the living conditions of occupiers of nearby dwellings on Birchington Road, with particular regard to noise and disturbance.

Reasons

Character and appearance

12. Birchington Road is located off Kilburn High Road that is a busy shopping street. On the junction is a bank to one side and supermarket to the other. No. 46 Birchington Road is located next to the bank and comprises a two storey building with a restaurant on the ground and basement floors. To the opposite side is a pet food shop, with houses beyond.
13. The decking and enclosures cover the forecourt of the restaurant premises, between the building and the rear of the pavement. The neighbouring pet food shop has an open forecourt to the pavement, and there are brick posts and open metal railings around the area to the side of the bank. The enclosures comprise timber planters surrounding the decked area that provides some outside seating for the restaurant and a ramp up to the front door, along with further planters dividing the decked forecourt. As a result, this is a significant construction. Taking account of neighbouring development, the decking and enclosures appear somewhat incongruous to the front of the premises.
14. The planters contain a variety of seasonal flowers and ferns that contribute colour and greenery to the area. The front elevation of the planters adjacent to the pavement is painted white and I note that the enclosures could be stained or painted another colour. However, these factors do not overcome the incongruous appearance of the development.
15. To the other side of the pet food shop is a high wall that separates the frontage from the gardens of the neighbouring dwellings. This results in a clear divide between the commercial frontage to the road and the residential dwellings beyond. To the front of the dwellings are low walls and higher brick piers that provide a residential character and appearance to that section of the road that contrasts with what was the more open frontage to the commercial premises close to the junction with Kilburn High Road.
16. For these reasons, I conclude that the decking and enclosures harm the character and appearance of the building and surrounding area. As such, they are contrary to Policy D1 of the London Borough of Camden's Local Plan (LP) that seeks development to respect local context and character and resists development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions.

Living conditions

17. Much of Birchington Road beyond the pet food shop and behind the supermarket are residential dwellings. The upper floor of the restaurant is also in residential use. Background noise and disturbance in an edge of town centre location, such as this, can be substantial.
18. I understand that the use of the building as a restaurant was permitted at appeal (reference APP/X5210/A/13/2204843) and that Inspector noted that there didn't appear to be an intention to use the outside area for seating and that such a use could result in disturbance, particularly to residents of the

upper floor flat. A subsequent appeal was dismissed for an alternative enclosure and decking under reference APP/X5210/W/17/3168796, partly due to noise and disturbance arising from the outside seating area. That Inspector concluded that the noise and disturbance could be adequately mitigated through the use of conditions that could limit the hours of use of the outside seating, playing of live or amplified music and illumination.

19. I consider the previous Inspectors' concerns were well-founded as to the potential for noise and disturbance from the use of the decking for outside seating, particularly in the evening. However, I agree with the second Inspector that this could be mitigated with appropriate conditions were I to allow the appeal under ground (a).
20. For these reasons, I conclude that the use of the decking for outside seating results in noise and disturbance that harms the living conditions of occupiers of nearby dwellings. This could be mitigated by conditions were I to allow the appeal. In the absence of such conditions, the proposal would conflict with Policy A1 of the LP that seeks to protect the quality of life of neighbours of development, particularly in relation to noise levels. That policy also refers to other effects of development on occupiers of neighbouring properties, such as privacy, outlook, light and vibration but these are not affected by the development.

Other matters

21. I note that there have been a number of planning applications for various schemes to provide easier access to the building and for outside seating on the forecourt. The design of the enclosure and decking has been altered such that it differs from those previous proposals. I understand these have been refused by the Council and are not before me.
22. Reference is made to awning posts that form part of the decking and enclosures. They are not specifically referred to in the description of the breach of planning control. Nevertheless, I have considered them as part of the development.
23. The appellant suggests that the forecourt could be used for outside seating without further permission, albeit restricted by conditions on the previous approval for use of the property as a restaurant, should the decking and enclosures be removed. I see no reason to disagree with that, but it does not affect my conclusions in relation to development.
24. Reference has been made to other properties with enclosures around their forecourts. However, I need to consider the development on its individual merits.
25. My attention has been drawn to Policies TC1, TC2 and TC4 of the LP that seek to support the vibrancy of the town centres within Camden. The decking provides an outside seating area for customers of the restaurant and contributes toward its viability. Consequently, the proposal complies with these policies.

Conclusion

26. I have found that the proposal would comply with policies supporting the vibrancy of the town centre. However, that is not sufficient to outweigh the

harmful effect the works would have on the character and appearance of the building and surrounding area, and the living conditions of occupiers of nearby properties. Given that results in conflict with development plan policies, on balance I conclude that the proposal would be contrary to the development plan as a whole. The appeal on ground (a) therefore fails.

The Appeal on Ground (f)

27. An appeal on this ground is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
28. In this case, the requirements seek to remove the timber decking and enclosure, make it comply with the planning permission reference 2014/5696/P and make good any damage as a result of the above works. Therefore, the requirements seek to make the development comply with the planning permission for the change of use of the ground floor and basement from shop to restaurant. It is unclear what changes, if any, were proposed to the forecourt in that permission. For these reasons, I consider that the purpose of the notice requirements is to remedy the breach of planning control.
29. The appellant suggests that the enclosures could be reduced to 1m in height to comply with the requirements of the GPDO. However, under the GPDO it is not possible for development to become permitted development retrospectively. It would be necessary, therefore, for the development to be completely removed prior to undertaking any new construction that might benefit from a planning permission granted by the GPDO. In addition, this would not address the timber decking used for outside seating that forms part of the development enforced against.
30. As a result, I conclude that the requirements of the notice do not exceed what is necessary in order to remedy the breach of planning control. As such, the appeal fails on ground (f).

The Appeal on Ground (g)

31. An appeal on this ground is that the period specified in the notice for compliance falls short of what should reasonably be allowed. The appellant suggests that a period of three months would be more reasonable, although it is unclear why they would not be able to comply with the requirements in the one month specified by the notice. Given the lack of information, I do not consider it is necessary to increase the period for compliance with the notice.
32. For this reason, I conclude that the appeal under ground (g) should fail.

Formal Decision

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

AJ Steen

INSPECTOR