



Appeal Decision

Site visit made on 20 March 2023

by D Hartley BA (Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23rd MARCH 2023

Appeal Ref: APP/B5480/C/21/3286744

Land known as 2 Berther Road (Shish Meze), Hornchurch RM11 3HS

- 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 Bilal Nadir Gul against an enforcement notice issued by the Council of the London Borough of Havering.
 - The enforcement notice was issued on 14 October 2021.
 - The breach of planning control as alleged in the notice is without planning permission, operational development in the form of 1) the erection of a front extension, a pergola and enclosure of additional seating area facing Berther Road, 2) the erection of a single storey side extension, and 3) the erection of 4 air source heat pump external housing units on the flank elevation of the building facing No 2a Berther Road at first floor level.
 - The requirements of the notice are 1) demolish to ground level the front extension facing Berther Road and the unauthorised pergola and remove all additional unauthorised development which makes up the seating area facing Berther Road as shown hatched in blue on the attached plan, 2) demolish the unauthorised side extension as shown hatched in red on the attached plan, 3) remove all 4 air source heat pump external housing units on the flank elevation of the building facing No 2a Berther Road at first floor levels and 4) remove all debris, rubbish or other materials accumulated as a result of taking steps 1 to 3 above.
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended.
-

Decision

1. 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.

Reasons

Appeal on ground (b)

2. The appeal on ground (b) is made on the basis that the matters comprising the alleged breach of planning control have not occurred. The Council has submitted photographic evidence to show that when the notice was issued the matters comprising the alleged breach of planning control had occurred. The appellant has not submitted any evidence to the contrary. I therefore conclude that the appeal under ground (b) fails.

Appeal on ground (c)

3. The appeal made on ground (c) is that the matters alleged do not constitute a breach of planning control. The onus is on the appellant to make their case

under ground (c). No such case has been advanced by the appellant and, in any event, the evidence is that the breach of planning control does require planning permission. It is operational development as defined in section 55 of the Act and there are no permitted development rights in respect of the restaurant use which would permit the erection of the extensions or alterations without the need for planning permission.

4. While the four air source heat pump external units on the flank elevation of the building have now been removed, it is of note that the appellant does not dispute the Council's comment that there such units on the rear of building and that Class G of Part 14 of the Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) indicates that only the first installation of an air source heat pump would be permitted development on a building.
5. On the evidence before me, I therefore find that all of the matters alleged constitute a breach of planning control. Therefore, I conclude that the ground (c) appeal fails.

Appeal on ground (d)

6. The appeal made on ground (d) is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. In an appeal against an enforcement notice on ground (d), the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is on the balance of probability.
7. The appellant claims that the additional sitting areas have been in place for four years. The notice was issued on 14 October 2021. To claim immunity from enforcement action, the appellant would need to demonstrate, with sufficient clarity, that the operational development was in place for more than four years prior to the notice being issued.
8. The Council's dated Google imagery shows that the extensions have not been in place for more than four years. In fact, it shows that in April 2018 the side extension, enclosed front extension and pergola were not in place. Four car parking spaces were available to the front of the premises and car parking was also available to the side of the premises at this time. Google imagery indicates that the front extensions were completed sometime between May 2019 and November 2020. The side extension, as shown in the Council's dated photograph of 12 October 2021, is not shown in Google imagery and hence it is reasonable that I conclude that it must have been erected after November 2020.
9. In addition to the above, the Council's site visit photographs and Google imagery show no air conditioning units on the flank elevation of the building on 18 August 2018. The evidence is that two were installed on the building by May 2019 and the final two by November 2020. These air conditioning units have now been removed but nevertheless I must consider this appeal on the basis of the situation that existed when the notice was issued.
10. For the above reasons, I find, on the balance of probabilities, that neither the air conditioning units nor the extensions to the building have been in place for more than four years. Therefore, I conclude that the ground (d) appeal fails.

Appeal on ground (a) and the deemed planning application

Procedural Matters

11. The appeal is made under ground (a) which is that planning permission ought to be granted in respect of the breach of planning control alleged in the notice. The breach of planning control relates to an enclosed wooden and glazed extension to the front of the building used for dining purposes, the erection of pergola to the remaining part of the front elevation of the building and including a partly enclosed front extension, the installation of four air conditioning units on the side elevation of the building and the erection of a flat roofed extension to the side of the building finished in a dark grey colour.
12. The Havering Local Plan 2021 (HLP) has now been adopted and this post-dates the issued notice. At my request, the Council has therefore provided me with copies of the policies that it now considers are relevant to the main issues and the appellant has been afforded the opportunity for further comment.

Main Issues

13. I have considered the reasons for issuing the notice. In this context, the main issues are (ii) the effect of the front and side extensions on the character appearance of the area, (iii) the effect of the front and side extensions on the living conditions of the occupiers of neighbouring residential properties in respect of noise, disturbance and anti-social behaviour, (iii) whether adequate off-street car parking is available for the restaurant use and the effect of the development on-street car parking demand and the free flow of traffic, and (iv) the effect of the air conditioning units on the character and appearance of the area and the living conditions of the occupiers of nearby dwellings in respect of noise.

Front/side extensions – character and appearance

14. The front extensions to the building almost extend the full width of the frontage of the property. I have been provided with a copy of a planning permission for a 'new pergola over existing seating area on Berther Road' dated 17 July 2019¹. Unlike the ground (a) appeal development, this permission allowed the erection of two modestly sized and light weight pergolas each with open sides and with a retractable translucent roof. Given the open sided appearance of such approved pergolas, such a permission ensured that the architectural features of the front elevation of the host property were still visible. I find that such pergolas would not be seen as dominant or enclosing additions.
15. Owing to the size, position and partly enclosed nature of the unauthorised front extensions, I find that it is appreciated by passers-by as being prominent and dominant in the street-scene. In fact, it detracts significantly from the pattern of development in Berther Road which comprises essentially open and unenclosed amenity spaces to the front of dwellinghouses. Furthermore, the development dominates the front of the host building such that it competes with the original architectural features of the front elevation of the property. The front extensions are not seen as subordinate or sympathetic additions.
16. The side extension has been built on land that has historically been used for the parking of vehicles. It has a flat roof and is prominent when seen from

¹ Planning permission P0823.19

Berther Road. It has a box like appearance and might be best described as having a 'storage shed' appearance. Owing to its uncharacteristic appearance and wooden material, it does not suitably reflect the predominant material and roof design of the host property. It does not represent good design and appears as an incongruous addition when seen from the main road.

17. For the above reasons, I conclude that the extensions have caused significant harm to the character and appearance of the area. They do not therefore accord with the character, appearance and design requirements of policies 12 and 26 of the HLP and Chapter 12 of the National Planning Policy Framework 2021 (the Framework).

Front/side extensions - noise, disturbance and anti-social behaviour

18. In approving two front pergolas on the site in 2019, the evidence is that the Council took into account the fact that these areas would not be used at all times for sitting out/dining purposes given likely changing weather conditions. In other words, they were not approved as all-weather facilities.
19. In respect of the breach of planning control, given the size of the pergola and the inclusion of significant enclosed areas for customers to eat and/or wait, it is clear that the development has increased the capacity of the restaurant from a customer point of view. There are numerous objections from nearby residents submitted as part of this appeal (e.g., from Nos 6, 19, 21, 24 and 27 Berther Road and 1 Ingleglen). They allege that as a result of the appeal development there has been an increase in levels of noise, disturbance and anti-social behaviour. Some comment that there has been increased noise and anti-social issues associated with customers congregating under the pergola areas and/or because of increased dining capacity. It is suggested that complaints have been sent to the Council from both a noise and licensing point of view.
20. I note the concerns raised by residents in the area about noise, disturbance and anti-social activity issues. However, in the absence of any objective evidence from residents about such issues, I cannot conclude with any certainty whether the breach of planning control has had a materially different impact relative to what has already been approved at the site from the point of view of customers leaving the premises late at night in respect of talking, shouting or any other anti-social activity. Even if clearer evidence had been provided, I would need to be sure that any such activities were directly associated with use of the appeal property as a restaurant.
21. Notwithstanding the above, I acknowledge that there is certainly the potential for increased levels of noise and disturbance arising from the breach of planning control given increased customer capacity in the building. Nonetheless, without objective evidence before me of actual activities and events occurring from the premises, either from the Council or from residents, it is difficult for me to conclude on this matter with any reasonable degree of certainty. I would add, however, that I afford the appellant's reference to Covid-19 restrictions as limiting the number of customers within the premises limited weight in decision making terms as such restrictions have now gone.
22. As part of my site visit, I was able to consider the size and position of the unenclosed outside seating areas in terms of the relationship with dwellinghouses. The outside, albeit partly covered areas, are large when compared to what was approved in 2019. In my judgment, and in this context,

there is potential for large numbers of customers to occupy this space and hence for some noise and disturbance to be generated from customers which in turn would have negative impact on those that live immediately opposite these areas. This would be from large numbers of customers gathering in such areas, whether as a result of smoking, and/or simply eating or drinking alcohol.

23. While the above level of disturbance would not likely be significant in the autumn and winter months, there is nonetheless a real potential for material harm to be caused to living conditions during the spring and summer months when many customers would want to eat and drink outdoors. Even accounting for a possible condition, which could restrict the use of such open areas to no later than 22.00 hours (as per the 2019 planning permission), I find that owing to the position and size of these areas this would not be a reasonable level of control from a living conditions point of view. In other words, I find that residents in the area should expect a reasonable degree of peace and quiet in the early evening. The extent/size of the 'pergola' area provides a controlling mechanism in this regard, and, in this case, the areas are simply too large.
24. For the above reasons, I therefore conclude that while there is no evidence of the breach of planning control leading directly to anti-social activity, material harm has nonetheless been caused to the occupiers of nearby residential properties in respect of noise and disturbance. The latter issues would not be capable of being reasonably controlled by planning condition. In this respect, the development does not accord with the amenity requirements of Policy 34 of the HLP and paragraph 130(f) of the Framework.

Car parking

25. The 2019 planning permission retained several on-site car parking spaces within the frontage of the appeal property. All of the frontage spaces have essentially been lost as a result of the breach of planning control. The appellant says that '*most of our customers arrive and leave by taxi*', but this claim is not substantiated by means of any objective evidence. In any event, the appellant comments in his statement of case that the car park used by staff only at the front (three spaces) is to be '*reinstated and the temporary canopy be removed*'. The Council's approved plans shown four car parking spaces and not three. Nevertheless, it is not clear from the appellant's intention to reinstate car parking spaces, whether he acknowledges that in the absence of such spaces there would be issues associated with car parking demand pressures on Berther Road.
26. Berther Road includes single yellow lines for most of its length. It is in a controlled parking area. There are a limited number of 'bay' car parking spaces provided on Berther Road. The evidence before me is that there are existing car parking space pressures in Berther Road. While my site visit was only a snapshot in time, I found it difficult to find a car parking space. In this context, I do not doubt the representations made by some residents about customers parking in driveways or in areas that they should not do so. These comments have not been specifically disputed by the appellant. There are comments about existing car parking restrictions not being enforced by relevant officials; such comments have not been disputed by the main parties to the appeal.
27. In the absence of on-site car parking at the site, I find that the evidence indicates that the breach of planning control has and would continue to cause significant on-street car parking pressures in Berther Road. Not only would

there be increased competition for car parking bays with users/visitors to dwellinghouses in Berther Road, but I find that if the development were to be allowed it would likely lead to indiscriminate car parking on single yellow lines thereby unacceptably interrupting the free flow of traffic in this residential street. I find that this level of harm would be compounded as a result of the fact that the breach of planning control has increased the potential for the restaurant to hold more customers at any one time and as Covid-19 restrictions have now gone.

28. The appellant's contention that many customers arrive by public transport does not outweigh or alter my conclusion on this matter. This comment is not reasonably substantiated. Furthermore, it is of note that the appellant has not provided me with any car parking surveys associated with the opening hours of the premises and the breach of planning control. In other words, the appellant has not robustly demonstrated that the spaces are not needed in accordance with policy 24 of the HLP.
29. For the above reasons, I therefore find that there is not adequate off-street car parking provision associated with the breach of planning control and that if planning permission were to be granted it would lead to unacceptable on-street car parking demand/pressure issues in Berther Road to the detriment of the free flow of traffic and the living conditions of the occupiers of nearby residential properties. Consequently, I conclude that the development fails to accord with the car parking, amenity and traffic management requirements of policy 24 of the HLP and paragraph 111 of the Framework.

Air conditioning units

30. When the notice was issued, the four air conditioning units were positioned, at first-floor level, on the side elevation of the building facing 2a Berther Road. These have now been removed, but I have nonetheless been able to consider them given the Council's submitted photographs. Despite their removal, it is necessary that I consider them as they were in situ when the notice was issued and hence form part of the deemed planning application.
31. Owing to the colour, position, number and stark appearance of the air conditioning units, I find that material harm was caused to the design of the host building and hence to the character and appearance of the area. The brick-built side elevation of the building is relatively simple in terms of its appearance. In contrast, the air conditioning units, which were very industrial in appearance, did not assimilate well with the appearance of the property and were seen as prominent and out of character additions when viewed from Berther Road.
32. The Council has indicated that the air condition units were noisy. As they have been removed, I was not able to listen to them in an 'on' position as part of my site visit. I cannot therefore reach an informed view about whether they were noisy or not. This is not a determinative issue as I have found that they were harmful in character and appearance terms. However, it is of note that the appellant has not provided me with any manufacturing details about the noise generated from these air conditioning units or indeed a noise survey relating to them.
33. For the above reasons, I conclude that the air conditioning units have a harmful impact on the character and appearance of the area and hence do not accord

with the character, appearance and design requirements of policies 12 and 26 of the HLP and Chapter 12 of the Framework. Furthermore, I am unable to conclude that the four air conditioning units would accord with the noise requirements of Policy 34 of the HLP and paragraph 130(f) of the Framework.

Conclusion – ground (a) appeal

34. For the reasons outlined above, I conclude that the ground (a) appeal should fail.

Appeal under ground (g)

35. The appeal on ground (g) is that the period specified in the notice in accordance with s173(9) falls short of what should reasonably be allowed.

36. The compliance period is two months. The appellant has requested a varied compliance period to September 2023 on the basis that *'steps should not be taken to demolish and/or remove/stop the development and/or operations until the national pandemic is declared over'*. While Covid-19 has not gone away, national restrictions have been removed following public vaccination. It is now permitted and deemed safe for customers to eat or drink inside premises. I therefore conclude that there is no reasonable justification for extending the compliance period and hence the ground (g) appeal fails.

Conclusion

37. 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.

D Hartley

INSPECTOR