



Appeal Decision

Site visit made on 11 May 2020

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

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

Decision date: 15 May 2020

Appeal Ref: APP/M4320/C/19/3235269

Joarr Hot Food Emporium, 139 Bispham Road, Southport PR9 7BL

- 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 Act).
 - The appeal is made by Mr Arif Deniz against an enforcement notice issued by Sefton Metropolitan Borough Council.
 - The enforcement notice was issued on 30 July 2019.
 - The breach of planning control as alleged in the notice is change of use of the area to the side of the property to create an outdoor eating area along with the erection of a boundary wall, the erection of an external brick built BBQ and flue and erection of an air conditioning unit on the side elevation of the property.
 - The requirements of the notice are 1. Cease using the outdoor area as an outdoor eating area; 2. Remove all of the chairs and tables from the outside area; 3. Remove the boundary wall and make good the ground where the wall has been removed; 4. Remove the outdoor brick built BBQ and flue and make good and make good any damage to the wall of the building behind where the brick built BBQ and flue were located; and 5. Remove the air conditioning unit from the side elevation of the building and make good any damage caused to building behind where the air conditioning unit was located.
 - The period for compliance with the requirements is two months.
 - 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.
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Decision

1. The ground (a) appeal is allowed in so far as it relates to the erection of a boundary wall. Planning permission is granted for the erection of a boundary wall at Joarr Hot Food Emporium, 139 Bispham Road, Southport.
2. The enforcement notice is varied by:
 1. The deletion of 'along with the erection of a boundary wall' in section 3 of the notice;
 2. The deletion of requirement 3 in section 5 of the notice; and
 3. The deletion of '2 months' in section 5 of the notice and the substitution instead of '4 months'.
3. Subject to the variation and to the grant of planning permission the appeal is dismissed and the enforcement notice is upheld.

Applications for costs

4. An application for costs has been made by Mr Deniz against Sefton Metropolitan Borough Council and by the Council against Mr Deniz. These applications are the subjects of separate Decisions.

Reasons

Background information

5. Joarr Hot Food Emporium is a café with frontages to Bispham Road and Thornton Road, for which retrospective planning permission DC/2015/00901 was granted on 7 August 2015 for 'change of use from laundrette to a café including the erection of flue to the rear elevation'. Before the alleged breach of planning control occurred the café had open forecourt areas on both road frontages. The forecourt area on the Thornton Road frontage has been enclosed by the erection of a brick wall around an outdoor eating area. A brick built BBQ with metal flue above has been built alongside the wall to the property and attached to this wall is an air conditioning unit. Before the enforcement notice was issued a retrospective planning application (ref. no. DC/2018/01467) was submitted for 'change of use of the area to the side of the existing café to create an outdoor eating area'. The application was refused and a subsequent appeal was dismissed.

6. The Appellant's Agent has, in his appeal statement and for each ground of appeal, referred to the requirements of the enforcement notice. The requirements of the notice are only relevant to the ground (f) appeal and, if necessary, in consideration of the ground (g) appeal. It is the alleged breach of planning control that is relevant to the ground (a) and (c) appeals.

The ground (c) appeal

7. The ground (c) appeal relates to the use of the forecourt as an outdoor eating area and to the erection of the boundary wall. It is worth noting that the breach of planning control specifically refers to a boundary wall. This is the wall adjoining the pavement to Thornton Road; the wall at right angles to this boundary wall subdivides the two forecourt areas and is not a boundary wall.

8. The location plan submitted with planning application DC/2015/00901 identified, with a red line, the extent of the property to which the application related. The property encompasses the building and the forecourt areas. The Appellant therefore maintains that the use for which planning permission was granted extends over the forecourt areas and that planning permission is not thus required for the outdoor eating area. The submission of a location plan "...which identifies the land to which the application relates" is a requirement of Section 6(c)(i) of The Town and Country Planning (Development Management Procedure) (England) Order 2010 (the 2010 Order).

9. Section 6(c)(ii) of the 2010 Order requires the submission of "...other plans, drawings and information necessary to describe the development which is the subject of the application". A diagrammatic plan submitted with the application indicated the internal layout of the café including eating and food preparation areas. Nothing in the application indicated that the eating area of the café would extend outside the building. Furthermore, the application form indicated that the use would retain three parking spaces and, within the outdoor seating area and attached to the external wall of the building, there is a small sign that states 'Customer Parking'. The forecourt area was clearly intended to be for parking.

10. The brick boundary wall that encloses the forecourt area is 110 cm high. The wall exceeds the 100 cm height limit of a wall adjoining a highway that can be erected under permitted development rights afforded by Class A of Part 2 of Schedule 2 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the 2015 Order). The height difference is not *de minimis* and, in any event, the conditions and criteria of the 2015 Order must be strictly applied. The brick boundary wall is not permitted development.

11. Planning permission DC/2015/00901 does not permit use of the forecourt as an outdoor eating area and the brick boundary wall is not permitted development. The ground (c) appeal thus fails.

The ground (a) appeal

12. The café was closed at the time of the site visit due to the COVID-19 pandemic crisis. However, there is no evidence to indicate that circumstances have changed since the previous appeal was determined about one year ago, other than that which is mentioned in the Appellant's Agent's statement. He mentions that previous heavy tables have been replaced by lightweight tables and chairs and that these would be used when the café reopens, and could be stored away when not in use at the rear of the café. He suggests that this matter could be the subject of a condition, as could the suggested requirement that the use of the outdoor eating area ceases at 2100 hours.

13. It is important that there is consistency in decision making. The main issue in the ground (a) appeal and in relation to the use of the outdoor eating area and the BBQ is therefore whether the imposition of conditions as suggested would overcome the reasons for dismissal of the planning appeal. The BBQ is considered with the outdoor eating area because it facilitates and supports the eating use.

14. The storage of lightweight tables and chairs when not in use would overcome concerns regarding use of the outdoor eating area outside of café opening hours. Previously the outdoor eating area has accommodated 10 tables each capable of seating 4-6 people. Even if the replacement lightweight tables were of the same number and could each seat only 4 people, up to 40 customers could be accommodated at any one time. It is quite possible, on a warm summer evening when the installed BBQ is in use, that this would occur. It is on the same evenings that residents of nearby dwellings would be wishing to use their garden areas for outdoor eating and other activities. There are dwellings close to the north of the appeal property and on the opposite side of Thornton Road. Activity associated with up to 40 customers in the outdoor eating area and in such close proximity to residential properties, even only before 2100 hours, would be likely to cause significant noise and disturbance for nearby residents.

15. Other matters considered by the previous Inspector are the same and, as in the previous decision, do not affect the principal conclusion that, on reopening of the café, use of the BBQ and the outdoor eating area would result in significant noise and disturbance that would harm the living conditions of nearby residents. The resumption of use of the outdoor eating area and the BBQ would thus conflict with, in particular, policy HC3 of A Local Plan for Sefton.

16. The external flue above the BBQ and the air conditioning unit were not considered in the previous planning application and appeal. The main issue with regard to these two items of equipment is their effect on the appearance of the building and the visual amenity of the area.

17. The silver metal flue extends upwards from the top of the BBQ and terminates above the roof of the building. The air conditioning unit is attached to the same brick elevation as the flue above and to the left of a ground floor window, and is encased in a metal grille. Both items of equipment are, given, their form and materials, prominent and visually dominant features that detract from the appearance of the building, and painting the flue black would not diminish its prominence to any significant degree. The building, given its corner location, is in a prominent location and the items of equipment also detract from the visual amenity of the area. The flue and the air conditioning unit conflict with policy EQ2 of A Local Plan for Sefton.

18. The Council has not identified any harm caused directly by the boundary wall, only that it facilitates the use of the forecourt area for outdoor eating. The wall, in itself, does not facilitate that use, which could continue whether or not the wall is in place. The wall is unobtrusive, is similar to many other boundary walls in the vicinity, and does not cause any harm.

19. The ground (a) appeal succeeds in so far as it relates to the boundary wall but fails in so far as it relates to the change of use of the area to the side of the property to create an outdoor eating area, the erection of a brick built BBQ and flue, and the erection of the air conditioning unit. Planning permission has been granted for the erection of a boundary wall at Joarr Hot Food Emporium, 139 Bispham Road, Southport and the enforcement notice has been varied accordingly.

The ground (f) appeal

20. The only specific comment made by the Appellant under the ground (f) appeal relates to the boundary wall, reference to which has been removed from the enforcement notice. Otherwise, the notice is not excessive because it only requires that which is necessary to remedy the breach of planning control. The ground (f) appeal thus fails.

The ground (g) appeal

21. Two months is insufficient time to arrange for and relocate the air conditioning unit, which will probably include significant internal works. The Appellant has asked that the compliance period be extended to four months. This is a reasonable period. The ground (g) appeal thus succeeds and the enforcement notice has been varied accordingly.

John Braithwaite

Inspector