



Appeal Decision

Site visit made on 8th October 2021

by Megan Thomas Q.C. Barrister-at-Law

an Inspector appointed by the Secretary of State for Levelling Up, Housing and Communities

Decision date: 01 November 2021.

Appeal Ref: APP/Z5060/W/21/3271030

242 Bennetts Castle Lane, Dagenham RM8 3UU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Bekim Hyseni against the decision of the London Borough of Barking and Dagenham.
 - The application Ref 20/02284/FULL, dated 17 November 2020, was refused by notice dated 17 December 2020.
 - The development proposed is a rear enclosure with open sides for Shisha seating area.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. I have not included reference in the banner heading to the development being retrospective or used the word "retention" because that is not in itself development. However, I was able to see at my site visit that the rear enclosure had been constructed and was equipped for shisha pipe smoking. I have therefore altered the description and determined the appeal accordingly.
3. Within the context of an appeal under section 78 of the Act it is not within my remit to formally determine whether the proposed development requires planning permission (as raised by the Council) for the use of the rear enclosure as a shisha pipe smoking area. It is not for me to assess what the planning unit constitutes or whether a material change of use of the planning unit has taken place or not. Notwithstanding that, I have undertaken an assessment of the development bearing in mind that operational development has taken place in the erection of a physical structure and I have assessed the rear enclosure with regard to its suitability for a shisha pipe smoking /café/bar activity. At the time of my site visit the rear enclosure was being actively used as a café/bar. The roller blinds were up.

Main Issues

4. Given the above, the main issues in the appeal are (1) the effects of the rear enclosure on the living conditions of neighbours with particular regard to noise, disturbance and fumes and (2) its effects on the character and appearance of the host building and the surrounding area.

Living Conditions of Neighbours

5. The appeal site is an end-of-terrace property located to the west side of Bennetts Castle Lane within a row of local shops within a predominantly residential area. The appeal concerns the ground floor development/use. There is a residential flat above on the first floor with accommodation in the roof space (242a Bennetts Castle Road) and there are residential units on the upper floors of neighbouring shops in the terrace to the north of the appeal site.
6. There are dwellings along the Linkway to the north west of the appeal site and dwellings to the south of the site on Bennetts Castle Lane. These latter dwellings are separated from the site by a road which skirts the site and leads to Bennetts Castle Care Home to the west.
7. The appeal site has a raised outdoor seating deck fronting Bennetts Castle Lane (B191) giving access to an indoor room with a bar/small kitchen, WC and a customer seating area. The rear enclosure is accessed through a door at the rear. The rear space is enclosed on its northern and eastern sides and partially on its other sides but there are roller shutter blinds (about 6 in number) which can ventilate the space. There is a small storage area for shisha pipes to the west of the seating area. There is an L-shaped outdoor walkway on the southern and western sides of the enclosure which itself is enclosed by boundary walls/fences. The roof of the enclosure is similar in appearance to a large timber parasol, from the interior. There is a central column to which TVs are attached and there are seats, tables and a wooden floor.
8. The rear enclosure projects about 7.5m from the main rear elevation of the building and is about 8m wide. The circular timber-framed structure has a maximum height of about 3.6 m with 'eaves' to about 2.8m. No.14 Linkway has an outbuilding at its rear which abuts part of the rear enclosure area of the appeal site as does part of its rear garden.
9. The premises have an alcohol licence which runs from 1000 hrs to 2230 hrs and it is said to permit the use of the external seating area until 2200 hrs after which customers must move. The opening hours of the café are 0600 hrs to 2300 hrs daily.
10. Policy BP8 "*Protecting Residential Amenity*" of the Borough Wide Development Policies Development Plan Document expects all developments to ensure that neighbours are not exposed to unacceptable levels of noise, disturbance, smokes or fumes. The development has introduced a sizeable new area where customers can sit, drink, eat, watch TV and smoke shisha pipes. There are a number of residential units in very close proximity to the rear enclosure particularly (but not only) those which are on the upper floors of the row of shops. There are several windows in the rear elevation of terrace of which the appeal site is part, and there are windows in the flank elevation of the terrace.
11. There have been complaints of intrusive noise and of intrusion by the smell of smoke from the premises. I am mindful that there is an apparently lawful use as (at least) a café in the main part of the premises (which may or may not include a lawful outdoor front seating area) and that the premises have a licence to serve alcohol. However, there is insufficient evidence to convince me

that the tall boundary treatments and the roof of the structure mitigate noise transmission or smoke to an acceptable level. Given the close proximity of residents and their windows, I consider that the use of the rear enclosure (which if smoking is taking place must by law be partially open) gives rise to unacceptable disturbance from noise and fumes. In coming to this view, I have borne in mind that the premises are located on a classified road where there are other businesses which operate until 2230 hrs.

12. The main parties have suggested that a planning condition could be attached to the grant of a planning permission which restricts the use of the rear enclosure to the following hours: 0700 to 2100 hrs Mondays to Fridays, 0800 to 2100 hrs on Saturdays and 1000hrs to 1900hrs on Sundays and public holidays. However, I do not consider these restrictions would bring the intrusion to nearby residents from noise, disturbance and fumes arising from the rear enclosure down to acceptable levels. Similarly, there is insufficient evidence to convince me that another suggested condition which seeks to control noise so as to be inaudible inside adjoining and other noise-sensitive premises would be workable in practice or would achieve suitable living conditions for nearby neighbours. It would not control the escape of fumes from shisha pipe smoking in any event.
13. On this issue I conclude that the rear enclosure results in unacceptable living conditions for nearby neighbours by reason of noise, disturbance and fumes. It would be contrary to policies BP8 and BP11 of the LDF Borough Wide Development Policies DPD (March 2011) and policies D3, D13 and D14 of The London Plan 2021.

Character and Appearance

14. From public vantage points, the majority of the rear enclosure is screened by a wall and artificial hedging rising above the exterior boundary wall. Large vents and a pyramid structure are visible, however, these are not unduly high or visually intrusive from public areas, including when approaching the appeal site from the south. They are not necessarily at odds with infrastructure associated with food and drink outlets that can be glimpsed in urban areas from units located below residential flats. The rear enclosure itself is an irregular design but has an attractive interior and it does not materially impact the wider character of the area. The boundary treatments are not so high as to be unduly dominant or inappropriate in the context of the streetscene.
15. Consequently, on this issue, I conclude that the rear enclosure does not unacceptably harm the character or appearance of the host dwelling or the surrounding area. It is not in conflict with policy D4 in The London Plan (2021) in so far as it seeks to protect character and appearance of an area, policy CP3 of the Borough's Core Strategy (July 2010) or policy BP11 of the Borough Wide Development Plan Policies DPD (March 2011) in so far as it seeks to protect character and appearance of an area.

Other Matters

16. There is insufficient evidence for me to conclude that additional vehicle parking associated with the erection or use of the rear enclosure is likely to lead to unacceptable adverse impacts.

17. In coming to my decision, I have had due regard to the public sector equality duty pursuant to the Equality Act 2010.

Conclusion

18. I have found that the rear enclosure would harm the living conditions of nearby residents due to noise and fumes. Whilst I have found there would be no adverse effect on the character and appearance of the host dwelling or the area, this would not outweigh the harm I have identified to the living conditions of neighbours. In coming to this view, I have borne in mind that Covid-19 has had a profound impact on the hospitality trade and that the appellant is running a small hospitality business. I have attached significant weight to the need to support economic growth and productivity as advised by national policy but nevertheless the substantial harm to the living conditions of neighbours outweighs these other factors.
19. Having taken all representations into account, for the reasons given above, I dismiss the appeal.

Megan Thomas Q.C.

INSPECTOR