



Appeal Decision

Site visit made on 24 August 2021

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 November 2021

Appeal Ref: APP/H5960/C/20/3260035

Land at 41-43 Bedford Hill, London SW12 9EY

- 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 Ms Bonnie McKeivitt of Chelsea Fine Foods Ltd against an enforcement notice issued by the Council of the London Borough of Wandsworth.
 - The enforcement notice was issued on 21 August 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, and within the last four (4) years, the unauthorised installation of a retractable glass canopy/skylight at rear ground floor level of the Property.
 - The requirements of the notice are:
 1. Remove the unauthorised glass canopy / skylight at rear ground floor level and install a new roof to match in facsimile the previous existing roof; and
 2. Remove from the site all debris arising from compliance with step 1 above.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. 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.

Preliminary Matters

2. Since the notice was issued the revised National Planning Policy Framework (the Framework) came into force, replacing a previous version of the Framework. Both main parties were given an opportunity to comment on any relevant implications of the above for the appeal and any relevant comments received have been taken into account in my reasoning.

Reasons

The ground (a) appeal

3. The main issue in the ground (a) appeal is the effect of the appeal development on the living conditions of neighbouring occupiers, with particular regard to noise and disturbance.
4. The appeal site contains a large restaurant at ground floor level with flats above. It is within a terrace of buildings in a busy high street location. However, at the rear of the site, the area is almost entirely residential in

character, as are the upper floors of the buildings on either side in the same terrace. As such, the site is in a mixed acoustic environment where it is significantly quieter to the rear than to the front of the site.

5. The appellant states the restaurant is open Monday to Saturday 08:00 to 23:00 and Sunday 09:00 to 22:00. Noise generated from within the restaurant includes people talking and laughing, the clinking of glasses, cutlery and crockery and a cocktail shaker. The service of alcohol, including as part of a brunch service, is part of the restaurant's normal operation.
6. The appeal development is a substantial area of glass roof which forms a conservatory. It slopes over the rear part of the ground floor restaurant. This glass roof is formed of 4 rows of 6 large panes, of which the lowest 3 rows may be mechanically retracted underneath the highest row, within a matter of minutes, by means of an electric motor. This was demonstrated at my site visit.
7. As a result of the retractable nature of the glass roof, nearly all of the conservatory dining area at the rear of the restaurant may be opened to the sky. From the information available, there have been days when the glass roof has been opened in the morning and has remained open until late in the evening. At the time of my site visit, this discrete part of the restaurant was laid out with approximately 60 covers and was furnished with tiled walls and a hard floor with a polished concrete appearance. Standing in this conservatory, I had direct views of windows and external amenity spaces for homes which surround it.
8. The appellant states that the scale, dimensions and external appearance of the appeal development is in accordance with an earlier planning permission, Ref 2019/1902, for a glazed roof, ie 'the approved development', which was granted on 12 November 2019. But I do not agree with the appellant in this regard because the appeal development has a different external appearance to the approved development.
9. The approved development was for a "glazed roof". Approved drawing 2240-204A clearly shows this as a "fixed glazed (non-opening) roof" with a consistent profile when viewed on the proposed section. This characteristic was specifically secured by conditions 2 and 3 of that permission, the latter of which repeated the annotation on the above drawing that the roof shall be non-opening. The appeal development which I have seen at my site visit clearly has a stepped profile. This facilitates its retractable nature and, in my judgement, this materially affects its external appearance, and that of the building overall, compared to the approved development.
10. Moreover, condition 4 of the above permission explicitly stated that no development shall take place until full details of the glazed roof/skylight have been submitted to and approved in writing by the local planning authority. It is my judgement that this condition goes to the heart of that permission and as the evidence indicates this condition has not been complied with the development on site is not the approved development.
11. Installation of the appeal development has been followed by complaints from neighbouring residents about noise and disturbance, including 'continuous interruption' from noise associated with a busy kitchen, raised voices and music. Representations received report that as guests drink [alcohol] noise

- levels go up. This is consistent with my own experience of establishments which serve alcohol, including restaurants.
12. The appellant has provided a noise assessment. This includes a survey, one of the stated objectives of which was to assess the restaurant noise levels external to the nearest residential windows at the rear of the restaurant with the glass roof open and closed. It is common ground that the appeal development does not emit an unacceptable level of noise when the glass roof is closed.
 13. The assessment includes sound measurements for noise emissions from the restaurant. However, these measurements were not taken from the nearest windows or external amenity spaces of neighbouring residential properties. Instead they were taken from other locations, the closest of which externally were from within a rear alley behind the restaurant, where I saw (and heard) 6 condenser units mounted on the rear elevation of the property.
 14. I am not satisfied these locations are representative of the nearest windows or external amenity spaces of neighbouring residential properties. Nor am I satisfied that measurements taken from these locations were not affected by background noise from the aforementioned condenser units or by a screening effect of the rear wall of the property.
 15. Whilst the noise assessment states that it was not practical to measure noise levels external to the nearest residential windows because access was not available, in my judgement the locations used have not all been justified. The appellant indicates that 2 of the locations were in front of the nearest gardens. But this does not seem to take account of closer outdoor amenity spaces at first floor level on the same land as the appeal development.
 16. In light of the above, I do not accept the noise assessment's conclusion that it would be acceptable for the glass roof to be open until 7pm Sunday to Thursday and until 9pm Friday to Saturday. In my judgement, the glass roof being open results in noise from the restaurant being noticeable and intrusive for neighbouring residents in their homes and outside spaces, before and after the above times, in what I observed as an otherwise relatively quiet, predominantly residential area surrounding the rear of the restaurant. The noise assessment has not led me to a different conclusion in this regard and it is unlikely the hard surfaces I saw in the conservatory on my site visit would assist in absorbing noise from the restaurant.
 17. My attention has been drawn to other noise sources in the area, such as bottles being emptied into a bin by a neighbouring restaurant. I have no doubt this occurs and is noisy. But this is a fleeting event (as opposed to prolonged restaurant noise through the open glass roof of the appeal site) and it is not a fair indication of average background noise levels to justify the appeal development.
 18. The appellant has suggested I may allow the appeal with a condition permitting the opening of the glass roof within specified restricted hours for a 12 month period to enable further noise testing to take place. But there has been ample opportunity for testing in my view and so I am not satisfied more time is necessary or appropriate in light of the harm identified above or as a result of any on-going restrictions relating to COVID-19.

19. I have considered the appellant's request that I grant planning permission with a condition allowing the roof to be opened "solely for the purposes of cleaning". But I am not satisfied this would avoid the harm identified as it depends on when the roof is opened, how long for and how often and no details have been provided by the appellant in this regard. In any event, there are other means by which the roof may be cleaned and so I am not satisfied the cleaning-related safety concerns referred to by the appellant are a good enough reason to allow the roof to be opened.
20. On the basis of the evidence provided, I conclude that the appeal development harms the living conditions of neighbouring occupiers, with particular regard to noise and disturbance. This does not comply with Policy DMS 1 (c) of the Development Management Policies Document, adopted March 2016, identified in the notice. This policy states that planning permission will be granted for development which does not harm the amenity of occupiers/users and nearby properties through unacceptable noise.
21. The Council's statement draws my attention to other policies not identified in the notice. But based on the information provided, none of these policies make any difference to my conclusion on the main issue and as these policies do not assist the appellant's case, I do not need to consider them any further.
22. I appreciate that the external appearance of the appeal development may be acceptable and that it may not cause overlooking. But these are not benefits of the appeal development and so they do not outweigh the harm identified above.
23. Taking into account all of the above points, the appeal on ground (a) fails.

The ground (f) appeal

24. Under section 173(4) of the 1990 Act, when serving an enforcement notice the Council may seek to (a) remedy the breach of planning control, including by restoring the land to its condition before the breach took place, or (b) remedy any injury to amenity which has been caused by the breach.
25. The notice requires the installation of a new roof to match in facsimile the previous existing roof. This is clearly depicted on drawing 2240-204A. As such, the notice requires that the land is restored to its condition before the breach took place and so the purpose of the notice is to remedy the breach of planning control, rather than remedy any injury to amenity.
26. Pursuant to the ground (f) appeal, the appellant states that there is no technical reason why the roof cannot be kept closed permanently. But this would not resolve the breach of planning control and so it would not achieve the purpose of the notice. The earlier planning permission does not assist the appellant on the ground (f) appeal because, as stated above, what has been built is materially different to what was approved.
27. I have considered the appellant's request that I grant planning permission with a condition that the glass roof is kept closed. But I am not satisfied a condition requiring the roof to be kept closed would be reasonable as, in my judgment, such a condition would nullify the benefit of the planning permission. As stated in the allegation on the enforcement notice, the deemed planning application is for a roof which is "retractable". So to require that it be kept closed would not

comply with the test of reasonableness set out in paragraph 56 of the Framework.

28. I conclude no lesser steps have been suggested which would achieve the purpose of the notice. As such, the appeal on ground (f) fails.

Conclusion

29. 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 application deemed to have been made under section 177(5) of the 1990 Act as amended.

L Perkins

INSPECTOR