



Appeal Decision

Site visit made on 11 October 2021

by Richard S Jones BA (Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 January 2022

Appeal Ref: APP/K5600/C/21/3266352

Land at 97 Old Brompton Road, London, SW7 3LD

- 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 Chucs Restaurants Ltd against an enforcement notice issued by The Council of The Royal Borough of Kensington & Chelsea.
 - The enforcement notice, numbered ENF/20/00597, was issued on 27 November 2020.
 - The breach of planning control as alleged in the notice is, without planning permission, the erection of timber framed decking and planters on Old Brompton Road, and the erection of timber framed decking on Cranley Place.
 - The requirements of the notice are:
 - i) Remove the timber framed decking and planters on Old Brompton Road, and any fixtures or fittings associated with their installation;
 - ii) Remove the timber framed decking on Cranley Place, and any fixtures or fittings associated with their installation;
 - iii) Remove all resultant materials from the site.
 - 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. 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. It is directed that the enforcement notice is varied by the deletion of 'To be complied by the 5th March 2021 (within 2 months of this notice taking effect)' and the substitution with 'The period of time for compliance with the requirements is six months'.
2. Subject to the variation, 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 Town and Country Planning Act 1990 as amended (the 1990 Act).

Preliminary Matters

3. The appeal form cited grounds (a) (f) and (g). However, the appellant has raised issues which relate to ground (c). Following my request for clarification on this matter, the appellant confirmed that a ground (c) appeal is also made. The Council has been offered opportunity to respond and I have determined the appeal accordingly.

The Appeal on Ground (c)

4. A ground (c) appeal is that the matters alleged in the notice do not constitute a breach of planning control. In this case, the alleged breach is the erection of

timber framed decking and planters on Old Brompton Road, and the erection of timber framed decking on Cranley Place.

5. The appellant has not sought to demonstrate, and I do not find, that the decking does not require planning permission, or that it has been granted planning permission by the GPDO¹. The ground (c) appeal therefore relates only to the planters on Old Brompton Road.
6. The Council's view is that the planters are part of the decking and are likely fixed. Although the appellant argues that the planters are wholly separate structures to the decking, it has not been shown that they are moveable. Whilst their weight is likely to provide some stability, given the risk of the planters toppling into the footway, I consider it more likely than not, that they are attached to the decking. There is also a clear degree of permanency.
7. The correct approach therefore is to consider the development as a whole, rather than its component parts. Whether or not the planters would ordinarily constitute 'development' in their own right for the purposes of s55 of the 1990 Act, I am satisfied that they form part of the overall structure with the decking.
8. The appellant argues that the planters benefit from permitted development rights conferred by Class A of Part 2 of Schedule 2 of the GPDO (hereafter referred to as Class A) by forming a means of enclosure below 1m in height. The Council's view is that the height of the planters, in combination with the decking exceeds 1m and are not therefore permitted development. The appellant has not provided evidence which demonstrates otherwise.
9. In any case, Article 3(5)(a) provides that permitted development rights granted by the GPDO are not available where the building operations involved in the construction of that building are unlawful.
10. Although the Council accepts that there is a fallback position to install the planter boxes under permitted development rights, that is after the enforcement notice has been complied with (i.e., once the decking has been removed).
11. It has not therefore been demonstrated, on the balance of probabilities, that the matters alleged in the notice do not constitute a breach of planning control. The appeal fails on ground (c).

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

Main Issues

12. The main issues are the effect of the alleged development on pedestrian users and highway safety; accessibility; and the character and appearance of the area and the Thurloe and Smith's Charity Conservation Area.

Reasons

Pedestrian users and highway safety

13. The appeal site is located on the corner of Old Brompton Road and Cranley Place, within the primary frontage of the South Kensington District Shopping Centre. The ground floor of the property is used as a café. The alleged timber

¹ The Town and Country Planning (General Permitted Development) (England) Order 2015

- decking areas are raised above adjacent pavement level and are used for outdoor tables and seating in connection with that use. The alleged planters effectively enclose the frontage of the decked area on Old Brompton Road and return to the front of the building on one side.
14. The appellant's position is that the seating area on Old Brompton Road is private land, which does not form part of the public highway. The Council state otherwise and refer to a Tables and Chairs Licence that has been in place since at least 2013. Whether or not the land is public highway, or whether a licence is required or whether any licence restrictions have been breached, are not matters for this appeal. Nevertheless, I note that the plan provided by the appellant annotates the area hatched in red across the Old Brompton Road frontage as footway, albeit privately maintainable rather than publicly so. The decking and planters also visually appear to protrude into the footway.
 15. The appellant suggests that the area is not heavily used by pedestrians and the photographs provided appear to support that position. However, that does not reflect my own observations at the time of my early evening site visit and no evidence is provided, such as pedestrian surveys, to support the appellant's assertion (or indeed that of the Council). Nevertheless, within a busy commercial centre such as this, it is reasonable to assume there will be an associated level of footfall and that the decking and planters create a 'bottle-neck' that is likely to impede pedestrian flows and potentially necessitate pedestrians use the road as an alternative. That is to the detriment of the safety and comfort of footway users, particularly those in wheelchairs, the elderly, infirm, partially sighted and parents with small children and pushchairs. I saw no other comparable arrangements to the commercial frontages along the road.
 16. I agree that the alleged development does not impede the natural desire line for pedestrians walking along Old Brompton Road, however, that ignores the need to avoid obstructions and other pedestrians during peak footfall periods when continuing along a straight desire line is not possible. When cutting the corner it has the effect of channelling pedestrians from a wider space into a narrower gap with less space to manoeuvre and avoid conflict.
 17. Although the Council has provided no evidence of accidents occurring, being raised above pavement level the decking poses a trip hazard for pedestrians walking across the frontage Old Brompton Road, particularly at busiest times when users may be forced towards it. The presence of the planters will provide some visual cue/guidance but that could increase the risk as the decking protrudes beyond their outer edge.
 18. Even if the present arrangement protrudes no further than the pre-existing artificial grass, the effects are materially different; the pre-existing surface was at grade and thus would not have been a trip hazard. Moreover, the appellant's photographs show that the seating did not extend as far into the frontage area and contained no fixed edges. Consequently, pedestrians would have been able use the additional space to avoid other pedestrians.
 19. The decking to Cranley Place is positioned on private land between the side of the building and the railing enclosure to the back of the footway. Consequently, the footway is not narrowed or otherwise compromised such that pedestrian users and highway safety is affected.

20. Nevertheless, for the reasons explained, I find that the alleged development to the Old Brompton Road frontage is harmful to pedestrian users and highway safety and thus conflicts with Local Plan² Policies CT1(g)(h) and (p) and CR3(c) and (d). These policies require, amongst other things, improvements to the walking environment, new development to incorporate measures to improve the safety of pedestrians and to maintain the free, safe and secure passage of pedestrians.

Accessibility

21. Because the decking to both Cranley Place and Old Brompton Road frontages are raised, a physical barrier is created for wheelchair users. The decking areas are not therefore inclusive and accessible to all.
22. Given that the outdoor space was previously at grade, as per the neighbouring units, accessibility has been reduced. As the main entrance to the café restaurant is also stepped, the decking appears to be creating further, unnecessary barriers.
23. I appreciate that access can be achieved by way of a mobile ramp but that would involve a member of staff having to go to one of the vault stores, bringing it back and then putting it into position. As noted by the Council, that makes wheelchair users dependent on the capacity of the staff to provide assistance, rather than enabling wheelchair users to be autonomous to access and exit the spaces freely. That is not inclusive and could be perceived as somewhat demeaning, drawing unwanted attention to wheelchair users. In my view, such arrangements are likely to discourage wheelchair bound customers.
24. I therefore find that the decking areas are not inclusive and accessible to all and as such are contrary to those requirements of Local Plan Policy CL2. I understand the appellant's arguments that Local Plan Policy CL10 (shopfronts), is not relevant, but that policy is not cited in the corresponding reason for issuing the enforcement notice.

Character and Appearance

25. The site falls within the Thurloe and Smith's Charity Conservation Area (the Conservation Area), the special interest of which is largely derived from its architectural history and the grand and coherent design of terraced streets.
26. The appellant's Heritage Statement refers to the Conservation Area Appraisal of 2016, which identifies the site as a 'positive' contributor to the character of the area, being constructed in 1855 as part of a development by renowned architect and builder James Freake. It is situated at the end of a short terrace built in the Italianate Victorian style with stucco finish to the upper storeys. Characteristic details include rustication to the corner with emphasised quoin stones, architraves to the first-floor windows and a pronounced corbelled cornice to the roof line with double bottle baluster parapet above.
27. As noted, the decking onto Cranley Place is discreetly positioned between the side of the building and the boundary enclosure. It is therefore clearly perceived as falling within the demise of the premises, rather than protruding into the public realm. The rhythm of the street frontage is maintained.

² The Royal Borough of Kensington and Chelsea Local Plan, September 2019

28. In contrast, the decking and planters on Old Brompton Road do appear to protrude into the public realm, regardless of ownership. Whilst it is evident that the ground floor shopfronts in the group have been altered over the years such that there is little visual consistency at street level, other than in the case of the appeal site, none have been physically extended forward of their main frontage elevation. In such a prominent position, the alleged development visually disrupts the rhythm and continuity of the front building line and the space forward of it, creating an awkward visual relationship with the footway and undermining the integrity of the building taken as a whole.
29. Although outside seating is part of the character of the street scene, the solidity and degree of visual permanency, differentiates the arrangement from the more informal arrangement of neighbouring premises, which are largely restricted to tables and chairs positioned on the footway. That has the effect of making the appeal premises unduly prominent in the street scene.
30. Given the juxtaposition of the pre-existing artificial grass alongside the footway and decorative tiles of the neighbouring property, that surfacing would have appeared odd and out of place. However, that does not justify a replacement that is more intrusive due to a greater physical presence.
31. Although not referred to in the reasons for issuing the enforcement notice, I have a duty under s16 and s66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the setting of a listed building. The nearest to the appeal site are the mid-19th Century brick and stucco terraced houses located on both sides of the road at Nos 1-10 and 11-19 Cranley Place. The special interest of these well-preserved Victorian terraces is largely derived from the consistency of the three storey plus mansard scale, the set back from the road, the architectural detailing and the distinctive colour and texture of the buildings, which combine to create an elegant streetscape. The straight alignment of the road reinforces the strong architectural rhythm of the buildings.
32. Given my findings on the effect of the Cranley Place decking and the relative position of the decking and planters on Old Brompton Road, I find that the alleged development results in a neutral effect on the setting and significance of the listed terraces. Given the separation to the listed buildings at 108-113 Queens Gate, the effect on the setting of those designated heritage assets is also neutral.
33. For the reasons explained I find that the decking on Cranley Road preserves the character and appearance of the Conservation Area. However, I find that the alleged development on Old Brompton is harmful to character and appearance of the street scene and therefore fails to preserve or enhance the Conservation Area, contrary to Local Plan Policies CL1, CL2, CL3, CL6, CL9, CL11 and CR4. Those policies require, amongst other things, development to preserve or enhance the character or appearance of the conservation area, to improve the visual, functional and inclusive quality of streets and resist small-scale development that harms the character or appearance of the existing building, its setting or townscape.
34. In this case I also find that the alleged development leads to less than substantial harm to the Conservation Area taken as a whole. In such circumstances the National Planning Policy Framework (NPPF) requires that any

identified harm is weighed against any public benefits the development might secure.

35. I have no reason to doubt the popularity of the outdoor seating area to local residents (and visitors) and as a community facility, that is clearly a public benefit. However, I see no reason why that same benefit could not be achieved without the alleged development and the associated harm I have described. The same conclusion can also be applied to any operational and business viability arguments arising from the COVID-19 pandemic. The creation of an unnecessary barrier to accessibility also weighs against the public interest.
36. I therefore find that the public benefits advanced in favour of the alleged development do not outweigh the great weight that should be given to the conservation of the heritage asset.

Planning Balance

37. There is no 'fallback' position for the planters by operation of Article 3(5) of the GPDO. The fallback position that does exist (for the planters) relies on the decking and the associated harm being removed. Consequently, such arguments attract limited weight in favour of the alleged development.
38. The appellant has referred to an appeal decision relating to a public house in Woking³, which happens to be one of my own. As in that case, I fully appreciate the impact of the COVID-19 pandemic on the hospitality sector and recognise the operational and business benefits arising from the alleged development. Moreover, as highlighted in the referenced appeal decision, paragraph 81 of the NPPF explains that planning decisions should help create the conditions in which businesses can invest, expand and adapt and that significant weight should be placed on the need to support economic growth, taking into account both local business needs and wider opportunities for development.
39. However, as explained above, the removal of the decking and planters would not preclude those benefits, as outdoor drinking and dining could still take place, as it did previously. The circumstances are therefore materially different to the Woking case.
40. I therefore find that the arguments advanced in favour of the decking and planters on Old Brompton Road do not outweigh the combined harm to pedestrian users and highway safety, accessibility and to the character and appearance of the area and Conservation Area.
41. Although the decking to Cranley Place does not result in harm to pedestrian and highway safety or to the character and appearance of the area and Conservation Area, the development plan conflict would remain in terms of accessibility. It has not been shown that raising the outdoor seating area to create that barrier is necessary or unavoidable. The harm is not therefore outweighed by the benefits advanced.
42. I therefore conclude that the alleged development is not in accordance with the development plan, read as a whole, and for the reasons given above, and having had regard to all other matters raised, I conclude that the appeal should fail on ground (a) and the deemed planning application should be dismissed.

³ Appeal Ref: APP/Y3615/C/20/3259273

The Appeal on Ground (f)

43. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. In this case, the breach of planning control is the erection of timber framed decking and planters on Old Brompton Road, and the erection of timber framed decking on Cranley Place. The requirements of the notice are to remove the same and all resultant materials from the site. The purpose of the enforcement notice must therefore be to remedy the breach.
44. The appellant argues that the planters are permitted development and therefore the requirement to remove them exceeds what is necessary to remedy the breach of planning control. However, for the reasons explained under ground (c), the planters do not benefit from permitted development rights and they cannot therefore remain if the breach is to be remedied. The notice is not flawed as stated. Whether or not the planters are reinstated after the notice has been complied with, will be a matter for the appellant.
45. The appellant has not shown that there are any lesser steps that would remedy the breach of planning control. The requirements of the notice are not excessive and the appeal on ground (f) fails.

The Appeal on Ground (g)

46. The appellant considers that the two months given to comply with the enforcement notice is too short having regard to the effects of the COVID-19 pandemic on the hospitality sector and the importance of outdoor trading areas. The Council has confirmed that due to the general upheaval associated with the pandemic and associated difficulties securing contractors, it would be happy for the period of compliance to be extended.
47. A specific date (30 September 2021) is requested, which has now passed, when temporary Government initiatives to assist the hospitality sector were due to expire. That equates to around seven more months from the date of the notice for compliance (nine months in total).
48. I am satisfied that in the current circumstances that it would be appropriate to extend the period of compliance but that a period of six months would strike a reasonable and proportionate balance between the business needs of the appellant and any difficulties that may be encountered in the current pandemic, and the public interest in this case.
49. I shall therefore vary the enforcement notice accordingly prior to upholding it. The appeal on ground (g) succeeds to that extent.

Other Matters

50. The appellant has not made an application for costs against the Council but has suggested that I should consider issuing such an award. However, I have no reason to believe that the Council has acted unreasonably to prompt me to pursue the suggested course of action and initiate an award of costs.

Conclusion

51. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Richard S Jones

INSPECTOR