



Appeal Decisions

Site visit made on 8 March 2022

by Gareth Symons BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 March 2022

Appeal: APP/M5450/C/20/3265889

Seven Balls Public House, Kenton Lane, HARROW, HA3 6AW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by The Seven Harrow Limited against an enforcement notice issued by London Borough of Harrow.
 - The notice was issued on 1 December 2020.
 - The breach of planning control as alleged in the notice is: The construction of a pergola in the rear garden of the Land ("the Unauthorised Structure"); The material change of use of the Land from use as a public house (Sui Generis) to a mixed use comprising public house and shisha lounge (Sui Generis) ("Unauthorised Use").
 - The requirements of the notice are: 5.1 Cease the Unauthorised Use of the Land; 5.2 Remove from the Land all items connected to and associated with the Unauthorised Use; 5.3 Demolish the Unauthorised Structure or modify the Unauthorised Structure so that it is built in accordance with the approved layout of planning permission ref: P/0148/18; 5.4 Remove from the Land all material and debris arising from compliance with the requirements of paragraph 5.3 of this Notice.
 - The periods for compliance with the requirements are: 6.1 In relation to the requirements at paragraphs 5.1 and 5.2 of this Notice, one (1) calendar months after the Notice takes effect; 6.2 In relation to the requirements at paragraphs 5.3 and 5.4 of this Notice, three (3) calendar months after this Notice takes effect.
 - The appeal is proceeding on the ground set out in section 174(2)(a) of the Town and Country Planning Act 1990 as amended.
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Appeal B: APP/M5450/W/20/3265888

The Seven Balls Public House, Kenton Lane, HARROW, HA3 6AW

- 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 Sanjay Samani against the decision of London Borough of Harrow.
- The application Ref P/3143/20, dated 4 September 2020, was refused by notice dated 10 November 2020.
- The development proposed is Variation of Condition 2 (Approved plans) attached to planning permission P/0148/18 dated 27.4.18 to allow enlargement of pre-existing pergola in rear garden and use of pergola as a shisha lounge and dining area and associated alteration.

Decisions

Appeal A: APP/M5450/C/20/3265889

1. The appeal is dismissed. The Enforcement Notice (EN) is upheld and planning permission on the application deemed to have been made under s177(5) of the 1990 act is refused.

Appeal B: APP/M5450/W/20/3265888

2. The appeal is dismissed.

Preliminary Matter – Appeal B

3. Planning permission Ref: P/0148/18, granted on 27 April 2018, was for various alterations to the main building and a replacement pergola and a new pergola. This planning permission did not include any change of use of the premises. The planning application related to Appeal B seeks a variation of condition 2 of the original permission to allow a minor amendment to the design of the new pergola at the rear of the property. It also seeks for that pergola to be used as a shisha lounge and dining area. However, it has been held that an application under s73 of the 1990 Act may not be used to obtain a permission that would require a variation to the terms of the operative part of the planning permission, that is, the description of the development for which the original permission was granted. This also applies to s73 appeals involving retrospective development as in this case.
4. This means that the description of the development in an existing planning permission cannot be amended at all. Furthermore, if amending a condition would result in a conflict between it and the description of development, then that amendment is beyond the powers under s73 and cannot be made. A fresh planning application would be required. Against this background the planning application seeking the use of the pergola as a shisha lounge conflicts with the description of the original development. Thus, it falls outside the scope of s73, and the appeal cannot be dealt with. Appeal B is dismissed on this basis.
5. Nevertheless, the merits of what the appellant wished me to consider under Appeal B are the same for the deemed planning application made under Appeal A. Therefore, the appellant has not been prejudiced by Appeal B being dismissed for the reason given.

Main Issues

6. The main issues are:
- the effects of the development on the living conditions of the neighbour at 3 Kingston Close in particular, with regard to noise, general disturbance, odour and smoke; and
 - whether the setting of the Seven Balls public house, which is a grade II listed building, has been preserved.

Reasons

Living Conditions

7. I acknowledge that there is no control over the use of the pub garden and the outside spaces around the building in terms of where patrons can be while enjoying food and drink, and smoking. I also note that planning permission ref: P/0148/18 granted a pergola in the area between the pub and the neighbouring residential property 3 Kingston Place. However, the approved structure was much smaller which would have accommodated 4 tables for up to 16 seats, apparently similar in size to the former structure in this position. By stark contrast the existing structure is much larger. The Council refer to it having 12 tables for up to 48 people. In the main part of the structure, I counted 46 seats with further seats and tables in the dogleg section such that

there were over 60 seats. The 'inside' space was also fitted out with three wall mounted TVs and several overhead heaters.

8. It is clear to me that the pergola has been designed to attract a large number of patrons for the specific purposes of congregation whilst shisha smoking. The effects of that on noise and disturbance levels, and the odour from various flavours of shisha smoke, would be materially different from an outdoor space with a relatively small, covered area with open slatted walls to be used for limited outdoor dining and drinking, with smoking most likely to be an ancillary and minor activity.
9. 3 Kingston Place is at a lower level than the appeal site meaning that the first floor side dormer windows to the house roughly line up with the upper half of the pergola. The windows are also close enough to the pergola such that persons in those rooms are very likely to experience adverse levels of noise, general disturbance, and smoke fumes, arising from at times what may be a significant number of pub patrons. These unneighbourly effects are likely to be exacerbated particularly when in pleasant and hot weather the occupiers of next door would wish to enjoy having windows open and be outside in their own garden at the same time as patrons in the shisha lounge are also likely to want to be enjoying the space in the pergola. Whilst there are some tall trees and a high wall/fence along the west boundary of the pub garden, the tallness of the trees is not continuous, and I doubt that they provide any effective mitigation against noise and smoke. There is also first-hand evidence from the neighbour about the adverse experiences over the summer of 2019 arising from the use of the pergola.
10. Moreover, the slatted west side of the pergola and the ends have been boarded over, which may have been done to mitigate nuisance from noise or odour. The Council's Environmental Health and Licensing officers consider the structure should be regarded as enclosed or substantially enclosed. Under the Health Act 2006 and its associated smoke free regulations the structure would need to be at least 50% open to the air and in its current state it is not considered suitable for shisha smoking. Consequently, it is likely that to meet these health standards some of the walls would need opening, which would probably make the unneighbourly effects even worse.
11. There are no details of what any alternative noise and odour mitigation measures might comprise and, given what could be required to make the structure more open sided, it is difficult to envisage the effectiveness of any different measures. Reducing the number of clientele able to be in the shisha lounge may lessen the adverse impacts, but no number has been suggested and it is not for me to come up with a lower number, particularly in the absence of showing the extent of improvement that could be achieved. Numbers would also invariably fluctuate regularly, and it would be difficult to effectively monitor and enforce such a restriction.
12. Restricting the hours of operation might help, but the appellant has not suggested what they could be. If they were those suggested by the Council, they would not ameliorate the adverse impacts of the shisha lounge use. More restricted hours would, in my view, also likely be too onerous and thus probably fail the test of reasonableness for imposing a planning condition. Planning conditions are not a way forward to make the development acceptable.

13. In view of the above, despite there being planning permission for a structure here and use of the pub garden being unfettered, the development undertaken means that the activities in this space are much more concentrated, thus leading to increased and unacceptable adverse side effects of noise, general disturbance, odour and smoke on the living conditions of the occupiers of 3 Kingston Place in particular.
14. The scheme therefore conflicts with the amenity protection aims of policy DM1 from the Harrow Development Management Policies Local Plan (LP). The Council has also referred to policies from the London Plan 2016 and the London Plan 2019 Intend to Publish Version. I am aware that these have been superseded by a new The London Plan 2021. However, I have identified a conflict with the LP which means that the development does not accord with the development plan taken as a whole, and the appellant has not sought to rely on any of The London Plan 2021 policies.

Setting of the listed building

15. Due to the pergola's boarded up walls it has a makeshift appearance that pays very little respect to the traditional character of the main pub building. Its overall large size also gives it a bulky appearance that occupies much of the space between the pub and the west boundary of the garden. Its closeness and design mean that the appreciation of the appearance of the pub is diminished, notwithstanding that there are other views of the pub from further away in the garden and from the road.
16. The garden space around the pub, which has 17th century origins when its surroundings would have been more rural, is important to the setting of the listed building. The visual intrusion into this setting is harmful to the significance of the designated heritage asset. The use of plastic leaves attached to some walls does not integrate the structure with the pub or its setting, and its subordinate size compared to the scale of the pub also does not mean that it has a sympathetic association with the listed building.
17. In the parlance of the National Planning Policy Framework (NPPF) the harm identified is less than substantial. Nevertheless, great weight should be given to an asset's conservation. This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance. Any harm to significance requires clear and convincing justification. In this case no public benefits of the development have been advanced to weigh against the harm.
18. The permitted pergola would have been a much smaller structure with more open slatted sides that would have given it a lighter weight and less bulky appearance, thus having an acceptable presence alongside the listed building. The permitted pergola would be materially different, and it does not therefore justify granting planning permission for the appeal development.
19. In view of the above, the development has not preserved the setting of the Seven Balls public house. It therefore does not accord with the design and heritage asset protection aims of policy CS1B and D from the Harrow Core Strategy and policies DM1 and DM7B from the LP. There are also conflicts with the related aims from the NPPF. Although the NPPF 2021 has replaced the NPPF 2019 referred to by the appeal parties, the policies related to considering the potential impacts of development on designated heritage assets have not

changed. Therefore, the replacement NPPF has not prejudiced the policy cases of either side.

Conclusion

20. For the reasons given above, the planning application deemed to have been made under Appeal A should be refused. Consequently, the appeal should be dismissed and the EN upheld. Appeal B should also be dismissed.

Gareth Symons

INSPECTOR