



Appeal Decision

Site visit made on 19 June 2023

by David Jones BSc (Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3 August 2023

Appeal Ref: APP/B4215/C/23/3314699

Land at 113 Lapwing Lane, Manchester M20 6UR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Grant Ashdown against an enforcement notice issued by Manchester City Council.
 - The notice was issued on 6 December 2022.
 - The breach of planning control as alleged in the notice is the erection of a timber and PVCu canopy to the rear.
 - The requirements of the notice are:
 1. Dismantle and remove the timber and PVCu canopy from the land
 2. Remove from the land all building materials, rubble and waste resulting from carrying out the above.
 - The period for compliance with the requirements is: Four months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) 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. The appeal is dismissed, and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Background and preliminary matters

2. Since the initial receipt of complaints in August 2020 concerning the matters alleged in the notice, two planning applications have been submitted to the Council. The first application¹ for the '*Installation of canopy at rear of premises to form an external seating area for customers*' essentially sought the retention of the works as built on site. This application was refused on 19 April 2021 with no appeal lodged against this decision.
3. Instead, a second planning application² was submitted for the '*Installation of enclosed canopy at rear of premises to form an enclosed seating area for customers and retention of first floor air conditioning unit*'. This application primarily sought to overcome the objections to the first application by raising the external brick boundary walls so as to infill the gap between the top of the existing walls and the timber and PVCu canopy. The application also proposed that the yard area would not be used beyond 21:00 and that the playing of amplified music would be prohibited. This application was refused on 2 March 2022 with no appeal subsequently lodged against the refusal.

¹ Council Ref: 128264/FO/2020

² Council Ref: 131763/FO/2021

4. For the sake of clarity, the brick boundary walls around the rear yard have not been raised so to infill the gap between the top of the walls and the canopy. Consequently, I consider that the scheme proposed under the second planning application does not amount to part of the matters stated within the notice. Given that a deemed planning application is made in respect of the development as alleged and carried out, there is no mechanism for incorporating any revised scheme into any deemed planning permission that may be granted. Therefore, the deemed planning application can only relate to what had been carried out when the notice was issued.

Ground (a) and the deemed planning application

Main Issues

5. The main issues are:

- the effect of the development on the living conditions of occupiers of nearby residential properties, with particular regard to noise and disturbance; and
- whether the development preserves the character or appearance of the Ballbrook Conservation Area.

Reasons

Living Conditions

6. The appeal premises is a mid-terrace commercial unit currently trading as a pizza restaurant, with residential apartments on the upper floors. The premises forms part of a parade of units which are occupied by a variety of different uses including a post office, pharmacy, café, and sushi restaurant. These units all front onto and have their main entrances facing Lapwing Lane. The area to the rear of these units however is less busy and has a much more sedate character with rear service yards, access to upper floor residential units, and bins stored along the narrow alleyway which runs to the side and rear of the parade. On the opposite side of the rear alleyway are the walled rear garden boundaries of houses on Ballbrook Avenue.
7. In addition to its internal seating, the premises already benefits from a small area of external seating to the front of the property under a restored canopy. The timber and PVCu canopy which is subject of the notice has been erected over the walled yard area to the rear. The gap between the top of the existing brick boundary walls and the canopy has been filled with timber boards so to fully enclose the rear yard. This is the development for which the deemed planning application relates.
8. It is common ground between the parties that the yard area forms part of the planning unit, and therefore can be used as part of the existing lawful use of the premises. This could include its use as an outdoor seating or dining area with loose furniture such as tables, chairs, heaters, parasols, and umbrellas being sited within it. The Council however considers that the timber and PVCu canopy provides shelter from inclement weather which allows the area to be utilised all year round. This results in the area being used more frequently with the level of noise and disturbance created by patrons talking, shouting, and laughing harming the living conditions of nearby residents.

9. At the time of my visit the yard area to the rear had been fully enclosed and effectively incorporated as part of the internal layout of the restaurant. The area includes a timber floor, seating and tables, lighting, and heaters. Pictures and other artefacts were also displayed on the walls which all contributed to the impression of being 'inside' the restaurant itself. The interior of this area is a more comfortable and pleasing environment for customers and allows them to be 'outdoors' more frequently and for longer periods, including later in the evening during hours of darkness and periods of inclement weather. Even with the provision of heaters, parasols, and umbrellas, to my mind the use of this area as an exposed outside space without the canopy would not be anywhere near as appealing to patrons or frequented as regularly all year round.
10. Although there would be some activity in the yard area all year round by virtue of patrons using the ladies' toilets or persons accessing the premises through the rear gate, it nevertheless follows that the development has resulted in an increase in the regularity, duration, and intensity of use of this area. The appellant however considers that despite this increase the timber and PVCu canopy reduces the noise impact on residents above, particularly given the modest number of patrons that can be accommodated and when compared to the potentially unmitigated use of the area as an open outdoor seating area.
11. In support of the appeal, the appellant has provided two Noise Impact Assessments dated March 2021 (NIA1) and July 2021 (NIA2). The appellant has confirmed that NIA1 was undertaken in relation to the first planning application submitted to the Council and therefore relates to the development subject of this appeal. NIA2 was prepared in relation to the scheme proposed under the second planning application.
12. NIA1 assesses the effect of the 'outdoor dining area' on the first-floor window located above the dining area, which is identified as the nearest identified receiver. The assessment concludes that 'compliance with the established criterion is feasible', and that the noise emissions from the proposed operations at the receiver are 'expected to be at a level indicative of the sound source having a low impact as specified in the British Standard'.
13. Notwithstanding these conclusions, NIA1 recommended measures to minimise the predicted noise impact, including carrying out regular patrols to monitor and control behaviour to minimise unreasonable noise due to patrons. This would place significant reliance on restaurant staff to intervene when customers are found to be making excessive noise. Such measures are likely to be difficult to enforce and challenging for restaurant staff engaged with potentially uncooperative customers. Other recommended measures included limiting music played in the outdoor area to 50dB(A) and ensuring that the area was closed by 23:00 and all external doors and windows closed, which would add further workload on staff.
14. NIA1 also does not appear to consider the potential effect on the nearby residential properties on Ballbrook Avenue and Lyndhurst Road, which adjoin the narrow alleyway which runs to the side and rear of the parade of units in which the appeal premises sits. In particular, the private external amenity spaces of many of the properties on Ballbrook Avenue and Lyndhurst Road are in very close proximity to the appeal site. The NIA does not assist with understanding the effect on the living conditions of occupiers of these

additional neighbouring properties, either in terms of noise levels within the dwellings or in their external amenity spaces.

15. After reviewing NIA1, the Council's Environmental Health Team objected to the development. It was considered that the predicted noise levels in the assessment seemed very low, particularly given that a normal conversation is usually about 60dB and noise from inside a restaurant can reach between 70-80db depending on the capacity. It was also considered that regardless of the predicted noise levels from customers which were averaged over an hour, customers laughing, or shouting will produce much higher noise levels that would be well above the average noise levels. These would likely be intrusive and detrimental to the amenity of nearby residents. Finally, the Environmental Health Team did not want any music being played in the external area or the area being used until 23:00 which was considered too late given the proximity of nearby noise sensitive receptors.
16. The appellant refers to the Environmental Health team's lack of objection in respect of NIA2. The conclusion of NIA2 was broadly the same as NIA1, albeit with a reduction in the hours of use of the external area to no later than 21:00 and amplified music not being played. The Environmental Health team accepted that these changes, along with the raised brick boundary walls which formed part of the second planning application for which NIA2 was prepared in relation to, should result in the noise levels not being detrimental to the amenity of residents.
17. Whilst I accept that planning conditions could be imposed restricting the use of the outdoor area to no later than 21:00 and that no amplified music should be played, I am not satisfied that these measures alone would be sufficient to ensure that the noise levels would not be detrimental to the living conditions of occupiers of nearby residential properties. I also have concerns that a condition requiring the area to be vacated by 21:00, or 22:00 as suggested by the Council, would be difficult to enforce particularly during busy periods when staff are busy or there were no alternative tables or seating available internally.
18. I also have concerns over the precision and adequacy of the noise assessment given that the executive summary refers to the report being 'designed to be suitable to discharge typical plant noise planning conditions, as per our original scope of work' and that 'the report should not be relied upon for other reasons, such as the detailed design of mitigation measures'. The assessments have also taken anticipated noise emissions from a shisha bar with a capacity of 50 people. However, no information is provided regarding the location or setting of the shisha bar, or the time of day that these noise readings were taken. Similarly, the assessments appear to assume that the shisha bar would operate in the same way as the restaurant at the appeal site.
19. For the above reasons, on the basis of the information before me, I am not satisfied that the development would avoid having a detrimental effect on the living conditions of occupiers of nearby residential properties, in relation to noise and disturbance. As such, the development conflicts with Policies C10, DM1, and SP1 of Manchester's Development Framework Core Strategy Development Plan Document (adopted July 2012) (CS) and saved Policies DC10.1 and DC26.1 of the Unitary Development Plan for the City of Manchester (adopted July 1995) (UDP).

Character and Appearance

20. The appeal relates to a 3-storey red brick terraced property with a cast iron and glass canopy to the front. The property is situated on the north side of Lapwing Lane and lies within the Ballbrook Conservation Area (CA). I therefore have a statutory duty to pay special attention to the desirability of preserving or enhancing the character or appearance of the conservation area.
21. I consider the significance of the CA, insofar as this appeal is concerned, to derive from the architectural quality of the buildings. These buildings are predominantly residential in nature and date from the Edwardian and Victorian periods, with tree-lined roads fronted by garden walls. Though the CA is predominately residential in character, the parade of shops with cast-iron and glass canopy on Lapwing Lane, of which the appeal premises forms a part, is an example of a shopping arcade from these periods.
22. The Council considers that by enclosing the rear yard area, the opportunity to accommodate waste bins in this space is removed. This is considered contrary to the general character of open yards to the rear of the parade and results in an accumulation of waste bins in the alleyway to the side and rear of the parade, which has a negative impact on the character and appearance of the CA.
23. I share the appellant's view that regardless of the timber and PVCu canopy, larger commercial waste bins could not be stored within the rear yard of the appeal premises due to the width of the rear gate. The rear yard area is also slightly raised above the level of the alleyway with there being a small step. This would provide further complications if attempting to bring large commercial bins into or out of the yard. The potential to store smaller domestic sized waste bins either within the rear yard or in the building itself is also not inhibited by the canopy. Accordingly, I do not find that the development removes the current ability to store bins within the appeal site itself or contributes to the accumulation of waste bins in the adjacent alleyway.
24. I saw during my visit that the alleyway to the rear and side of the parade was already being used to store a significant number of waste bins. These included larger commercial waste bins as well as smaller domestic size bins. As several of the bins had their property address on them, I was able to identify that the bins belonged to both ground floor commercial premises and residential units on the upper floors. Although some of the premises retain bins within their rear yard, other rear yards are used for other purposes or have structures or extensions built upon them, such as the nearby Sushi restaurant. The presence of bins within the alleyway is therefore already established.
25. Although several of the bins are stored along the alleyway to the rear and therefore not visible in the wider area, at the time of my visit a number were positioned along the alleyway to the side which were visible from Lapwing Lane. These bins were predominately the larger commercial bins and, despite being visible, they were not unduly prominent in the wider street scene. Longer distance views of the bins are not afforded from either direction along Lapwing Lane or from Palatine Road, and therefore they are not significantly detrimental to the character or appearance of the CA. In addition to the bins not having a significantly detrimental effect, for the reasons given above I do not consider that the development has resulted in additional waste bins from the appeal premises being positioned on the alleyway in any case.

26. The Council has also referred to the design of the canopy and the materials used in its construction. Although its materials differ from those of the host building, the rear service yards of premises in the parade appear to have been subject of various additions and alterations over time and are not therefore of any significant architectural merit. Furthermore, by virtue of its flat roof design and its secluded location the development is not visible within the wider area. Therefore, I find that the design of the canopy does not result in harm being caused to the character or appearance of the CA.
27. In view of the above I find that the development does not cause harm to the character or appearance of the CA. It therefore has a neutral effect, preserving the character and appearance of the CA. As such it would accord with Policies EN1, EN3, and EN19 of the CS and Policy DC18.1 of the UDP.

Conclusion on Ground (a)

28. There would not, I conclude, be any harm caused to the character or appearance of the CA. However, I am not satisfied that the development would avoid having a detrimental effect on the living conditions of occupiers of nearby residential properties, in relation to noise and disturbance. The development therefore conflicts with the development plan when considered as a whole and there are no material considerations, either individually or in combination, that outweigh the harm identified and the associated development plan conflict.
29. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal on ground (a) fails and the deemed planning application is refused.

Ground (g)

30. The appeal on ground (g) is that the time given to comply with the requirements of the notice is too short.
31. The appellant argues that a compliance period of four months is unreasonably short due to the pressures faced by small businesses and the adverse impact that compliance would have on the business, including the costs that would be incurred in removing the structure and the loss of the extra space. The appellant has suggested a compliance period of six months.
32. While I appreciate the economic pressures currently faced by many businesses following the Covid-19 pandemic and the more recent cost of living crisis, I am not persuaded that the removal of the timber and PVCu canopy would be particularly troublesome or costly. The required works would also not prevent the business from continuing to operate by utilising both the internal seating area within the premises itself and the external seating area to the front. Furthermore, and by the appellant's own admission, following the removal of the canopy the rear yard could still be used as part of the existing lawful use of the premises including its use as an outdoor seating or dining area.
33. I therefore find that four months is a sufficient and reasonable period of time to comply with the requirements of the notice. Accordingly, the appeal on ground (g) fails.

Conclusion

34. For the reasons given above, I conclude that the appeal does not succeed. I have upheld the enforcement notice and refuse to grant planning permission on the deemed application.

David Jones

INSPECTOR