



Appeal Decision

Site visit made on 10 October 2023

by L Douglas BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th NOVEMBER 2023

Appeal Ref: APP/A5840/C/23/3317665

The Property known as Public Viewing Platform at St Mary Overies Dock, Cathedral Street, London SE1 9DE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended ('the Act'). The appeal is made by Mitchells & Butlers Retail Limited against an enforcement notice issued by the Council of the London Borough of Southwark.
- The notice was issued on 24 January 2023.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the Land from public highway used as an accessible public viewing platform to a Sui Generis mixed use of public highway and Drinking Establishment.
- The requirements of the notice are: Cease the use of the viewing platform for any Sui Generis (Drinking establishment) purposes reverting it to (Sui Generis) public highway use only. Remove all tables, seating, signage and barriers from the viewing platform and any other structures, fixtures and fittings used in association with the unauthorised use. Remove from the site and surrounding areas any debris resulting from the carrying out of steps 1 and 2.
- The period for compliance with the requirements is 28 days.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), and (f) of the Act. 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.

Summary of Decision: The appeal is allowed, the enforcement notice is corrected and quashed, and planning permission is granted in the terms set out below in the Formal Decision.

The Notice

1. The allegation stated in the notice refers to an unauthorised material change of use of land from 'public highway used as an accessible public viewing platform'. I find this description of the claimed former use of the land potentially confusing as it refers to 2 different uses. It is not essential for the alleged breach of planning control to refer to the former use of the land, and this unnecessary text can be deleted from the notice.
2. I also find the alleged unauthorised use stated in the notice to be inaccurate. The land the subject of the notice, as set out below, has not been formally recognised as a public highway and there is insufficient evidence before me to suggest it is being used as a public highway and drinking establishment. Also, as discussed under the ground (b) appeal, the area is being used as a viewing platform and a drinking/eating area, which is a mixed use similar to what has been alleged in the notice. I can correct the notice so that it refers more accurately to the unauthorised material change of use which has taken place.
3. Correcting the notice as outlined above, using my powers under section 176 of the Act, would not cause injustice to any parties as there is no dispute that the land is being used as a viewing platform and an area to consume food and

drink, including by customers of the Old Thameside Inn (the OTI) in accordance with licences obtained by the appellant. This has implications for the appeal under ground (a), but not to such an extent that further submissions from the parties are necessary in that regard. I shall correct the notice accordingly.

Ground (b)

4. To succeed under this ground of appeal the appellant would need to demonstrate that the breach of planning control alleged in the enforcement notice has not occurred.
5. The land the subject of the notice is a viewing platform and a drinking/eating area comprising a boardwalk accessed by stairs and a ramp from Pickfords Wharf. It is adjacent to, and offers views of, the Thames and a replica of the Golden Hinde ship in what has been described by the main parties as 'St Mary Overies Dock' (the Dock). It is also adjacent to the OTI, which is a drinking establishment. The land does not lead anywhere, other than to an outside terrace exclusive to the OTI and a blank wall. The land is privately owned. In addition to being used as a viewing platform and drinking/eating area, the land provides access to the terrace associated with the OTI and a gated access to the Dock.
6. Part of the land has been licensed to the appellant by GMS Estates Limited to be used as a seating area for the consumption of food and drink by customers of the OTI since 24 August 2016¹. I am also advised that a Premises Licence has been obtained to allow customers of the OTI to consume alcohol on part of the land, without table service.
7. The boardwalk was constructed in the 1980s as part of the redevelopment of the area. Improvement works were carried out to it in the 1990s, including the construction of the ramped access. Those works are said to have been publicly funded, but there is nothing before me to suggest that means the land formed or forms part of the public highway, even if the public have been able to access it for more than 20 years.
8. Since its construction, the evidence indicates the boardwalk has been used to provide access around the building occupied by the OTI and the Dock, in addition to being a viewing area accessible by the public with permission from the freeholder. The Council claim that part of the land started to also be used as a seating area for customers of the OTI in 2016, which would be consistent with the licences I have been referred to.
9. Although the land has been used to provide access around the building occupied by the OTI, I am unconvinced that the land has ever had a primary use for purposes ancillary to the building. This is because that access route is convoluted and physically separated from the other outside seating areas of the OTI. Similarly, its provision of an access point to the Dock appears to be a minor element of how it is used now and how it has been used historically, based on everything I have read and seen.
10. The land the subject of the notice had a primary use as a viewing platform since its construction, with it being freely used by members of the public for that purpose. This continued until 2016, when there was a change in the use of the land to a mixed use comprising a viewing platform and a drinking/eating

¹ As set out in the sitting-out licence between the appellant and GMS Estates Limited, dated 28 March 2018

area. That was a material change of use, brought about as a result of customers of the OTI consuming food and/or drink on a large part of the land, which was facilitated by the placing of tables on that part of the land and the licences obtained by the appellant.

11. I do not doubt that some members of the public visiting the viewing platform prior to 2016 would have consumed food and/or drink there which had not been purchased at the OTI. Some members of the public probably continue to do that on the land. However, there is insufficient evidence to suggest that the appeal site has always had a mixed use as a viewing platform and a drinking/eating area. The evidence indicates that there was a significant intensification of drinking/eating on the viewing platform which took place in 2016, bringing about the material change of use to a mixed use. Thus, as a matter of fact and degree, the breach of planning control alleged in the notice as corrected has occurred.
12. The appeal under ground (b) therefore fails.

Ground (a) and the deemed application for planning permission

13. The main issues are the effect of the material change of use of the land to a mixed use as a viewing platform and a drinking/eating area on:
- the safety and ease of movement of pedestrians, with particular regard to the 'Thames Pathway';
 - the provision of public open space; and
 - the character and appearance of the area, with particular regard to the Borough High Street Conservation Area (CA).

Safety and Ease of Movement

14. The land remains accessible from Pickfords Wharf by stairs and a ramp. At the time of my site visit, when the OTI was closed, 6 barrel tables on the land did not greatly restrict movement or the ability to look out over the Thames, including by any people reliant on pushchairs, wheelchairs, or mobility scooters. I can see how pedestrian movement would be more difficult when large numbers of people use the land for drinking/eating, but similar issues would arise when large numbers of people use the land for looking out over the Thames without eating or drinking.
15. The placing of tables on part of the land encourages visitors to eat/drink and congregate in a particular area. Controlling the numbers and positions of tables and any other items, such as chairs, barriers or bins, could ensure safe and easy movement of people. I am mindful that as privately owned land, with no formally confirmed public right of way across it, the freeholder appears to be entitled to restrict public access if doing so would not bring about a breach of planning control.
16. I have not been provided with evidence which suggests the change of use creates any pedestrian safety concerns different to those associated with the use of the land solely as a viewing platform. Considering that lack of evidence and the length of time the land has been used as a viewing platform and a drinking/eating area, it appears very unlikely that the change of use has

brought about any unacceptable harm to the safety or ease of movement of pedestrians.

17. Furthermore, conditions could control the numbers and positions of any items placed on the land, such as any proposed tables, chairs, barriers, or bins. This would be sufficient to ensure the ongoing safety and ease of movement of pedestrians.
18. The Council has suggested that the appeal site forms part of the Thames Pathway/Path/Walk and that the change of use has hindered access to that route. Aside from whether the appeal site formally forms part of any such route, which has not been demonstrated, the land remains free to be accessed by members of the public to look out over the Thames and the surrounding area. The bins and tables provided on the land, which can be controlled by condition, encourage its use in that manner, consistent with the purposes of the Thames Pathway/Path/Walk.
19. For these reasons I find the change of use is not contrary to Policies D5, D8, E10, T2, T3, and T4 of the London Plan (2021) (the LP) and Policies P14, P25, P50 and P51 of the Southwark Plan 2019-2036 (2022) (the SP). These policies require, in general and amongst other things, development to support the safe, efficient, and inclusive movement of people, including those who rely on pushchairs, wheelchairs, and mobility scooters. Policy P25 specifically relates to the River Thames Path and aims to maintain and enhance existing facilities that support the use and enjoyment of the river and activities associated with it.

Public Open Space

20. I have not been provided with evidence which suggests the land the subject of the notice is defined as public open space in the development plan, or that it is otherwise formally designated as public open space. The evidence indicates it is privately owned land and it is accessible to members of the public with permission from the freeholder. The change of use does not prevent members of the public from being able to access the land.
21. In addition, the change of use does not have an adverse impact on the provision of public open space, or any other leisure, arts, cultural, or community facilities. However, even if the land was considered to form public open space or any such facilities, the change of use has only a negligible and most insignificant effect on the provision of such space and facilities across the Borough.
22. I have also taken into account comments from a local resident referring to the OTI as an important part of the local community, with tables on the land the subject of the notice often being used by the public for picnics. The land is also managed by the OTI to ensure it is clean and safe for public use. This suggests the change of use has not had a harmful effect on publicly accessible space used in a similar manner to other community facilities.
23. I do not therefore find any conflict with Policy G4 of the LP, or Policies P46, P47, and P57 of the SP. These require the retention of protected and designated open space, and leisure, arts, cultural, and community facilities, amongst other matters.

Character and Appearance

24. The appeal site forms part of the CA. Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 places a general duty on me to pay special attention to the desirability of preserving or enhancing the character or appearance of the CA.
25. My attention has been drawn to an appeal decision² which relates to a retrospective planning application for 'a kiosk and the change of use of open land to retail' at The Golden Hinde Shop. In that case, the appeal was dismissed because that development failed to preserve or enhance the character or appearance of the CA. I saw the kiosk the subject of that appeal during my site visit. I do not have the full details of the development considered as part of that appeal, but it appears to have quite a different effect on the character and appearance of the area compared to the development the subject of this appeal. Moreover, each case must be considered on its own merits.
26. The CA covers an extensive area, split into 4 sub-areas in the Council's CA appraisal (2006). From everything I have read and seen, the significance of the CA appears to largely rely on the mix of high-quality buildings which relate to the diverse history of the area, including its sometimes grim social and industrial past. It is now largely a commercialised tourist area comprising a mix of business and tourist uses, with cobbled streets and pedestrianised areas. Views of the Thames and the Dock in the pedestrianised area around Pickfords Wharf, and the mix of tourist uses and the crowds they attract, all contribute to the attractive and lively character and appearance of the area.
27. The use of the land as a viewing platform and a drinking/eating area is entirely consistent with the surroundings. The tables and bins placed on the land are modest additions to the viewing platform, and the groups of people they would attract to stand and drink/eat in this area would be typical for the CA. Those items, and the customers who eat and/or drink on the land do not unreasonably obstruct views of the Thames or the Dock or create a congregation of people uncharacteristic to the CA. I therefore find that the change of use does not harm the significance of the CA, and that it is consistent with and conserves the character and appearance of the CA.
28. Furthermore, the change of use does not detract from any views of the Thames, the Golden Hinde, or buildings of interest. It does not hinder or affect any views across the Thames of other parts of London. The land continues to be in part use as a viewing platform and items placed on that land could be controlled by condition.
29. The change of use is therefore consistent with Policies D4 and HC1 of the LP and Policies P13, P14, P20, and P21 of the SP. These seek to achieve development of high-quality design appropriate to its context, which does not harm the significance of heritage assets and preserves or enhances the character or appearance of conservation areas, amongst other things.

Other Matters

30. In addition to the development plan policies referred to above, the notice also alleges that the change of use is contrary to Policy G6 of the LP, Policies P22,

² Appeal ref: APP/A5840/W/22/3313780

P56, P58, and P59 of the SP, and chapters 2, 8, 9, 12 and 16 of the National Planning Policy Framework (the Framework). Policy G6 of the LP relates to biodiversity and access to nature. Policies P22, P56, P58 and P59 of the SP relate to Borough views, protection of amenity, open water space, and green infrastructure respectively.

31. I have not been referred to any evidence which suggests the change of use may affect any Sites of Importance for Nature Conservation, biodiversity, or access to nature. I find no conflict with Policy G6 of the LP.
32. The material change of use does not affect Borough views of any significant landmarks or townscape, or the specific views identified in Policy P22 of the SP. I do not find any conflict with Policy P22.
33. The Council clarifies that no 'amenity issues in general' have been identified as a result of the change of use. There appear to be residential properties in the local area, but I am unconvinced that the change of use has had any noticeable effect on the living conditions of occupants of those properties, compared to how the land has been used historically. The change of use does not cause unacceptable harm to the living conditions of any nearby residents and does not conflict with Policy P56 of the SP.
34. I have not been provided with any evidence that the appeal site is within, or that the material change of use affects, any designated Open Water Space, as referred to by Policy P58 of the SP. I therefore find no conflict with this policy.
35. Policy P59 of the SP relates to major development, explaining that it must provide green infrastructure, publicly accessible open space, and green links. The change of use does not comprise major development and I find no conflict with this policy.
36. For the reasons set out above with regard to development plan policies relating to similar matters, I do not find any conflict with chapters 2, 8, 9, 12 and 16 of the Framework. They cover a range of matters, including those seeking to achieve sustainable development, promote healthy and safe communities and sustainable transport, make effective use of land, and conserve and enhance the historic environment.

Conditions

37. With regard to landscaping, there is little opportunity for soft landscaping at the appeal site. Moreover, soft landscaping would not be necessary to make the change of use acceptable. A condition requiring the approval of all items placed on the land as part of a hard landscaping scheme would protect the safety and ease of movement of people visiting the land for viewing purposes, and protect the character and appearance of the CA. This would include the numbers, designs and positions of any bins, barriers, tables, or chairs. No other details of landscaping would be necessary to make the development acceptable.
38. As the development has already taken place, I have amended the condition suggested by the Council to ensure that the change of use could be enforced against if the required details are not submitted, approved and implemented within specific timescales. In this instance, given the details required, a period of 2 months would be reasonable for the submission of details for approval.

39. A condition relating to the hours of use of the land would not meet the tests set out at paragraph 56 of the Framework. There is nothing before me to suggest there have ever been any controls over the hours that the land is used by any persons. This includes any people who are not customers of the OTI, but who may choose to eat or drink on it. A condition seeking to prevent the use from 'affecting general public access to the land' would lack precision and be unreasonable, contrary to the tests of the Framework.
40. The land does not include any land forming part of the drinking establishment at the OTI. I am therefore unable to reasonably restrict use of the land by customers of the OTI to specific hours, much in the same way I would be unable to reasonably restrict the hours of its use by customers of any other businesses operating outside the appeal site. A condition restricting the hours when anyone could consume food or drink on the land would be unreasonable for the landowner to comply with, considering the land is free to be accessed by members of the public. Some of those people may choose to consume food or drink on the land, consistent with how the Council wants the land to continue to be used.
41. A condition controlling the hours when alcohol may be consumed on the land would have the same issues as a condition controlling the hours when food or drink may be consumed on the land. Such a condition could force the owner of the land to restrict public access to certain hours, possibly to match the opening hours of the OTI, which would be an undesirable outcome for all parties.
42. I have not been made aware of any evidence of noise and disturbance from customers of the OTI using the land causing harm to the living conditions of nearby residents. I therefore see no reasonable need for a condition in this particular case to control the hours of use of the land or the consumption of food, drink, or alcohol on the land, which may be in addition to any similar controls set out in the appellant's licences.

Conclusion

43. For the reasons given above, the appeal succeeds on ground (a). I shall grant planning permission for the material change of use of the land to a mixed use as a viewing platform and a drinking/eating area as described in the notice as corrected, subject to a condition.
44. The appeal on ground (f) does not therefore fall to be considered.

Formal Decision

45. It is directed that the enforcement notice is corrected by the deletion of the text 'from public highway used as an accessible public viewing platform to a Sui Generis mixed use of public highway and Drinking Establishment' at paragraph 3.1 of the notice and its substitution with the text 'to a mixed use as a viewing platform and a drinking/eating area'.
46. Subject to the correction, the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the material change of use of the land to a mixed use as a viewing platform and a drinking/eating area at The property known as Public Viewing Platform at St Mary Overies Dock, Cathedral

Street, London SE1 9DE as shown edged in red on the plan attached to the notice, subject to the following condition:

- 1) The mixed use of the land as a viewing platform and a drinking/eating area shall cease and all items, including any tables, chairs, bins and barriers associated with that mixed use shall be removed from the land within 28 days of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 2 months of the date of this decision a hard landscaping scheme to include details of any and all items placed on the land, such as the numbers, designs and positions of any tables, chairs, bins, and/or barriers shall have been submitted for the written approval of the local planning authority and the details shall include a timetable for its implementation.
 - ii) If within 6 months of the date of this decision the local planning authority refuse to approve the hard landscaping scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted hard landscaping scheme shall have been approved by the Secretary of State.
 - iv) The approved hard landscaping scheme shall have been carried out and completed in accordance with the approved timetable.
 - v) Upon implementation of the approved hard landscaping scheme, the numbers, designs and positions of all items specified in that scheme shall thereafter be maintained, and no other items including any other tables, chairs, bins or barriers shall be placed on the land.
 - vi) In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

L Douglas

INSPECTOR