



Appeal Decision

by S M Watson BA(Hons) MCD MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 22 January 2024

Appeal Ref: APP/E5330/X/22/3291974

11-13 Greenwich Church Street, Greenwich, SE10 9BJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Zinnureyin and Mrs Perihan against the decision of Royal Borough of Greenwich Council.
 - The application Ref 21/3905/CE, dated 29 October 2021, was refused by notice dated 24 December 2021.
 - The application was made under section 191(1)(a) and (b) of the Town and Country Planning Act 1990 as amended.
 - The use and development for which a certificate of lawful use or development is sought is the "use of rear yard for seating and shisha and a temporary pergola fixed to a timber deck in the rear yard and within the curtilage of a listed building".
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Decision

1. The appeal is dismissed.

Procedural Matters

2. I was unable to gain access to the rear yard when I visited the property. This decision is therefore based on the documents submitted, including the photographs.
3. An LDC is not a planning permission. Therefore, for the avoidance of doubt, the planning merits of the operations and use are not relevant in this appeal.

Main Issue

4. The main issue is whether the Council's decision to refuse to issue a LDC was well-founded. This turns on whether the use and operations for which the certificate is sought were lawful on the date the applications were made.

Reasons

The Pergola

5. The application for the LDC was submitted on 29 October 2021. An application for an LDC is to determine whether the use or operation was lawful on the date that the application was submitted. In respect of the pergola, therefore I must determine this against the permitted development right that was in force at the time. At that time, Schedule 2 Part 4 Class BB of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) granted planning permission as follows:

Until the end of 1st January 2022, the provision of any moveable structure within the curtilage, and for the purposes, of—

a) a building used for a purpose within—

(i) article 3(6)(p) or (q) (drinking establishments etc.) of the Use Classes Order; or

(ii) Class E(b) (sale of food and drink etc.) of Schedule 2 to that Order

6. The pergola is a pre-fabricated structure with 8 aluminium posts and a fabric canopy supported within a frame constructed of multiple metal bars. It is a large and substantial structure and although the appellant says that it is not attached to the listed building, it appears to be supported by the parapet wall of the appeal building as well as being supported by the aluminium posts. It is constructed over the decking which forms a floor. It appears from the pictures that there is a concrete insert in the decking to which the frame of the pergola is attached by screws or bolts.
7. A letter from the supplier says that the pergola can be erected in about 6 hours and dismantled in no more than 2 hours. This is 8 hours in total which is fairly significant, although this factor is not determinative on its own in respect of whether the structure is “moveable”.
8. The pergola fits the yard upon which it has been built and the parapet wall is required to support it. No explanation has been provided to explain whether it could be used on another site or where it might be moved to.
9. Given its large structure, the use of the wall to support it, its fixings to the site, the lengthy amount of time to dismantle and reconstruct it, and the lack of explanation about how it could be used or fitted in another location, I do not consider that as a matter of fact and degree that the pergola is moveable.
10. The decking has also been constructed to fit the site on which it is attached. It fits around various site features such as a downpipe and it has concrete inserts to accommodate the posts of the pergola, i.e., the decking is of a bespoke construction. The appellants acknowledge that it would have to be dismantled to remove it from the site but as it has been designed around the specific site and pergola, I am not persuaded that it could be accommodated elsewhere as a single structure. The submitted photographs appear to show lighting in the steps of the decking and this apparent inclusion of lighting within it adds to its complexity and bespoke nature. Therefore, as a matter of fact and degree, the decking is not moveable.
11. The appellants have cited the online Collins Dictionary in respect of the definition of “moveable”. This gives an example “the wooden fence is movable”. The appellant says that a wooden fence would be fixed down. They say that the Oxford English Dictionary defines movable as “that can be moved”. The pergola and the decking are more complex structures than a fence might be.
12. The appellants say that the Council has accepted that the decking and pergola are moveable because it quotes the words “The temporary decking and pergola” in its reason for refusal. However, the word “temporary” reflects the appellant’s description of the development and the Council’s case is very clear that the structures are not moveable. Furthermore, “temporary” does not have

the same meaning as “moveable”. It is the word “moveable” that is in the GPDO.

13. For the above reasons and as a matter of fact and degree, I do not consider that the pergola or the decking, either alone or in combination, comprise moveable structures and therefore they were not permitted development or lawful on the date the application was made.

The use of the rear yard for customers

14. For the purposes of the Act uses and operations are lawful at any time if— (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
15. Thus, failure on either (a) or (b) means that the use was not lawful on the date of the application and a certificate cannot be issued. The burden of proof falls on the appellant and the standard of proof is the balance of probability.
16. My attention has not been drawn to any enforcement notice served in relation to the use. There is no claim with documentary evidence that the use of the rear yard has been established over time.
17. The appellants’ case is that planning permission is not required for customers to use the outside area as the yard is part and parcel of the use of the premises as a restaurant. They say that putting out tables and chairs does not require planning permission. However, the Council claims that (i) there might have been a condition on what it says is the original planning permission (84/0026/HB) for the use which restricted the outside area and that (ii) the outside area might not have been part of the planning unit for which permission for the use was granted.
18. The appellants say that it is unlikely that a condition restricting the use of the outside area would have been attached to a planning permission. They say this is because there were no houses behind the site when, according to them, planning permission was granted, i.e., there were no residents behind the premises who could be disturbed. They say that there is a corresponding Listed Building Consent which, they claim, would probably have had the same conditions attached to it as the planning permission. No condition restricting the outside area is attached to the Listed Building Consent.
19. The Listed Building Consent referred to is under Council reference HB26/84/6/86/11.7 which was granted in 1986 for “alterations in association with change of use to restaurant and formation of self-contained flats over”. However, Listed Building Consent is for works to a listed building and therefore it would be wrong of the Council to copy over conditions from a grant of planning permission if they were not relevant to the Listed Building Consent.
20. Furthermore, although the houses behind the site were constructed later, there are residential properties above the shop units. The appellant says that there are not many such units. Nevertheless, the Listed Building Consent refers to flats over the restaurant itself. Any flats above the appeal premises or above surrounding commercial units may have provided a reason to impose a condition restricting the yard. I appreciate that it is frustrating for the appellant

that the Council cannot produce the claimed planning permission but without it, I have insufficient evidence to demonstrate that such a condition was not attached.

21. The appellant also says that the red edge would have included the yard as it provides access to the flats. However, without an approved plan I have no evidence of the extent of the red edge. Nevertheless, even if a relevant planning permission did incorporate the yard, this does not overcome the lack of a copy of a planning permission itself and the possibility that a restrictive condition may have been imposed.
22. The appellants claim that the Business and Planning Act 2020 (BPA) granted permission for the use of the outside area for customers. However, no specific part of that Act has been referred to in the appellants' case. I have examined the BPA and no part of it would have granted planning permission for the use of the yard.
23. In summary, I have no planning permission before me to demonstrate that the use of the rear yard for customers is lawful. The onus of proof is firmly on the appellant to provide evidence which is sufficiently precise and unambiguous to justify the grant of a certificate. Overall, I find that the appellant's evidence, on the balance of probabilities, does not meet this requirement. As with all LDC applications, it is open for fresh applications to be made if, for example, other evidence comes to light.

Conclusion

24. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of "use of rear yard for seating and shisha and a temporary pergola fixed to a timber deck in the rear yard and within the curtilage of a listed building" was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Siobhan Watson

INSPECTOR