



Appeal Decision

Site visit made on 8 December 2023

by M. P. Howell BA (Hons) Dip TP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5TH FEBRUARY 2024

Appeal Ref: APP/Y1110/C/23/3327495

Land at 38 Commercial Road, Exeter EX2 4AE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Ian Mitchell (Kennaway Estates Limited) against an enforcement notice issued by Exeter City Council.
- The notice was issued on 28 June 2023.
- The breach of planning control as alleged in the notice is without planning permission:
 1. The unauthorised change of use of part of the ground floor (in the north-western area of the building) of 38 Commercial Road, fronting Commercial Road, from retail class E to use for parking vehicles.
 2. Installation of roller shutter on Commercial Road elevation on north elevation of 38 Commercial Road, Exeter EX2 4AE.
- The requirements of the notice are to:
 1. Cease use of the ground floor as vehicular parking; and
 2. Remove roller shutter from north elevation fronting Commercial Road.
- The period for compliance with the requirement is: 2 (two) months.
- The appeal is proceeding on the ground set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.

Summary Decision: The appeal is dismissed, and the enforcement notice is upheld with variations in the terms set out below in the Formal Decision.

Matters Concerning the Notice

1. Paragraph 1 of the Enforcement Notice (Notice) states that there has been a breach of planning control falling within section 171A(1)(a) of The Town and Country Planning Act 1990 as amended (the 1990 Act), which is the carrying out of development without the required planning permission. Development is defined in section 55(1) of the 1990 Act as including 'the making of any material change in the use of any building or other land.'
2. Whilst the Notice refers to the 'unauthorised change of use of the land' it does not allege that a 'material' change in the use of the land has occurred. It therefore follows that the allegation in the Notice would not constitute development for the purposes of section 55(1) of the 1990 Act. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land. As the breach of planning control alleged in the Notice does not constitute the development of land, it follows that planning permission would not be required for it. The Notice is defective in that respect.
3. However, having regard to the appellant's case and the appeal plead on ground (c), they have clearly understood that the allegation was intended to refer to a material change of use. As such, I am satisfied that a correction of the Notice to include reference to a material change of use would not cause injustice in this case. As such, in paragraph 3 of the Notice, the word 'unauthorised' shall be deleted and substituted with the word 'material.'

4. In paragraph 3, part 1, delete the words '(in the north-western area of the building) of 38 Commercial Road, fronting Commercial Road.' In paragraph 2, Part 2, delete the words 'on north elevation of 38 Commercial Road, Exeter, EX2 4AE.' In respect of paragraph 3, Part 1 and 2, the land has already been identified once and there is no need to set it out again or the address.
5. In paragraph 5, step 1, delete all the words and substitute the words 'cease the use of part of the ground floor for the parking of vehicles.' The change to the wording in the requirements is simply to ensure it matches the breach set out in the allegation. In paragraph 5, step 2, insert the word 'the' after 'remove' and delete the words 'from north elevation.'
6. The variations set out above do not fundamentally change the matters alleged or the requirements. They are simply for precision, consistency and to remove superfluous words.

Background

7. Historical permissions are referred to, which are material to the determination of the appeal. These include the original permission for the change of use and extension to 38 Commercial Road (Grade II Listed Building) to form seven apartments, a restaurant and retail premises at ground floor, and an accompanying Listed Building Consent (LBC)¹. Further permissions allowed Non-Material Amendments (NMAs) to that original permission and an amended LBC in 2017². Discharge of condition applications agreed in 2019, discharged conditions 3, 4, 7, 8, 11 and 16 of the approved planning permission³, as well as conditions 3 and 4 in respect of the LBC⁴.
8. There are other permissions outlined in the planning history, but for the purposes of this appeal, the ones identified above are relevant.

The Appeal on Ground (c)

9. The appellant sets out in his Statement of Case that he does not contest the material change of use alleged in the Notice. He also confirms that the use of part of the ground floor of the unit for the parking of vehicles will cease in accordance with the requirements of the Notice. However, he contends that the roller shutters installed on the Commercial Road elevation have been granted planning permission. To succeed on ground (c), the appellant must demonstrate that, on the balance of probability, the matters alleged in the notice do not constitute a breach of planning control. The burden of proof is on the appellant.
10. The drawing approved as part of the original permission, reference 0087_COM_PL_3.0 Rev B, shows a polyester powder coated aluminium framed glazed entrance door, with an annotation indicating 'Security roller shutters: details to be agreed.' In this regard, some form of security shutter had been granted in principle as part of the original 2014 permission, but subject to details being agreed at a later stage. An NMA application was permitted to make changes to the elevations of the originally approved plans, which are described as a redesign of balconies and increasing the width of patio doors.

¹ Council references 14/4834/03 & 14/4835/07 (LBC)

² Council references 16/0371/NMA & 16/1464/LBC

³ Council reference 16/0242/DIS

⁴ Council reference 16/0243/DIS

11. An NMA does not supersede the original permission, allowing the appellant to either implement the original permission granted or the permission with the agreed non-material changes. However, the evidence with the appeal does not confirm whether the originally approved scheme was implemented or if the changes to the elevations agreed as part of the NMA were carried out. Also, as no specific details of the NMA were submitted with the appeal, such as a decision notice and plans, I was unable to confirm what permission was implemented as part of my site visit. Notwithstanding this, the appellant states that there were no changes to the Commercial Road elevation as part of the NMA application. Accordingly, I must conclude that no further details of the security shutters were set out and granted as part of the NMA permission.
12. The approved plan associated with the discharge of condition application (condition 4), identifies the opening as being on Elevation K. It shows details of a polyester powder coated aluminium framed glazed entrance door, but no security shutter. The appellant acknowledges that the details of the security shutters were not agreed as part of the condition discharge application, but this was because the roller shutter would be an internal doorway. Be that as it may, there is still no formal agreement before me in respect of the details of the security shutters that have been installed on site.
13. An email exchange with the Planning Officer, which occurred during the processing of the condition discharge and NMA applications, has also been provided as evidence. The Planning Officer has indicated in the exchange that an internal shutter system and a perforated shutter design would be the most suitable. However, an email exchange is the informal view of the Officer and not a formal decision authorised by the Council. The evidence submitted in respect of the condition discharge and the NMA applications would also suggest that this was not followed up and agreed as part of those applications. In this regard, the details of the roller shutter have not been formally agreed or given permission by the Council as part of the applications or the email exchange.
14. With the benefit of my site visit, it was noted that the opening does not currently have the polyester powder coated aluminium framed glazed entrance door in place, and a roller shutter with internal housing has been installed in the opening. As such, the works on site do not accord with the approved plan reference 0087_COM_PL_3.0 Rev B. I acknowledge that a glazed door has been damaged and will be replaced. Nonetheless, even if the glazed door is replaced, for the reasons set out above, the details of the roller shutter installed on site do not benefit from planning permission granted as part of the 2014 permission or any subsequent condition discharge or NMA applications.
15. For completeness I have also had regard to the permitted development rights that exist for the extension or alteration of a commercial, business or service establishment as part of Schedule 2, Part 7 Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). However, as the development is within a conservation area, the works would not be permitted by Schedule 2, Part 7, Class A of the GPDO.
16. I understand that the appellant may feel frustrated by the advice that was received, which would suggest that the roller shutters installed might be considered acceptable. However, the appellant has not plead ground (a), and I am not able to consider the planning merits of the roller shutter installed. In this

respect, whether its design and visual impact is acceptable is not a matter that can affect my decision as part of a ground (c) appeal.

17. The installation of a roller shutter is development requiring planning permission. The appellant has failed to show, on the balance of probability, that planning permission has been granted for the installation of the roller shutter. Accordingly, the operational development comprising the installation of a roller shutter, constitutes a breach of planning control. For this reason, the ground (c) appeal fails.

Conclusion

18. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations.

Formal Decision

19. It is directed that the enforcement notice is corrected and varied by: -

In paragraph 3 of the Notice, the word 'unauthorised' shall be deleted and substituted with the word 'material.'

In paragraph 3, part 1, delete the words '(in the north-western area of the building) of 38 Commercial Road, fronting Commercial Road.'

In paragraph 3, part 2, delete the words 'on north elevation of 38 Commercial Road, Exeter, EX2 4AE.'

In paragraph 5, step 1, delete all the words and substitute the words 'cease the use of part of the ground floor for the parking of vehicles.'

In paragraph 5, step 2, insert the word 'the' after 'remove' and delete the words 'from north elevation.'

20. Subject to the correction and variations, the appeal is dismissed, and the Notice is upheld.

M. P. Howell

INSPECTOR