



Appeal Decisions

Site visit made on 24 February 2024

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH JP

an Inspector appointed by the Secretary of State

Decision date: 8th March 2024

Appeal A: Ref APP/D1590/C/22/3295086

193 Eastern Esplanade, Southend-on-Sea, Essex SS1 3AA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mrs Beverley Clark against an enforcement notice issued by Southend-on-Sea Borough Council.
 - The enforcement notice, numbered 21/00061/UNAU B, was issued on 10 March 2022.
 - The breach of planning control as alleged in the notice is:
 - a. Without planning permission, the erection of a building and;
 - b. Without planning permission, related change in use of the land to mixed use as a café (Class E) and residual residential garden (Class C3) creating overall an unauthorised sui generis use.
 - The requirements of the notice are to:
 - (a) cease the use of the land as a café
 - (b) remove the unauthorised building in its entirety
 - (c) remove from the land all associated seating, tables, signage, fencing panels and similar items
 - (d) remove from site all materials resulting from compliance with (a), (b) and (c) above.
 - The period for compliance with the requirements is 3 calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) (g) of the Town and Country Planning Act 1990 as amended. Since an appeal on ground (a) has been made, the application for planning permission deemed to have been made under section 177(5) of the Act as amended falls to be considered.
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Appeal B: Ref APP/D1590/W/22/3296343

193 Eastern Esplanade, Southend-on-Sea SS1 3AA

- 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 Mrs Beverley Clark against the decision of Southend-on-Sea Borough Council.
 - The application Ref 21/02543/FUL, dated 28 December 2021, was refused by notice dated 14 February 2022.
 - The development is described on the application form as an outbuilding with internal alterations for mobile coffee shop.
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Decisions

1. It is directed that the enforcement notice be corrected by replacing the word 'café' with the words 'mixed use as a café and residual residential garden' in Section 5(a). Subject to this correction, Appeal A 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.
2. Appeal B is dismissed.

Procedural Matters

Appeal A

3. The notice requires use of the land as a café to cease (Section 5(a)). However, that it is not the use alleged by the notice said to constitute the breach of planning control (Section 3(b)). The targeted unlawful use is a sui generis mixed use as a café and residual residential garden. I am therefore using my power of correction to ensure the allegation and requirements of the notice match, without injustice to any party.

Appeal B

4. Notwithstanding the description of development set out in the banner heading above, which is taken from the application form, it is clear from the plans and accompanying details that the development comprises 'Erection of kiosk and change of use to cafe with outdoor seating'¹. The Council dealt with the proposal on this basis and so shall I².

Appeal A ground (a) and the deemed planning application (DPA); Appeal B

Main Issues

5. I consider the main issues in both appeals to be the effects of development on:
 - the character and appearance of the site, area and setting of the locally listed building at 193-194 Eastern Esplanade; and
 - the living conditions of nearby residential occupiers, particularly as regards noise, disturbance, intrusion and loss of privacy.

Reasons

Character and appearance

6. The wooden kiosk building with outdoor seating area occupies part of the open, grassed land historically associated with the residential dwelling at 193 Eastern Esplanade (No 193)³, which together with 194 Eastern Esplanade (No 194), constitute a 2-storey locally listed building (LLB)⁴. The appellant refers to these dwellings as cottages with a history at least as far back as the nineteenth century, and it seems to me that this is a given basis for their significance⁵.
7. The LLB is set back somewhat behind properties forming a ribbon of mixed residential and commercial development fronting the esplanade and sea wall. As a result, the appeal site represents a gap in the built form of the linear development and affords views of the LLB from the seafront.

¹ The description of development in the application form is inaccurate: it is a static building and not mobile. Further, the development is the erection of a new building and not alterations to a pre-existing one.

² The appellant's agent also confirmed this to be the description of development within Part E of the appeal form.

³ The appellant (on whom the burden of proof rests and notwithstanding that no 'ground (b)' appeal has been made) seems to dispute use as a residential garden, but she has submitted very limited evidence to contest the Council's assertion that historic maps and publicly available photographs indicate that the space appears to have been historically part of the curtilage of No 193. Further, the appellant has not commented on the Council's appeal submission that "Publicly available photographs from Google Street View dated May 2019 show the picket fence forming the boundary with the main road footpath, and a gate with the number 193 attached to it. Behind the gate is a mown lawn leading to a gap in the privet hedge and behind that the semi-detached dwelling known as no.193 Eastern Esplanade".

⁴ A building or other structure which is deemed to be of local architectural or historic interest.

⁵ Developers are required to include an assessment of a heritage asset's significance (Policy DM5 of the Southend-on-Sea Development Management Document).

8. Before the appeal development, notwithstanding a hedge now obscuring the lower storey of the building, the LLB would have been appreciated across the open area of grassed land within a predominantly residential context (notwithstanding commercial uses nearby) with the gap being framed on one side by a 3-storey residential dwelling (195 Eastern Esplanade, No 195) and on the other by non-ostentatious visitor accommodation within what is essentially a residential terrace in design. Moreso, the fact that the open land was or had been associated with one of the LLB cottages would have caused it and them to have been appreciated within the particular appealing visual context associated with the historic residential character of the LLB.
9. Following the commercial development however, the setting of the LLB (as experienced from prominent views from the seafront) is now dominated by a coffee kiosk of no significant visual interest and a use which involves customers patronising the open space (seated or otherwise) and coming and going onto the land. This is adversely unsympathetic to the erstwhile predominantly residential character of the particular very local but valued context I have described, and significantly harms the setting of the LLB and the character and appearance of the site and area. Information boards at the kiosk with details of the history of the LLB does not mitigate this harm, nor does the fact that the Council and Planning Inspectors⁶ have approved other kiosk-type structures in other locations away from the particular planning context in this case. Further, while the kiosk does not look unlike a beach hut - a common feature of seafronts - its erection in isolation away from the beach and setback on this patch of verdant open land between buildings adds to the incongruity.
10. Policy DM5 (Southend-on-Sea's Historic Environment) of the Southend-on-Sea Development Management Document (2015) (DMD) requires that development proposals that result in the loss of or harm to the significance of a non-designated heritage asset, such as a LLB or frontages of townscape merit, will normally be resisted - although a balanced judgement will be made having regard to the scale of any harm or loss, the significance of the asset and any public benefits. This is consistent with the up-to-date National Planning Policy Framework (the Framework) at paragraph 209.
11. The significance of the LLB, as a pair of historic seafront cottages, is significantly harmed by the effect of the development upon their setting as experienced from views from the seafront. I accept that there are public (and private) benefits provided by the development, and I have read what the appellant and interested third parties have said about them with considerable attention.
12. The development utilises a piece of land in a sustainable location which otherwise might be regarded as under-utilised and in circumstances where a level of even more substantive development would be constrained by the setting of the LLB. The business is clearly popular among many customers and contributes to the community as a place to meet, providing employment and economic activity while contributing to activity and vibrancy in this seafront location. I also acknowledge the benefits an outside location provides in terms of fresh air and accept the point made that the venue may be appreciated by wheelchair and mobility vehicle users (including the elderly) due to ease of access.

⁶ APP/K5600/W/20/3257931; APP/H5960/W/20/3265581. Notably, unlike the Inspectors' findings in those appeals, I find that the development before me provides no positive effect on character and appearance.

13. However, the totality of weight in favour provided by these benefits (public and private) does not outweigh the significant harm to the significance of the LLB. Accordingly, the development (Appeals A and B) does not accord with policies KP2 and CP4 of the Southend-on-Sea Core Strategy (2007) (CS) and policies DM1, DM3, DM5 and DM6 of the DMD, as supported by the Southend-on-Sea Design and Townscape Guide (2009) (DTG), which together aim to ensure that development is well-designed and conserves the historic environment. For the same reasons the appeal developments do not accord with the associated principles of the Framework or National Design Guide.
14. There are no conditions I could reasonably impose that would make the development acceptable on this main issue.

Living conditions

15. It is inherent in the design and character of use of this particular commercial development that customers are present on site in an unenclosed environment, queuing and (where choosing) consuming purchased items outside in the open air. This is due to the very limited size of the only enclosed structure forming part of the development (the kiosk) and the provision of an outside seating area as part of the scheme for which permission is sought. As such, inevitable noise from customer activity – including the community social interaction which I have read so much about in the submissions – will not be attenuated through the benefit of an enclosing structure. In the right location, that would not be problematic but the 3-storey residential property at No 195 (with upper outside balcony) immediately abuts the appeal site very close indeed to the café's seating area. In my assessment, and also having considered the evidence of the residents of that house, the close proximity to the unenclosed customers patronising the development is likely to cause a significant adverse impact on living conditions through noise and disturbance. Even were the seating area to be moved further away from the relevant boundary (through a conditioned permission), I do not think the distance would be far enough within the constraints of the appeal site to make a material difference. Nor would suggested conditions limiting the hours of use or the number of customers permitted to be on site at any one time – the location is simply too sensitive for this type of outdoor hospitality given the constraints of the land and the very close residential receptor. In this regard, I place significant weight upon and agree entirely with the objection of the Council's environmental health team and the reasons for it: that is to say, the difficulty in controlling nuisance to adjacent residential properties other than having the outdoor area removed.
16. While I would not go as far as the Council in saying that the area is relatively tranquil, with traffic noise and noise from other commercial uses on the seafront also being present from time to time as part of the prevailing acoustic climate, in my view noise from other sources would not mask or otherwise render acceptable the inevitable transmission of noise from the appeal site to its very close residential neighbour.
17. While the appellant has erected a screen near the boundary with No 195, ostensibly to provide some privacy to its occupants, it is clear from photographs submitted from inside that property of customers queuing for the café outside No 195 that such an intended effect is limited and that there is unacceptable intrusion and loss of privacy. The screen does not, in any respect, deal with my concerns regarding noise.

18. For all of the above reasons, the development (in both appeals) causes significant harm to the living conditions of nearby residential occupiers, particularly as regards noise, disturbance, intrusion and loss of privacy. As such it is contrary to policies KP2 and CP4 of CS and policies DM1 and DM3 of the DMD, as supported by DTG, which together aim to ensure that development is well-designed and protects the amenity and living conditions of neighbours. For the same reasons the appeal developments do not accord with the principles of the Framework.

Planning Conclusion

19. The appeal developments (Appeals A and B) do not accord with the development plan as a whole, and there are no other considerations which outweigh this finding. Consequently, I will not grant planning permission in respect of either appeal.

Appeal A ground (g)

20. For an appeal to succeed under this ground, I must be satisfied that the compliance period set down in the notice falls short of reasonable.
21. The appellant says that the notice compliance period of 3 months is not sufficient since the works would have to be undertaken personally due to limited resources caused by the closure of the business. She asks for 6 months in that regard.
22. However, it seems to me that the removal of the simple modest structure and other works could reasonably be undertaken by the appellant in 3 months even were she unassisted. Accordingly, ground (g) does not succeed.

Conclusions

23. For the reasons given above I conclude that Appeal A should not succeed. I shall uphold the enforcement notice with a correction and refuse to grant planning permission on the deemed application.
24. For the reasons given above I conclude that appeal B should be dismissed.

Andrew Walker

INSPECTOR