



Appeal Decisions

Site visit made on 18 March 2024

by Diane Lewis BA(Hons) MCD MA LLM MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 April 2024

Appeal A Ref: APP/Z5060/C/22/3293917

Land at 80 Longbridge Road, Barking IG11 8SF

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Avni Cenalia¹ against an enforcement notice issued by the Council of the London Borough of Barking and Dagenham.
- The notice was issued on 8 February 2022.
- The breach of planning control as alleged in the notice is Without planning permission, the unauthorised development of a rear canopy.
- The requirements of the notice are to:
 - i. Remove the unauthorised rear canopy in its entirety.
 - ii. Remove all subsequent waste material from the land.
- The period for compliance with the requirement is: 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f), (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.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with a variation.

Appeal B Ref: APP/Z5060/W/22/3290648

80 Longbridge Road, Barking IG11 8SF

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Mr Avni Cenalic against the decision of the London Borough of Barking and Dagenham as Local Planning Authority.
- The application Ref is 21/01894/FULL.
- The development proposed is Retention of mechanical retractable canopy to part of rear yard.

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. The Council issued two enforcement notices on 8 February 2022 related to the land at 80 Longbridge Road, Barking. One of the notices alleged the unauthorised development of a rear canopy. The second notice alleged the unauthorised change of use of the property to a shisha lounge (use class sui generis). An appeal was made against the notice concerning the retractable canopy (Appeal A), but there is no record of an appeal against the material change of use.
2. The documents submitted with the Council's appeal Questionnaire included copies of neighbour notification letters. The letters gave details of the notice

¹ The surname is as spelt on the appeal form. All other documents including those for Appeal B give the appellant's name as Mr Avni Cenalic.

alleging a material change of use. The Planning Inspectorate asked the Council to renotify people to correct the error. I am satisfied all correct procedures have been carried out.

3. Before the notices were issued the Council refused to grant planning permission for the retractable canopy by a decision notice dated 6 December 2021. This refusal is the subject of Appeal B.

Reasons

Appeal Site and the development

4. The plan attached to the enforcement notice identifies the Land to which the notice relates. The Land includes the main two storey building fronting Longbridge Road and the rear yard, extending to the rear boundary. The site plan submitted with the planning application shows the same area. The ground floor of the main building is in use as a restaurant/café. Residential accommodation is on the upper floor, accessed by a separate entrance and stair. Number 80 is in a parade with ground floor commercial uses.
5. The planning history does not provide details of planning permission for the use of the property or confirm its lawful use. In 2010 permission was refused for a rear extension to provide a smoking area and canopy. In 2021 planning permission was refused for 'Retention of mechanical retractable canopy to part of rear yard and change of use to shisha/lounge and recreation area to part rear of yard'. These proposals suggest that use of the ground floor for the sale of food and drink for consumption on the premises dates back some time. On the basis that the enforcement notice issued in February 2022 has taken effect, use of the premises as a shisha lounge would be illegal.
6. The deemed planning application and Appeal B are seeking planning permission for a development described as a canopy. The submitted plans show a mechanical retractable canopy supported by posts along the sides and in the centre. The structure projects about 13.29 metres (m) from the rear elevation and for most of its length it covers practically the full width of the plot (6.07 m). The maximum height is 3.02 m. Enclosure to the area is also provided by the side walls along the common boundaries, which are timber fences, topped with a timber lattice trellis. The appellant explained that following comments by the Council's environmental health officer, the fencing along one side was changed from close boarded fencing to lattice fencing to improve ventilation. Under the canopy, the ground has been paved over and seating and tables introduced. The structure is sited almost directly at the back of the main building.
7. According to the Council the area to the rear of the parade was originally designed to function as a service yard. In the area at the back of the properties rear extensions and outbuildings are typical. At number 80 buildings occupied part of the rear area of the site. They remain in place, behind and accessed through the more recently erected canopy structure². As a result built development occupies nearly all the area behind the principal building.
8. The ground (a)/deemed planning application in Appeal A is for the unauthorised development described in the notice. The Appeal B development is seeking retrospective permission for the development as built. In effect the

² Aerial photograph, appellant's enforcement appeal statement page 15

developments for consideration in the two appeals are the same, namely the operational development comprising the retractable canopy. Therefore they will be assessed together.

Appeal A Ground (a) and Appeal B

Policy and Main Issue

9. The development plan includes the London Plan published in 2021, the Borough's Core Strategy adopted 2010 (the CS) and the Borough Wide Development Policies Development Plan Document adopted in 2011 (the DPD). In addition to the policies regarding amenity and design, relevant policies supporting business needs and growth will be taken into account. The National Planning Policy Framework (December 2023) is also a consideration.
10. The appeal site is in Barking town centre. The development plan encourages development that promotes the vitality and viability of town centres and the diversification of the evening economy. However, such development should not adversely affect residential amenity.
11. The main issue for consideration is the effect of the development on the living conditions and amenity of neighbouring residents, having particular regard to noise and disturbance.
12. Neither the notice nor the Appeal B planning application was for a material change of use, although the purpose of the canopy is an important factor.

Living conditions

13. The design and access statement³ explained that the canopy was installed in 2019 over part of the rear yard to give shelter to patrons when waiting for seating and after eating in the restaurant. The extension was to provide for 10%-20% (5-10 people) of the restaurant patrons at any one time. At the appeal stage⁴ the stated purpose of the structure was to extend the restaurant and to enable use of the rear area by patrons for seating and occasionally smoking shisha.
14. The canopy is a substantial structure for the appeal site by reason of its size and means of construction. The covered area would comfortably accommodate a sizeable number of people. The amount of seating, as shown in the appellant's photographs and as seen on my visit, would cater for many more than the 5 to 10 people suggested. Notwithstanding the comments in the appellant's statement, I cannot rule out the possibility of music being played within the area. Even without music, the gathering of patrons for socialising probably would generate loud conversation and laughter. The insulation qualities of the structure have not been explained. The fact that the roof is designed to be retractable indicates the very real intention to have it open, thereby reducing any sound attenuating qualities of the structure.
15. The site fronts onto a busy road with a variety of commercial uses, with a higher level of background noise compared to the much quieter noise environment at the back of the parade. The siting, design and size of the canopy structure would provide the potential for the introduction of noise disturbance to the back of neighbouring homes. The noise environment would

³ The design and access statement accompanied the planning application.

⁴ Appeal statement paragraph 5.8

deteriorate as a result. The small amount of separation space between windows to upper floor habitable rooms and the canopy structure would be unlikely to offer any meaningful mitigation given the form and layout of built development in this urban area. Even if homes have double glazed windows residents should be able to open windows in warm weather. There is no substantiated evidence to demonstrate the development would be compatible with nearby residential accommodation. The development is likely to result in significant harm to living conditions and amenity.

16. A letter from the family occupying the flat at number 80 stated the canopy did not cause noise disturbance or any other problems. The owner of the business at number 82 stated no objection to the use of the rear yard by customers. Even though these representations are positive, a planning permission runs with the land and occupation of the restaurant and neighbouring properties may well change over time.
17. Planning Practice Guidance advises that when used properly, conditions can enhance the quality of development and enable development to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects. The Framework states planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.
18. The one condition outlined by the parties is a restriction on opening hours. The appellant indicated the restaurant/café use would start at 1100 hours and end at 2200 hours every day of the week, including Sundays and Bank Holidays. The Council indicated the proposed closing time would be 30 minutes earlier than the existing time of 2230 hours. However, neither party has supported the proposal with reasoned argument, explanation or detailed wording. Unresolved matters include (i) whether the use of the entire premises should cease at 2200 hours or whether the restriction would apply to patrons only, (ii) whether the restriction is intended to apply only to the use of the yard area covered by the canopy or to the indoor restaurant at the front, and (iii) whether there would be conflict with any existing condition controlling hours of use. The reasonableness and precision in the wording of such a condition has not been demonstrated. Furthermore, I have concern about the seven day week operation and the consequent lack of respite for residents.
19. The relationship between the canopy development and neighbouring residential accommodation has not been shown to be acceptable when taking into account the scale of the structure and the extent of the seating area created.

Other Matters

20. The appellant referred to four planning permissions for canopies and covered seating areas in the Borough. The permissions indicate the local planning authority may find canopies over seating areas acceptable in the right location. Otherwise, the information about each of the four developments is very limited and does not include matters such as size of establishment, location, authorised use, adjacent uses, details of the canopy and size of seating area. No informed comparisons can be made with the appeals. The example B permission was subject to planning conditions to control noise emission, indicating a much greater level of technical information was available than with

the current proposal. The examples do not add support for approval of the development at the appeal site.

21. Under a ground (a) appeal there is provision in the 1990 Act to grant planning permission for part of the development (section 177(1)(a)). The appellant, albeit in the ground (f) appeal, indicated reducing the scale of the canopy as a means of mitigating harm. However, no details of an alternative lesser scheme have been submitted for consideration.
22. The appellant acknowledged the “residential flats” on the upper floor of the property do not have access to the rear amenity space. The appellant proposed securing shared or dedicated amenity space by way of condition or planning obligation. However, all the rear space at the back of the main building appears to be utilised for the business. Without further details it is difficult to see how such a proposal realistically could be achieved alongside retention of the canopy and how the principal objection to the canopy on noise and disturbance would be overcome.
23. The canopy structure is a low form of development and would not cause significant overshadowing to neighbouring properties. The side ‘walls’ created by the fencing along the boundaries are not solid and neighbours potentially could experience a perceived sense of a loss of privacy or intrusion. Even though the adjacent rear garden spaces have not appeared to be well used amenity areas over the last few years, the position may change in future.
24. Compliance of the development with the requirements under the Health Act 2006 and the Smoke-free (Premises and Enforcement) Regulations 2006 is a neutral factor in the planning balance.
25. The development was carried out in 2019 and therefore predated the Covid 19 pandemic. The covered area may well have complied with Covid restrictions for social distancing and outside seating but this consideration now has limited weight.

Planning Balance

26. The appellant submitted the development will encourage the growth and diversification of the business, which serves the community, promotes social interaction and contributes to the viability and vitality of the area through taxes. When the appeal was made, the business was said to be recovering from the impact of the Covid 19 pandemic and the removal of the canopy would have a serious effect.
27. On the other side of the balance the development is likely to have an adverse effect on the living conditions and amenity of neighbouring residents, especially by reason of noise and disturbance. In terms of the DPD the development fails to comply with Policy BP8, one of the principles of Policy BP11 and one of the design criteria identified in Policy BE2. The scale of the structure is not compatible with its surroundings, given its purpose to facilitate socialising and act as an extension to the restaurant business. For this reason the canopy is not high quality sustainable design and is in conflict with Policy CP3 of the CS. Turning to the London Plan, a design led approach to optimise the capacity of the site has not been demonstrated, contrary to Policy D3.
28. Having had full regard to the strategic policy support for town centres and business growth, the development itself fails to comply with the development

plan when read as a whole. The evidence has not been sufficient to show that planning conditions would adequately address the identified harm.

Conclusion

29. The ground (a) appeal (Appeal A) should not succeed and I refuse to grant planning permission on the deemed planning application. Appeal B should be dismissed.

Appeal A Ground (f)

30. The issue is whether the requirements are excessive in view of the purpose of the notice to remedy the breach of planning control.
31. The notice requires no more than the removal of the unauthorised canopy in its entirety, together with all subsequent waste materials. These actions are necessary to remedy the breach. In view of the statutory provisions, it is not open to the appellant to argue the notice should have a different purpose.
32. The appropriate ground of appeal to consider the planning merits of the existing structure and an alternative lesser form of development is ground (a). As noted above, no details of a lesser scheme have been submitted.
33. The requirements are not excessive and the appeal on ground (f) fails.

Appeal A Ground (g)

34. The issue is whether the compliance period of three months is reasonable. National planning policy confirms the importance of effective enforcement. Considerations on ground (g) include what the recipients of the notice will have to do in practice to carry out the required remedial steps, how much time would be reasonable for that purpose and the level of harm caused by the breach of planning control.
35. The appellant stated the development was started in May 2019 and completed by June 2019. On that timescale three months would be a reasonable period of time to make arrangements and carry out works to remove the canopy. With a view to reducing the impact on the business time also should be allowed for the appellant to discuss with the local planning authority possible alternative schemes.
36. I conclude that a compliance period of six months strikes the right balance and is reasonable in the circumstances. The appeal on ground (g) succeeds to this extent.

Conclusions

37. For the reasons given above, Appeal A does not succeed. The enforcement notice shall be upheld with a variation and I shall refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act (as amended). Appeal B shall be dismissed.

DECISIONS

Appeal A Ref: APP/Z5060/C/22/3293917

38. It is directed that the enforcement notice be varied in paragraph 6 by the deletion of "3 Month" and its substitution with 6 months as the period for

compliance. Subject to the variation, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B Ref: APP/Z5060/W/22/3290648

39. The appeal is dismissed.

Diane Lewis

INSPECTOR