



Appeal Decision

Site visit made on 21 February 2024

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 April 2024

Appeal Ref: APP/Y1110/C/23/3326209

Land rear of 14 Mary Arches Street, Exeter EX2 3AZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeal is made by Mr Chris O'Carroll of 'South X West' against an enforcement notice issued by Exeter City Council.
 - The notice was issued on 7 June 2023.
 - The breach of planning control as alleged in the notice is: Without planning permission, the erection of a pergola/structure in the rear garden outlined in blue on the attached plan.
 - The requirements of the notice are to:
 - Demolish the pergola/structure; and
 - Remove all materials formerly comprising the pergola/structure from the Land and responsibly dispose of them.
 - The period for compliance with the requirements is: 2 (two) months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (f) 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.
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Decision

1. 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.

Preliminary Matters

2. The appeal form included the wrong address for the appeal site. There is no dispute however that the notice relates to the address that is set out above in the header to this decision, which I have taken from the notice.

Appeal on ground (b)

3. To succeed on ground (b), the onus is upon the appellant to demonstrate that the breach has not occurred.
4. The appellant does not deny that the development exists. Ground (b) can however be used to challenge the way in which the allegation is worded. Their arguments about size, permanence and means of attachment relate to the appeal under ground (c) rather than the wording of what is alleged.
5. Although described as a gazebo by the appellant rather than a "pergola/structure" as alleged, that doesn't fundamentally affect what has been

alleged which is a canopy measuring, according to the appellant's statement, 2.2m high, 7.2m long and 3.5m wide. It is made of coated metal has 6 legs and a roof.

6. Notwithstanding the difference in description, what is alleged exists as a matter of fact and as such the appeal on ground (b) fails.

Appeal on ground (c)

7. On ground (c) the onus is on the appellant, to demonstrate that alternatively, if what is alleged has occurred, that it does not constitute a breach of planning control.
8. The appellant states that the gazebo can be reduced in length but what I saw at my site visit seemed to approximate to the dimensions referred to above. It is constructed of grey coated metal and has been positioned on a decked area. The decked terrace had been subject of an enforcement investigation and a planning application for a change of use. Through those processes, it was acknowledged by the Council that the deck as a structure had been substantially completed for more than 4 years and was immune from enforcement action.
9. The deck is constructed of timber, much of which has been covered by an artificial grass surface. It has some wooden steps down to a grassed area at the rear. Along much of the rear of the deck and underneath the gazebo there are substantial benches constructed from wood which serve as a barrier defining the edge of the deck.
10. The appellant considers firstly that the gazebo does not require planning permission because it is not a permanent structure. By reason of s57 of the Act, planning permission is required for the carrying out of development of land. In turn, s55(1) of the Act states that development "means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". The allegation is that the gazebo was a building operation and therefore development requiring planning permission. Building operations are defined by s55(1A) of the Act which includes (c) structural alterations of or additions to buildings, and (d) other operations normally carried on by a person in business as a builder. This is not an exhaustive list. This also needs to be considered with regard to s336(1) of the Act which defines a 'building' as including any structure or erection and any part of a building.
11. The gazebo has 6 legs which sit on the decked area. Although these are not all bolted down, I did see some screws connecting it to the deck. However, even if the structure is potentially moveable as the appellant suggests, there is settled case law concerning disputes about whether a temporary or moveable structure has involved a building operation. The 3 primary factors to consider are size, permanence and physical attachment with none of these factors individually being decisive.
12. The gazebo is large and covers a substantial part of the terrace. It is not explained how it has been constructed but the appellant does refer to it being easily dismantled. The 6 legs rise up vertically and each are connected by the framework of bulky, box metal beams which also support the roof which includes slats running parallel along the length of the roof. I could not see how

the legs are secured into the metal beams forming the roof. There are also wired electric lights fixed to the legs and roof.

13. Although the Council refer to it having been moved, it seems probable that the gazebo was erected on or close to the site rather than being pre-fabricated elsewhere, brought in one piece or a few sections and just on the deck. Furthermore, even without the few screws connecting it to the deck/terrace, it is such a substantial structure that it is, in effect, held in place by reason of its own mass. The legs have been integrated within the robust timber benches. It would require a degree removal of some of that timber in order to move the structure thereby involving further building operations, even if the gazebo could be easily moved once any screws are removed and the electrical lighting disconnected. The appellant says that the gazebo could be moved by 2 people but based upon what I saw, work would be required in order to enable that.
14. What the Council has said about the grass area to the rear of the decked area not being part of what has been approved for use by the bar/restaurant is not disputed. There would seem to be no obvious alternative location where the gazebo would need to be used elsewhere within the premises or evidence that it has been moved. For reasons I have already explained, due to its size and method of securing to the deck/terrace it would take substantial work to move it around the outside area. It is far more substantial in size and weight than, for example, a large external umbrella or parasols that may need to be used in different places according to the weather conditions. I am therefore satisfied that, as a matter of fact and degree, the installation of the structure in this position would have involved building operations requiring planning permission.
15. The appellant also raises the issue of permitted development rights under the provisions of The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO). If there is an applicable class, that may grant the necessary deemed planning permission for the structure.
16. The GPDO at Schedule 2, Part 2 Minor Operations includes at Class G, planning permission for "the provision of one moveable structure within the curtilage, and for the purposes, of a building" used for a purpose within drinking establishments and places where food and drink are sold. I am not referred to any guidance about how mobile a structure would need to be to benefit from this class of the GPDO. Consequently, using the normal common-sense meaning of the words, I find that the gazebo for reasons I have already set out above, is not "moveable". As such, it cannot benefit from this class of permitted development right within the GPDO.
17. The gazebo requires planning is therefore a breach of planning control and as such the appeal on ground (c) fails.

Appeal on ground (a)

18. Under this ground of appeal, I have to consider whether planning permission ought to be granted for the matters stated as the breach of planning control.

Main issues

19. The first main issue is the effect of the development on the character and appearance of the area. In considering that main issue, I will have special regard to the desirability of preserving the setting of nearby Listed Buildings

and also whether the development would preserve or enhance the character or appearance of the Central Conservation Area (the CA).

20. The second main issue is the effect of the development on living conditions for the occupiers of neighbouring residential properties.

Reasons – character and appearance

21. The gazebo is at the rear of No 14 which is part of a line of modern, industrial building used as a bar and restaurant. This and other similar nearby buildings face onto Mary Arches Street but have rear elevations facing towards the grassed area at the back. The deck has been accepted as lawful by the Council and the material change of use of that area was given planning permission at the rear of the licensed premises (ref 21/0514/FUL). The gazebo is constructed on the deck.
22. St Olave's Church House is a large grade II Listed Building to the northwest of the appeal site. There is a parking and turning area in front of that building which joins onto the grassed area next to the appeal site. There are some partly damaged modern fence panels which adjoin the decked area and which provide some degree of separation of the grassed area and the parking area. It would appear from the rather incongruous, informal and incomplete nature of that fence line and from the maps submitted with the appeal, that the grass and parking area were previously part of one open area in front of that Listed Building. Where the decked terrace is, would also have been part of that area.
23. Other Listed Buildings as well as the modern buildings, provide a substantial, high enclosure around the edge of the area. Those buildings include No 21 The Mint which is a grade II* Listed Building which is also part of the St Nicholas Schedule Ancient Monument. No 21 The Mint has a prominent side elevation with windows facing towards the open area. After the accompanied site visit, I walked around the back of the appeal site, along the public footway called The Mint and viewed through an open gate within the wall that defines the south-western side of the open area. I could see the gazebo and decked area from there as well as the contrast of that with the adjoining grass area. The open area provides spatial relief in an otherwise tight-grained area of dense urban development when seen from The Mint and also the car parking area at the rear of St Olave's Church House. These historic buildings are constructed of natural stone, slate and render incorporating traditional windows. They are close to the appeal site and contrast with some of the stark, modern architecture of Mary Arches Street.
24. The broader CA is also varied in terms of the style, age and uses that buildings and open spaces are put to. I am not provided with a CA appraisal but did walk around the City and saw how the traditional buildings, are interspersed both with immediate post-war redevelopment but also more recent modern buildings. These included some of those buildings referred to by the appellant including the Lloyds Lounge next to St Stephens Church. From what I saw and the photographs provided by the appellant, it is clear that modern structures can, in the right place, be comfortably incorporated within historic settings.
25. The decked area will remain notwithstanding the outcome of this appeal and that area will be used as a sitting out area in connection with the bar and restaurant. The structure of the deck and the adjoining fencing has already caused an incursion into what I consider is a distinctive part of the CA and

which appears to have been an inherent open area providing relief from the built-up surroundings. Chapter 13.0 of the Exeter Local Plan adopted March 2005 (LP), in the explanatory paragraphs leading to Policy DG1, refers to the importance of good enclosure and spaces with clear identity being created. By the same token, those spaces that exist and which are part of the character of the CA, are clearly significant and important to retain.

26. The gazebo is a permanent, substantial structure on top of the deck. When seen against the industrial looking buildings including No 14 itself, it has a limited impact and has a simple, modern design similar to some others within the city centre. However, when viewed from the open space between the site and St Olave's Church House and also from the other Listed Buildings surrounding the grassed area, the gazebo provides a further incursion into that area. The structure protruding above the deck provides a harmful further incursion into that distinctive open area within the CA, harming the setting of the Listed Buildings, in particular St Olave's Church House but also the others nearby, including the very closely positioned Scheduled Ancient Monument.
27. As such therefore, in relation to the first main issue, the development has a harmful effect on the character and appearance of the area. This does not preserve the setting of nearby Listed Buildings and does not preserve or enhance the character or appearance of the CA. It is therefore not compatible with the urban structure of the city. As such, LP Policies C1, C2 and DG1 are not complied with. The harm to these designated heritage assets is less than substantial but as the National Planning Policy Framework (the Framework) advises, that harm needs to be weighed against the public benefits of the development which I do below when considering the overall planning balance.

Reasons – living conditions

28. The decked area can already be used within the constraints provided by the conditions on planning permission 21/0514/FUL. The existing planning conditions limit the hours of use before 10.00 hours and after 22.00 hours. No amplified music is allowed on the terrace area. There are windows of residential properties that face towards the rear of the appeal site and people gathering, talking and the general hubbub of social activities can cause disturbance at those sensitive locations.
29. It seems to me that the most use of the decked terrace will take place during good weather conditions as well as more generally as a place to smoke. The additional shelter provided by the gazebo may increase usage when the weather is not as good. However, this is a busy urban environment where some noise within reasonable limits should be an expectation. With the existing controls in place, I feel that the increased use of this area would not cause unreasonable impacts. I have no evidence for instance that shows there have been specific times since the erection of the gazebo that it has directly resulted in further noise and disturbance.
30. In relation to the second main issue, from the presented evidence I do not consider that the development has a harmful impact on living conditions for the occupants within neighbouring residential properties. Nearby sensitive developments will not be adversely affected by additional noise from additional late night activities. As such, the development complies with LP Policies EN5 and S5.

Reasons – other matters, including public benefits

31. I recognise that the gazebo must provide a more comfortable environment for customers of the premises which is an important part of the local economy including through employing local people. I have no evidence however about the extent to which the development has increased trade or how it will do so in the future. These matters indicate that the development has some benefits to the business but given the evidence on these matters, I can only attribute limited public benefits to them.
32. I recognise that the experience of the enforcement action has affected the appellant personally and his willingness to undertake further expansion within Exeter. This is unfortunate but the Framework makes it clear that effective enforcement is important to maintain confidence in the planning system. The Council has acted proportionately and in the public interest.

Reasons – planning balance

33. I consider that the development is unacceptable with respect to the first main issue. This is not outweighed by the lack of harm with respect to the second main issue. There are no public benefits of sufficient weight to outweigh the less than substantial harm that has been caused by the development.

Conclusion on ground (a)

34. For these reasons, having had regard to the development plan as a whole and all other material considerations, I conclude that the appeal on ground (a) should fail and consequently, the deemed planning application shall be refused.

Appeal on ground (f)

35. The appeal on this ground is that the steps required exceed what is necessary to achieve the purpose of the notice. The notice requires the demolition of the structure and removal of the materials resulting from that. The purpose of the notice is therefore to remedy the breach of planning control as confirmed in the Council's appeal statement.
36. The appellant has not supported this ground of appeal with any clear evidence about what lesser steps could or should be undertaken to achieve the purpose of the notice or that there is any lesser obvious alternative that would do so. The notice requires the undoing of what was undertaken in the breach of planning control and I consider that it does enough and no more than is necessary to remedy the breach of planning control.
37. Consequently, the appeal on ground (f) fails.

Conclusion

38. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Andy Harwood

INSPECTOR