
Appeal Decision

Site visit made on 5 December 2023

by Roy Curnow MA BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22nd April 2024

Appeal Ref: APP/H5390/C/22/3306522

Land at 1A Eyot Gardens London W6 9TN

- 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 One Two Champion Corporation against an enforcement notice issued by the Council of the London Borough of Hammersmith & Fulham ('the Notice').
 - The enforcement notice, numbered 2021/00904/CONDS, was issued on 21 July 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of an awning attached to the side elevation at ground floor level on Chiswick Mall and a gazebo to the front of the property.
 - The requirements of the notice are: a) Remove from the land the awning on the side elevation at ground floor level and repair any resultant damage to the brickwork; and b) Dismantle and remove from the land the gazebo to the front of the property.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended ('the Act').
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Decision

1. It is directed that the enforcement notice is corrected by omitting the words "an awning" between the words "of" and "attached" in section 3 of the Notice", 'The breach of planning control alleged' and substituting the words "three awnings; and varied by omitting the word "awning" in requirement a) of section 5 of the Notice 'What you are required to do' and substitute the words "three awnings", and by the deletion of "2 months" and the substitution of "6 months" as the period for compliance.

Subject to the correction and variation, the appeal is allowed in part on ground (a) insofar as it relates to the erection of three awnings attached to the side elevation at ground floor level on Chiswick Mall and planning permission is granted on the applications deemed to have been made under section 177(5) of the 1990 Act as amended, for the erection of three awnings attached to the side elevation at ground floor level on Chiswick Mall at Land at 1A Eyot Gardens London W6 9TN.

Otherwise, the appeal is dismissed and the enforcement notice is upheld as corrected insofar as it relates to the erection of a gazebo and planning permission is refused in respect of a gazebo to the front of Land at 1A Eyot Gardens London W6 9TN on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Reasons

Description of the development

2. Numbers 1A ('No 1A') and 1 Eyot Gardens ('No 1') are accommodated in a three-storey end of terrace property on the corner of Eyot Gardens and Chiswick Mall. No 1A is a ground floor property in use as a delicatessen and café. No 1, which has an independent access, appeared to be in residential use when I visited.
3. The unauthorised development alleged in the Notice comprises two distinct elements. Firstly, three awnings, rather than a single "awning" as stated in the Notice, are bolted to the wall on the Chiswick Mall elevation by means of brackets. When not in use they fold down and retract, swinging back flush to the wall. When in use they swing out and open to give the appearance of square umbrellas. When opened, they provide shade and shelter to members of the public eating and drinking at tables and chairs positioned on the footway along Chiswick Mall. The erroneous reference to a single awning can be corrected without prejudice, and I do so in my decision.
4. The second element is a free-standing gazebo. It is located on the forecourt to the café/delicatessen, on the Eyot Gardens frontage. It has a square footprint with a light-coloured pyramidal cover. It is supported by four legs, and, at the time of my visit, I saw that three of these legs were held in place by heavy weights at their bases. When the business is open, it provides cover to cabinets displaying food and for people eating and drinking. The display cabinets and seats are taken inside when the business is not open, but the gazebo remains in-situ.

Ground (c)

5. An appeal made under Ground (c) is that the matter alleged in the Notice has not occurred. This is a legal ground of appeal where the onus lies with the Appellant to make his case on the balance of probability.
6. Initially, in his appeal form, the Appellant questioned whether the awnings and the gazebo were development and, if so, whether they were permitted development by reason of Schedule 2, Part 2, Class G of the Town and Country Planning (General Permitted Development Order) (England) 2015 (as amended) ('GPDO'). This position was refined in his Statement of Case ('SoC') to relate to the awnings only.
7. Section 55 of the Act defines development as "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". Building operations are defined as including "(a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder".
8. To my mind, the installation of the awnings was a building operation. S55(2)(ii) sets out that where building operations "do not materially affect the external appearance of the building" then this should not be taken as being development. The awnings clearly have a material effect on the external appearance of the building. They are, therefore, development.

9. The permitted development right in Schedule 2, Part 2, Class G of the GPDO is for "the provision of one moveable structure within the curtilage, and for the purposes, of a building used for a purpose within...(b) Class E(b) (sale of food and drink etc.) of Schedule 2" to The Town and Country Planning (Use Classes) Order 1987 ('UCO'). The UCO sets out that Class E(b) is for "the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises".
10. Whether the consumption of food and drink at the appeal site accords with the description of "mostly" in Class G is unclear, and the case has not been made on the balance of probability.
11. Notwithstanding this, the awnings could not have been installed using these Class G permitted development rights. The evidence put forward by the Council shows that they were installed sometime after July 2019, but before November 2020 when the Council wrote to the Appellant on the matter. Thus, the development was undertaken prior to the addition of the Class G rights into the GPDO, which occurred on 2 January 2022. Therefore, those permitted development rights for the awnings were not in place at the time they were installed. These rights cannot be applied retrospectively.
12. Although it is academic, given my findings, above, there is a requirement for any structure allowed by Class G to be moveable. Although not defined in the GPDO's Interpretations, I take moveable to mean that the structure can be moved from one position to another without any particular effort. This is not the case here; the awnings would have to be taken down from the wall and reaffixed somewhere else, work that would require a degree of planning and skill. That they retract and fold back against the wall does not make them moveable. In this respect they are quite different from the standard pole-supported umbrellas secured by weighted bases that the Appellant likens them to. Furthermore, the Class G rights, had they applied, would only apply to one of the three awnings.
13. No evidence has been put forward to substantiate the case with respect to the gazebo, on the balance of probability.
14. For the above reasons, the Ground (c) case fails.

Ground (a)

15. An appeal made under Ground (a) is that planning permission ought to be granted for the development that is the subject of the Notice.
16. The main issue is the effect of the development on the character and appearance of the host property and its environs, which lie within The Mall Conservation Area ('the MCA').
17. The MCA follows a meander in the Thames. In a roughly east to west axis, it stretches from just east of Chiswick Eyot to just east of Hammersmith Bridge. North to south it runs from the Great West Road to a line midway along the river.
18. The Appellant drew my attention to The Mall Conservation Area Character Profile ('CACP'). Neither he, nor the Council, has provided a copy of this, though the Appellant does cite it in his SoC. As the Council does not counter what he has said in this respect, I take it to be the case.

19. The evidence shows that the MCA has been sub-divided into character areas and the appeal site lies within sub-area A 'Chiswick Mall to Hammersmith Terrace'. Much of the character and appearance of the MCA is derived from its proximity to the Thames. It has a mixture of residential and commercial development, interspersed with areas of open space. Its ambience ranges from busy and noisy close to the Great West Road to relaxed and peaceful alongside the Thames.
20. Sub-area A of the MCA is primarily a residential area. In the close vicinity of the appeal site, the built form varies and includes large period villas, more modern flats, multi-storeyed period terraces and small cottage style dwellings. Eyot Gardens, itself, links the Great West Road to Chiswick Mall. On its west side, at its junction with the Great West Road, there is a large commercial building and, immediately to its south, a three-storey flats development that looks like it dates from the mid-late 20th century.
21. Those flats reflect the scale of the terraces of late Victorian dwellings in Eyot Gardens. These terraced dwellings are set behind small front gardens, and are finished in yellow brick with stucco detailing, with decorative bay windows at ground floor level and further decorative detailing on their upper floors. Many of the dwellings have large shrubs in their front gardens and there are street trees on both sides. Beyond the flats development, the effect of the Great West Road on the area's character lessons considerably.
22. The appeal site lies at the river end of the terrace on the west side of the road. It shares the scale and detailing of the terrace, all of which are described as 'Buildings of Merit' in the CACP. However, it differs by reasons, amongst others, of the café/delicatessen on its ground floor, a chamfered corner as it links Eyot Gardens and Chiswick Mall and that the area in front of it, onto Eyot Gardens is, and always has been, unenclosed. It is on this unenclosed area that the gazebo has been erected. Its side elevation, onto Chiswick Mall, has similar decoration but its ground floor window pattern reflects the commercial use, and a doorway leads to flats on upper floors. The awnings are on this elevation.
23. Beyond Eyot Gardens to the east, the road is flanked by 20th century flats on the river side of the road with imposing, terraced period dwellings opposite. The road moves away from the river, along the stretch to the four-storey properties of Hammersmith Terrace. These, I am told, are Grade II and II* listed. Whilst fairly close to the appeal site, due to the orientation of Chiswick Mall, the developments that are the subject of the Notice do not fall within the setting of the listed properties in Hammersmith Terrace.
24. Although Chiswick Mall is fairly straight, when approaching from the west, the three awnings are not seen until one is quite close to the site. As the road bears to the left away from the river, and rises slightly, in the vicinity of Miller's Court, so views along Chiswick Mall are interrupted. The result is that the awnings are not readily perceived until one reaches that part of Chiswick Mall quite close to the appeal site. From that point on, they become increasingly visible and are, of course, clearly seen from close-by the site, including from the terrace of properties that lie on the river side of the road and from windows above, in No 1.
25. Moving east along Chiswick Mall from the site, the awnings are again only seen from relatively close to the appeal site. As the road bends away from the river,

they are lost to view when one is in front of Hammersmith Terrace, a short distance to the northeast.

26. As such, their effect on character and appearance is localised. In any event, being visible does not necessarily equate to being harmful. The awnings are not set very high on the wall, being below first floor level. They have a minimal projection from the side of No 1A when in use and, even then, I would not describe them as being prominent. When they are folded back, their effect would be considerably less. They are seen in the context of the café/delicatessen use of the building, and their purpose to provide shelter to customers leads them to be readily assimilated into the street scene.
27. For the above reasons, they are neither prominent, obtrusive nor incongruous features in the street scene. I find them to be appropriate additions to the building on which they are attached, which cause no harm to the wider area. Their design accords with the requirements of Policies DC1 and DC4 of the Hammersmith and Fulham Local Plan February 2018, ('LP'), and they preserve the character and appearance of the MCA in accordance with the statutory test and the terms of LP Policy DC8 and Key Principles CAG2 and CAG3 of the Council's 'Planning Guidance' Supplementary Planning Guidance, February 2018, ('SPG') that reflect the statutory test.
28. The gazebo lies on a hard surfaced area fronting onto Eyot Gardens. I am told that it has a square footprint that measures 3.3m on each side, and that it is 2.5m high to its eaves and 3.8m to the top of its pyramidal roof covering.
29. Although it, too, is seen in the context of the café/shop, it is entirely incongruous in the streetscape by reasons of its form and design. It screens much of the attractive frontage of the host building. Furthermore, it detracts from the Buildings of Merit on the west side of Eyot Gardens and the very pleasant street scene at the junction of this road and Chiswick Mall.
30. The gazebo is not seen from any great distance to the north, along Eyot Gardens, nor from the east and west, along Chiswick Mall. Case law has established that a proposal must be judged according to its effect on the MCA as a whole. Given its adverse effect on the local area and on the terrace of Buildings of Merit, which are important in and contribute greatly to, the character and appearance of the MCA, I find that the gazebo does cause harm to the character and appearance of the wider MCA.
31. My attention was drawn to structures erected at the Black Lion pub, a short distance to the northeast of the appeal site. I saw a large tent-like structure in the rear garden and what I might call a large glass-fronted pavilion in the side garden area. As it is positioned to the rear of the pub, the effects of the former are mitigated by an extension to the rear of the pub and intervening shrubs. The pavilion, on the other hand, was clearly seen from the corner of South Black Lion Lane and Hammersmith Mall.
32. There were some similarities between these structures and the gazebo, as all are structures serving customers in commercial premises. However, their positions are quite different. Whilst the two at the Black Lion are visible, to varying degrees, they are contained within the well-defined and bounded curtilage of the pub, along with pub furniture and signage. This is quite different to the position of the gazebo on open land to the front of the café/delicatessen.

33. Although I am told that enforcement action has not been taken against the structures at the Black Lion, that does not, of itself, justify the development that has occurred at the appeal site.
34. I have also taken into account the seating area at the 'Elder Press Café' in my assessment. However, from the evidence before me, and from what I saw at my site visit, that outdoor seating area is not covered by a gazebo, nor an awning for that matter. The Council's Notice does not attack the use of land as an outdoor seating area; its subjects are the structures used to provide shelter for customers. As such, the development there has little bearing on the appeal case.
35. Save for these sites, my attention has not been drawn to any similar gazebos in the MCA, and I did not see any.
36. The harm that the gazebo causes is, in the words of the Framework, less than substantial and, in these circumstances, decision-makers have to weigh this harm against the public benefits of retaining the gazebo. The Appellant's line is that there is no harm to the MCA and, as such, does not refer to less than substantial harm nor specifically puts any benefits forward in that context. However, they set more generally out what they consider to be public benefits that arise from the developments, in their SoC.
37. From these, and from what I saw at my site visit, these are as follows. The gazebo provides a community facility, as it allows members of the public to meet up and converse, irrespective of their mobility. It is beneficial to keeping one of the few cafes between the Great West Road and the Thames, on the Thames Path, running. At a time of changing climate, the gazebo provides shade and shelter during extreme weather change. Although it is not specifically set out in the Appellant's representations, I saw how the limited space inside the café/delicatessen affected the business. Taking the serving equipment and seating outside during opening hours and bringing it back in when closed provides additional business 'floorspace'. This benefits the café/delicatessen which, in turn, benefits the general public.
38. I also note that the CAPC states that the café/delicatessen "utilises the forecourt, paved in York stone as a seating area for refreshments, thereby creating an attractive little focal and activity point, capturing the space at the junction". The CAPC pre-dates the erection of the gazebo, however, and it does not refer to any such structure. I agree with the CAPC's comment, but, as I have said, the Notice would not affect the use of the forecourt for the seating of customers.
39. All of the above are points that weigh in favour of the Appellant's position. However, I find that they do not outweigh the harm that the gazebo causes. It is not akin to the form of traditional blind that is said was on the building before. I am reticent to say that there definitely was such a blind, as the photographic evidence¹ is unclear. A corner shop such as this would, more often than not, have had a blind but it seems to me that one was not present in 1975².
40. There might be other ways to provide a covered area to the benefit of the public and the business. Indeed, in their appeal form, the Appellant said that in

¹ Figure 7, Appellant's SoC

² Figure 6, Appellant's SoC

his Ground (f) case an alternative scheme would be submitted that would “address alleged concerns about detail of construction, operation materiality and type of coverings and configuration”. It makes sense to deal with this matter here.

41. No scheme was proposed. The Appellant states that an alternative is possible, but this would come at considerable cost. He says that a slight rearranging of the gazebo, seating and sales equipment would be possible. It has not been demonstrated how this slight rearrangement might overcome the harm that I have identified, and I cannot see how it would.
42. Due to the date when the appeal was lodged, the Appellant also refers to the effects of the Covid-19 pandemic, and how this outside space is beneficial in this regard. I am also aware how the business served the community during the pandemic. However, whilst Covid-19 has not gone away, the restrictions relating to it have. Although some people still need to take additional precautions, this is, again, is not sufficient reason to justify retaining the gazebo.
43. In the light of the above reasons, I find that the less than substantial harm to the character and appearance of the MCA is not outweighed by the public benefits that I have identified. Whilst its effect is localised, it fails to preserve or enhance the character or appearance of the MCA as a whole and, therefore, fails the statutory test and does not accord with the terms of LP Policies DC1, DC4 and DC8, as well as Key Principles CAG2 and CAG3 of the Council’s ‘Planning Guidance’ Supplementary Planning Guidance, February 2018, (‘SPG’) that reflect the statutory test.

Ground (f)

44. I have addressed the arguments put forward on this Ground in my reasoning for Ground (a), above. Therefore, I need not rehearse them here. For those reasons, the Ground (f) case fails.

Ground (g)

45. This ground of appeal is that the period given for compliance with the Notice falls short of what should reasonably be allowed.
46. The Appellant’s case is that as they could not be left outside when the café/delicatessen is closed, the serving and display equipment is brought inside. That equipment and, to a lesser degree, the seating, cannot be left out uncovered in the rain. Given the limited space inside No 1A, it could not be brought inside when the business is open. Therefore, they would have to be reaccommodated or replaced. These options would require the reconfiguration of the interior of No 1A. On this basis, the Appellant asks for a “further” 6 months, by which I take him to mean varying the period for compliance to 8 months.
47. Whilst I have found that the benefits of the gazebo did not outweigh the harm that it causes to the character and appearance of the MCA, I understand the request for a longer period for compliance and can see how this would be beneficial to the business. As the café/shop is a facility that provides a valuable service to the area, I find that the additional period is warranted and in the public interest. I shall vary the Notice accordingly.

48. Therefore, the appeal made under Ground (g) is allowed.

Overall Conclusion

49. For the reasons given above I conclude that the Ground (a) appeal should succeed in part only, and I will grant planning permission for the erection of three awnings attached to the side elevation at ground floor level on Chiswick Mall, but otherwise I will uphold the notice with correction and variations and refuse to grant planning permission in respect of the gazebo to the front of the property. The requirements of the notice will cease to have effect so far as inconsistent with the planning permission which I will grant by virtue of s180 of the Act.

Roy Curnow

Inspector