



Appeal Decision

Site visit made on 14 May 2026

by Richard S Jones BA (Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 July 2026

Appeal Ref: APP/B1605/C/24/3338516

Land at 125, 127, 129, 131, 133 Promenade Cheltenham Gloucestershire

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
- The appeal is made by Mr J Dunkerton against an enforcement notice issued by Cheltenham Borough Council.
- The notice was issued on 11 January 2024.
- The breach of planning control as alleged in the notice is without planning permission, the retention of all marquees at 125, 127, 129, 131, and 133 Promenade, Cheltenham, Gloucestershire and associated fittings and chattels that facilitate the use of the marquees; the retention of the said marquees was refused permission under planning application 22/01373/FUL and the subsequent planning appeal to the Planning Inspectorate ref APP/B1605/W/23/3314132 was dismissed. A further application for planning permission under reference 23/01597/FUL has also been refused.
- The requirements of the notice are to remove all marquees from outside of the front, side and rear of 125, 127, 129, 131 and 133 Promenade, Cheltenham, Gloucestershire and remove all associated fittings and chattels that facilitate the use of the marquees, including temporary wood walls, bar areas and any other items associated with the marquees.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (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.

Decision

1. It is directed that the enforcement notice is corrected and varied by:
 - Deleting the breach of planning control in section 3 and its substitution with “Without planning permission, the erection of marquees to the front of 125, 127, 129, 131, and 133 Promenade and to the side of 133, with their associated fittings and chattels facilitating their use.”
 - Deleting the requirement in section 5 and its substitution with “Remove all marquees from the front of 125, 127, 129, 131, and 133 Promenade and to the side of 133, and remove all associated fittings and chattels that facilitate the use of the marquees, including temporary wood walls, bar areas and any other items associated with the marquees.”
 - Deleting three months as the period for compliance in section 6 and substituting it with seven months.
2. Subject to the corrections and 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.

Preliminary Matters

3. I note that the appellant has sought to submit additional late evidence, but there are no exceptional reasons why evidence pertaining to the planning history of the site could not have been provided within the written representation timetable for this appeal. Furthermore, the interests of natural justice do not demand that I consider it. I have not therefore considered that information.
4. I note the highlighted errors in the Council's questionnaire, but the appellant is clearly aware of the correct name for the conservation area as it is stated in the notice. The appellant will also be undoubtedly aware that the enforcement notice does not relate to a single private dwellinghouse but does concern the setting of a listed building. He will again be aware of the development plan policies and their status and that of the CIL charging schedule. No injustice has therefore arisen as a result of those errors.

The Enforcement Notice

5. An enforcement notice is null if it is 'defective on its face'¹, normally by missing some vital element that it 'shall' include under s173 of the 1990 Act. S173(10) of the 1990 Act states that "*An enforcement notice shall specify such additional matters as may be prescribed, and regulations may require every copy of an enforcement notice served under section 172 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 174.*"
6. Regulation 5 of the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 requires that every copy of an enforcement notice served under s172(2) of the 1990 shall be accompanied by an explanatory note, which shall include the specified information set out therein.
7. The appellant says that the Council omitted "*several pieces of this statutory required information*" but refers only to the omission of the fee for the deemed application for planning permission, as required by Regulation 5(a)(iv). That omission is accepted by the Council.
8. Whilst that is a breach of the regulations, the fact that an enforcement notice must be "*accompanied by an explanatory note*", emphasises the fact that it is something separate from the enforcement notice. On that basis, omission of the explanatory note, let alone details of the fee, can't be a defect which is apparent on the face of the enforcement notice itself, so cannot give rise to nullity. In any case, no injustice or prejudice has arisen as the appellant has been able to make a valid ground (a) appeal.
9. An enforcement notice must be drafted fairly to tell a recipient what he has done wrong and what he must do to remedy it². A notice may be a nullity if it is 'hopelessly ambiguous and uncertain'³.
10. In this case, the breach of planning control as alleged in the notice is "*without planning permission, the retention of all marquees at 125, 127, 129, 131, and 133 Promenade, Cheltenham, Gloucestershire and associated fittings and chattels that*

¹ *R v Wicks* [1997] JPL 1049 (HoL)

² S173 of the 1990 Act

³ *Miller-Mead v MHL* [1963] 2 WLR 225

facilitate the use of the marquees; the retention of the said marquees was refused permission under planning application 22/01373/FUL and the subsequent planning appeal to the Planning Inspectorate ref APP/B1605/W/23/3314132 was dismissed. A further application for planning permission under reference 23/01597/FUL has also been refused”.

11. Unless relating to a breach of condition, the planning history does not form part of the breach, so those references should be deleted. They are repeated in the reasons for issuing the enforcement notice in any case.
12. The appellant considers that the notice is imprecise and unclear in that it does not refer to a specific number of marquees. However, the breach refers to “*the retention of the said marquees...*” which were refused permission under planning application 22/01373/FUL. The matters therefore concern those specific marquees across the frontages of the three listed buildings and to the side of No 133, which were the subject of that application and subsequent appeal. The appellant confirms that number to be 19.
13. Consequently, any pre-existing marquee(s) to the rear of No 133 do not form part of the breach of planning control. Accordingly, I have not considered the acceptability or otherwise of a marquee in that location (even on the basis of its siting for four months per year), and the specific reference to remove any such structure should therefore be deleted from the requirements.
14. In essence, the breach is the retention of the marquees, with associated fittings and chattels facilitating their use, despite planning permission being refused for them. The requirements of the notice are to remove the same. That is unambiguous and there is no uncertainty. The appellant will therefore clearly know what he has done wrong and what he must do to remedy the breach.
15. Nevertheless, “*retention*” is not an act of development, so should be deleted. It is also unnecessary to repeat the full address of the breach as that is already set out under section 2 of the notice. The allegation should therefore be corrected to “*Without planning permission, the erection of marquees to the front of 125, 127, 129, 131, and 133 Promenade and to the side of 133, with their associated fittings and chattels facilitating their use.*” It follows that the requirement should be similarly corrected.
16. Correcting the notice as such does not expand or change the fundamental aspects of the breach or the requirements, and I am satisfied that I am able to make those corrections under the powers transferred to me by s176(1)(a) of the 1990 Act, without injustice to any party.
17. The appellant is also critical of the Council for not providing an expediency report. However, whilst that would clearly have been helpful to the appellant, I am only able to consider whether or not a notice is a nullity by considering whether any defect is evident on its face. I am unable to assess the background to issuing the notice, including expediency; such matters must be pursued through the courts. Furthermore, an application for costs has not been made and I have no reason to believe that the Council has acted unreasonably.
18. For the reasons explained, I do not therefore find the enforcement notice to be hopelessly ambiguous or uncertain so as to amount to a nullity, and I have found no defects that would render it invalid.

The Appeal on Ground (a)

Background

19. The enforcement notice relates to the marquees and associated fittings and chattels used in connection with the hotel and restaurant/bar use of the main listed buildings.
20. The marquees were originally erected during the COVID-19 pandemic under the relaxed planning regime for temporary, moveable structures in place at that time. When those measures ended, an application was made to retain the marquees for a further two-year period⁴. That application, as referred to in the uncorrected breach, was refused and a subsequent appeal was dismissed in August 2023⁵.
21. For the avoidance of doubt, that appeal decision evidently relates to what was proposed in its entirety, including the three marquees that had been removed from the side of No 133. Nevertheless, the Inspector states that “As they [the marquees] are predominantly in place already, I was able to take into account the effects of the structures on the designated heritage assets that I observed on site. My assessment considers the effect of the proposed retention of the marquees for a further two years...”.
22. By any reasonable reading of that decision, it is clear that the majority of the Inspector’s commentary on identified harms were made in respect of the marquees in place at the time of his site visit. It then logically follows that harm is exacerbated by three additional marquees to the side of No 133.
23. Following the appeal, the Council then declined to determine a subsequent application for the retention of a reduced number of marquees in July 2023 on the basis that a similar application had been considered⁶. Although the appellant disagreed, a further application was submitted to retain 16 marquees with an altered roof form. That was refused in December 2023⁷.
24. The Council appears to imply that a further s78 appeal is pending determination, but I have been provided with no such details, and the appellant is unaware of any other ongoing appeals.

Main Issues

25. The main issues are the effect of the marquees on the special interest of the adjacent listed buildings, with particular regard to their setting, and whether they preserve or enhance the character or appearance of the Central Conservation Area.

Reasons

Special interest and significance

26. The appeal concerns the existing marquees situated within the frontage areas of three elegant, Grade II* listed Regency villas constructed in the early 1830s at Nos 125 to 133 Promenade, and the pre-existing marquees situated to the side of No 133.

⁴ Ref: 22/01373/FUL

⁵ Appeal Ref: APP/B1605/W/23/3314132

⁶ Under s70b(3) of the 1990 Act. Ref: 23/01118/FUL

⁷ Ref: 23/01597/FUL

27. The listed buildings are designed with classical proportions and are finished in stucco render. No 125 and 127 have two main storeys, an attic and basement. The outer bays and the central section project slightly forward from the main façade. The central projection is decorated with six pilasters running through the ground and first floors, topped with composite-style capitals, and supporting an entablature above. The main frontage entrances are reached via a flight of steps at each end of the building, leading up to decorative porches supported by two fluted Doric columns, with wreath decorations on the frieze above. Each entrance has a pair of panel doors, with overlights above.
28. Nos 129 and 131 are two storeys above a basement. The central section projects forward with windows framed by fluted columns. A continuous decorative entablature runs across the top of the building. The ground-floor windows and main central entrance have decorative stone surrounds. The central entrance is reached by rounded-edge steps. At each end are slightly recessed two-storey entrance sections.
29. No 133 is two storeys and a basement, with three main bays. The central section is taller and projects slightly forward of the lower flanking end sections. The central section contains three first-floor windows and is decorated with pilasters. At ground-floor level, the pilasters are Doric style and support decorative curved arches above the windows. At first-floor level, the pilasters are Ionic style.
30. The ground floor windows to each villa are tall and elegant, indicating the historical importance of the rooms on this level. Each ground floor features balconies with decorative metal railings. Continuous decorative balconies are present for much of the ground floor at No 125 and No 127, and at No 133 with tent roofs above, whilst those at Nos 129 and 131 are individual balconies served by French windows.
31. The previous Inspector highlighted that the design detailing of the appeal buildings contributes to an elegant appearance, reflective of the increasing prosperity of Cheltenham as a Regency Spa town. He further commented that whilst each building has individual design features, their materials, scale and spacious siting are unifying characteristics, together forming part of an outstanding group of Regency villas along this part of Promenade overlooking Imperial Gardens and the Queens Hotel, also Grade II* listed.
32. I see no reason to disagree with any part of that assessment, which entirely accords with my own observations at the time of my site visit.
33. The villas are set back from their frontages facing onto the broad, tree-lined Promenade, and are predominantly enclosed by black railings. The three sets of gate piers adjacent to No 133 are also individually Grade II listed. The elevated ground floor levels of the appeal buildings along with their elegant ground floor windows and balconies allow key views of that planned tree-lined avenue and Imperial Gardens beyond.
34. The consciously larger plots to the villas are distinctive compared to nearby terraces and add to the sense of space and grandeur, whilst the deliberate setback from the road allows these buildings to be better appreciated by those walking along Promenade, a clear intention of the design of the buildings in the nineteenth century.

35. The appeal site also falls within the Central Conservation Area (Montpellier Character Area), the significance of which is largely derived from its many complete and uniform formal terraces and villas built in the Regency style, set within spacious grounds. Its significance is also derived from its formal public gardens, important landmark public buildings, and the importance of the Promenade as a planned tree-lined, wide and spacious thoroughfare.
36. The appeal buildings, being elegant Regency villas in a spacious and planned setting and forming a high-quality building group, reinforce those characteristics and positively contribute to the significance of the Conservation Area as a designated heritage asset. The sensitivity of the site is reinforced by facing out onto one of the town's most visually striking tree lined streets and towards Imperial Gardens, and by its proximity to the Queen's Hotel landmark building, all of which also make a very positive contribution to the significance of the Conservation Area.

Effects

37. The Inspector for the previous appeal found that:

"Owing to their considerable height, spread and form, the marquees almost completely obscure the ground and basement elevations of the buildings, radically reducing the visibility of their architectural detailing, such as the arcading and balconies to the ground floor areas referred to above. The peaks of the marquees also obscure parts of the first floors of the buildings. Visibility of the buildings in views from outside the site as well as from the entrance to Imperial Gardens opposite and from further along Promenade has been radically reduced. This severely restricts the ability to appreciate the significance of the buildings.

Within the site, views of the exterior of the buildings are extremely limited and diners within this space, in my view, are unlikely to be able to gain a realistic appreciation of the significance of the buildings that they are visiting."

38. He also found that:

"The scale of the development has drastically reduced the degree of spaciousness within the appeal site (despite three proposed marquees being absent on my visit). The development of the site has had a significantly diminishing effect on the legibility of the original conscious design as grand villas within a spacious setting, adversely affecting their significance. Moreover, the tented form and irregular positioning of the marquees within the site jars with the formal symmetry of the Regency buildings. This also has the effect of reducing the individuality between the three buildings and blurring the definition between them.

Having regard to the above, the marquees have become a prominent and incongruous feature of the streetscene along Promenade and due to their scale, colour and form are visible for much of its length. They are also prominent in views from Imperial Gardens. The marquees intrude into the space adjacent to the street trees, imposing upon them, unbalancing the symmetry of the avenue in views looking down Promenade from the Queens Hotel and adversely affecting the spacious, verdant character of the CA as a whole."

39. The Inspector therefore concluded that the retention of the marquees would have a harmful effect on the special interest of the adjacent Grade II* listed buildings, particularly their setting, and would fail to preserve or enhance the character or

appearance of the conservation area, thereby causing harm to the significance of those designated heritage assets.

40. The appellant seeks to highlight the differences between the development subject to this ground (a) appeal, and the applications and appeal listed in the enforcement notice. However, as explained, the notice relates to the same marquees as considered under the referenced application and related appeal. Although it is likely that the marquees to the side of No 133 had been removed by the time of issuing the enforcement notice, the photographs show that that part of the breach had occurred before that date. The previous Inspector's findings are therefore entirely applicable to this ground (a) appeal and are an important material consideration.
41. In any event, it is evident from the Inspector's assessment that his comments are primarily made in respect of those marquees in place at the time of his site visit, which is very likely the same as those in place at the time of issuing the enforcement notice. To include the additional three marquees to the side of No 133 would serve only to increase the degree of harm.
42. By the time of my site visit, the marquees had been removed from the front of Nos 125 and 127, thereby allowing the significance of that building to be appreciated. The difference is stark and serves to clearly demonstrate the degree of harm caused to the setting of the listed buildings arising from the marquees. Still, the adjacency of the remaining marquees to that space affect how it is appreciated from oblique angles and how Nos 129 and 131 can be appreciated from the outdoor seating area of No 125 and No 127.
43. The previous Inspector further found that:
44. *"Lying within its setting, the appeal site also contributes to the special interest and significance of the Grade II* listed Queens Hotel. This is through reinforcing the spacious character of the area and allowing views across it to the appeal buildings' facades as part of a conscious grouping of Regency buildings and development along this part of Promenade. Through interrupting the spacious character and views between the two buildings the development has adversely affected the significance of the Grade II* listed Queens Hotel through development within its setting."*
45. Again, those findings remain applicable here and are fully consistent with my own observations.
46. In terms of the Grade II listed gate piers located along the frontage of No 133, the previous Inspector rightly highlighted that their significance derives from their association with No 133, which lies within their setting. In that regard he found that *"A further consequence of the appeal development has been that these gate piers have also been partly or totally subsumed by the structures, eroding their legibility within the site, to the detriment of their significance."* Again, I agree with those findings; given their height and extent in the intervening space, the marquees severely compromise the ability to appreciate the gate piers' association with No 133.
47. Whilst the effect on the special interest and significance of the Queens Hotel and the gate piers did not form part of the reasons for refusing the application subject to the previous appeal or indeed the reasons for issuing the enforcement notice in

this appeal, the Inspector highlighted the statutory duty of the decision maker under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving listed buildings or their settings. In that regard, my findings, as per the previous Inspector, add to the harm to the heritage assets described above.

48. I therefore find that the marquees fail to preserve the special historic interest of the setting of the identified Grade II* and Grade II listed buildings and fail to preserve or enhance the character or appearance of the Conservation Area.

Public Benefits and Balance

49. Paragraph 212 of the National Planning Policy Framework (the Framework) advises that when considering the impact of development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
50. Paragraph 213 goes on to advise that any harm to, or loss of, the significance of a designated heritage asset from development within its setting, should require clear and convincing justification.
51. On the basis of the above, I find the harm to be less than substantial in this case. I note the appellant argues that would be at the lower end of that spectrum, as the marquees are temporary in nature and do not physically touch the listed buildings. However, the harm to the setting of the listed buildings, including those which are Grade II*, is significant, such that the degree of harm is towards the midpoint of the spectrum. Even the harm to the Conservation Area as a whole is not at the very lowest end of the spectrum, given the sensitivity of the location. In any case, the harms are of considerable importance and weight.
52. In such circumstances, paragraph 215 of the Framework advises that this harm should be weighed against the public benefits of the development, including, where appropriate, securing its optimum viable use.
53. I recognise the importance of tourism to the economy of Cheltenham and in that context the contribution of the hospitality sector to visitor experiences. I also recognise the importance of the hospitality sector to employment in the town and the myriad factors which make this a challenging time for that sector.
54. The appellant states that the lack of a more appropriate and longer-term replacement of the existing marquees would have severe economic consequences. However, this appeal is concerned with the marquees subject to the enforcement notice, rather than any longer-term replacement, which would be a matter for the appellant and the Council.
55. In that regard, I note that since submission of the appeal, the appellant has been granted planning permission for the erection of metal-framed pergola structures within the frontages of Nos 125-133, to provide external restaurant, dining and drinking facilities in association with the hotel⁸.

⁸ 24/01763/FUL approved 13 March 2025

56. This appeal is supported by an Economic Impact Statement (EIS) which states that the year-round availability of marquee dining and drinking represents over 53% of the total turnover of the venue over the period from 2020-2023. The appellant has also provided figures showing a significant revenue growth for the business after the installation of the marquees. Whilst I have no reason to doubt the headline financial figures provided, in the absence of any underpinning financial data, they do carry less weight. The figures are also likely skewed by restrictions in place during the COVID-19 pandemic.
57. Nonetheless, it is very likely that the marquees facilitate a very significant contribution to the total turnover of the venue, arising from the additional covered trading capacity and differing offer. The appellant states that removing these facilities would necessitate making 39 part-time and 23 full-time staff redundant, amounting to a 61% reduction in the employment headcount.
58. In the event that this type of facility is permanently lost, it is argued that the overall viability of the entire premises would be genuinely threatened, meaning a loss of 103 jobs, as well as the related adverse consequences for the supply chain, the evening and wider economy.
59. The appellant argues that the figures illustrate the essential economic role of the dining and drinking experiences provided by the marquees in driving venue viability and that their continued operation remains integral to the financial sustainability of the business based on revenue dependency. The appellant argues that the business is simply unviable without the additional space provided and the alternative and distinctive experience it offers. To that end, the appellant further argues that the viability of the business is essential to the on-going use and maintenance of the listed buildings.
60. Despite the limited evidence underpinning the EIS, I accept that significant economic benefits are likely derived from the marquees in relation to the business premises, its employees and the supply chain, all of which will contribute to the vitality and viability of the town centre. Those are public benefits that weigh in favour of the marquees.
61. In that context paragraph 85 of the Framework states that planning decisions should help create the conditions in which businesses can invest, expand and adapt, and that significant weight should be placed on the need to support economic growth and productivity, taking into account both local business needs and wider opportunities for development. Paragraph 90 also states that planning decisions should support the role that town centres play at the heart of local communities, by taking a positive approach to their growth, management and adaptation.
62. The marquees glean further support from Gloucester, Cheltenham and Tewkesbury Joint Core Strategy (CS) Strategic Objective 1 (building a strong and competitive economy), Strategic Objective 2 (ensuring the vitality of town centres) and to the employment objectives of Policy SD1.
63. However, the recent planning permission represents a fallback position which would likely continue to provide the economic benefits derived from the marquees in a manner which is much less harmful and is evidently acceptable to the Council. In any event, it is not an all or nothing scenario in terms of the economic benefits as the space in which the marquees sit, would remain. I saw that there are significant outdoor dining and drinking opportunities outside the areas covered by marquees

to the side and rear of No 133 and now in front of Nos 125 and 127. I see no reason why such facilities could not be replicated in place of the remaining marquees, should the appellant wish to do so.

64. Facilities attractive to visitors would then remain, albeit on a more seasonal basis. Indeed, it seems to me that much of the attraction of sitting outside in a location such as this, is the ability to be able to appreciate the surroundings, including the adjacent listed buildings. A more conventional arrangement of outdoor dining and drinking would better facilitate that compared to the more enclosed nature of the marquees. Moreover, as pointed out by the previous Inspector, although nearby bars and restaurants have outdoor seating, he saw no similar marquee type structures. That is consistent with my own observations.
65. Nevertheless, I recognise that the marquees will provide better weather protection than a conventional beer garden type umbrella or commercial parasol, so will be able to attract customers to the outside area for much longer periods of the year.
66. The appellant considers that the marquees are supported by paragraph 4 of CS Policy SD8, which states that proposals that will secure the future conservation and maintenance of heritage assets and their settings that are at risk through neglect, decay or other threats, will be encouraged. Whilst in that regard, I do not doubt the benefits to the business flowing from the use of the marquees, I do not have the evidence to demonstrate that the business is unviable without them or is at risk in a manner envisaged by CS Policy SD8. In any case, the marquees are harmful to the setting of the listed buildings so do not secure their future conservation and maintenance in that regard, and, moreover, a less harmful option has been approved.
67. The appellant further argues that the retention and continued use of the marquees allows the heritage assets to fulfil their “*optimum viable use*”. However, this issue was considered by the previous Inspector who explained that, although the buildings were vacant prior to being incorporated into the current business, the appellant has not demonstrated why they consider the buildings’ current use is their optimum viable use. In that regard he noted that Planning Practice Guidance sets out that where there are other economically viable uses, the optimum viable use is the one likely to cause the least harm to the significance of the asset, and, that this may not necessarily be the most economically viable one.
68. Whilst the marquees may be particularly profitable, the approved scheme demonstrates that there are other viable options for outdoor dining and drinking which would cause less harm to the significance of the heritage assets compared to the marquees. Therefore, as per the previous Inspector, I am not convinced that the marquees in particular are fundamental to maintaining the buildings’ optimum viable use.
69. Therefore, given the alternative, less harmful options available to the appellant for outdoor dining and drinking, I attribute limited weight to the economic benefits offered by the marquees.
70. I recognise that the outside space is accessible but that would remain the case without the marquees and presumably the same would apply to the recently approved alternative. I therefore attach limited weight to the marquees in terms of their specific accessibility benefits.

71. I accept that in the aftermath of the pandemic some people may remain nervous about being in crowded, indoor spaces, and prefer to socialise in well-ventilated spaces where greater distancing can be achieved. However, I have nothing to show that numbers attracted to the site are material in that regard and I saw that a significant stretch of the marquees are fully enclosed on their sides anyway. In any event, customers could sit outside during the warmer months and achieve any health benefit arising. I therefore apply very little weight to that argument.
72. Collectively therefore, the individual and cumulative weight I have attributed to the public benefits identified are not sufficient to outweigh the considerable importance and weight I attach to the harm arising to the special interest and significance of the adjacent Grade II* and Grade II listed buildings, with particular regard to their setting, as well as the harm to the character and appearance of the conservation area. Indeed, I find that the marquees do not sustain or enhance the significance of the designated heritage assets and do not conserve them in a manner appropriate to their significance.
73. The marquees thus fail to satisfy the requirements of sections 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and are contrary to the Framework and CS Policy SD8, which together seek to conserve and enhance heritage assets and safeguard local distinctiveness and the historic environment. The marquees are also contrary to CS Policy SD4 and Policy D1 of the Cheltenham Plan, which state, amongst other things, that development will only be permitted where it complements and respects neighbouring development and the character of the locality.
74. In principle, if I were to have allowed the ground (a) appeal, permanent planning permission would be granted for the marquees, which are likely only designed as temporary structures. The appellant's primary case is that temporary planning permission should be granted for them, and he has confirmed he would be happy to accept a condition on that basis. However, as noted, the Inspector for the previous appeal has already found the harm arising from the marquees to be unacceptable even for two years. For this appeal, I find that the degree of harm is such that a lesser period of even 12 months would be unacceptable.

Alternative schemes

75. In the event that I make the above finding, the appellant has requested, under ground (f), that I consider whether lesser steps would remedy the harm. To that end the appellant has proposed three alternatives.
76. Caselaw⁹ directs that, so long as there is an appeal on ground (a), I must consider whether those modified schemes would be 'part of the matters' and should be permitted. Such options should be considered under ground (a), even though the actual application under ground (a) relates to the marquees as erected. Whether or not the proposed alternative scheme amounts to part of the matters, and may be permitted, is for the planning judgement of the decision maker¹⁰.
77. Alternative 1 is stated to be an amendment to the height and shape of the roof of the marquees and is in effect the scheme considered by the Council under application reference 23/01597/FUL.

⁹ *Ahmed v SSCLG & Hackney LBC* [2014] EWCA Civ 566

¹⁰ *R (oao Banghard) v Bedford BC* [2017] EWHC 2391 (Admin)

78. Although they would remain marquees in the same position, their design and appearance would be materially different. The existing marquees are a distinctive pagoda style so have a steep roof with a relatively high, single peak, whereas what is proposed has a shallow curved roof, akin to an arcum marquee.
79. Consequently, it is very likely that a different cover would be required and, at least, a partly differing frame. Although virtually any alternative scheme is likely to involve some element of new work, the extent of the work in this case would likely to be relatively significant, such that alternative 1 would not form part of the matters stated in the enforcement notice and would be materially different. Consequently, the alternative would not fall within the statutory powers open to me to grant planning permission under s177(1)(a) of the 1990 Act.
80. As alternative 2 would utilise the same design as alternative 1, but with the smaller linking marquees removed, I reach the same conclusion that that modified scheme would not form part of the matters stated in the enforcement notice.
81. For alternative 3 the appellant states that he would be willing to accept the removal of one or more of the marquees to the front of Nos 125 and 127, leaving as few as eight marquees in front of Nos 129 to 133. However, it is proposed to utilise the same design as alternatives 1 and 2, so it again follows that alternative 3 would not form part of the matters.

Other Matters

82. The appellant submits that there is a legitimate fallback available in that listed pubs and restaurants can erect a moveable structure (including a marquee) for 120 days in a 12-month period, subject to prior approval. The appellant does not identify the permitted development right but presumably reference is being made to Class BB of Part 4 of Schedule 2 of the GPDO¹¹.
83. Various court cases have considered the concept of fallback development as a material consideration. In the case of *Mansell*¹², the Court of Appeal confirmed that there should be a “*real prospect*” of a fallback development being implemented and that the decision-maker should exercise their planning judgment as to whether that would be the case depending on the particular circumstances. The basic principle is that a real prospect does not have to be probable or likely: a possibility will suffice.
84. The case of *Mansell* also confirmed that it was plainly appropriate for the Council to take into account the fallback available to the developer, including the permitted development rights arising under Class Q in the GPDO. In the circumstances of that case, it was found to be entirely reasonable to assume that any relevant permitted development rights by which the developer could achieve residential development value from the site would ultimately be relied upon if an application for planning permission for the construction of new dwellings were refused.
85. That is clearly applicable here. Having regard to the EIS submitted with the appeal, there remains a real prospect of the appellant seeking to utilise Class BB permitted development rights in the event that this appeal is dismissed, even though planning permission has recently been granted for the pergola structures.

¹¹ The Town and Country Planning (General Permitted Development) (England) Order 2015

¹² *Mansell v Tonbridge and Malling BC & others* [2017] EWCA Civ 1314

86. However, the prior approval of the Council would be required as to the siting of the moveable structure. Even if that were to be granted, the height would be restricted to 3m and the duration of any potential harm would be restricted to 120 days, whereas those currently in place are likely significantly taller and are in place year-round. Consequently, that fallback position would amount to an improvement in terms of the effect on the setting of the listed buildings and the conservation area. I therefore apply limited weight to it as an argument in favour of the ground (a) appeal.
87. The planning permission for the metal-framed pergola structures had not been implemented by the time of my site visit, but it represents a clear fallback position for the appellant. However, because the approved scheme amounts to a significant improvement over that before me, that fallback also carries very limited weight.
88. Nevertheless, if there are any elements of the enforcement notice which have been granted planning permission as part of that scheme, s180(1) of the 1990 Act provides that where planning permission is granted after the service of an enforcement notice for any development already carried out, the enforcement notice shall cease to have effect insofar as it is inconsistent with the planning permission.

Ground (a) Conclusion

89. For the reasons given above, I conclude that the marquees are contrary to the development plan as a whole, and material considerations do not indicate that the appeal should be determined otherwise than in accordance with the development plan. The ground (a) appeal should not therefore succeed. 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.

The Appeal on Ground (f)

90. An appeal on ground (f) is that the requirements of the enforcement notice are excessive to remedy the breach of planning control or, as the case may be, the injury to amenity caused by the breach.
91. The corrected breach in this case is the erection of marquees with associated fittings and chattels facilitating their use. The corrected requirements of the notice are to remove all marquees from outside of the front and side of Nos 125 to 133 and remove all associated fittings and chattels that facilitate their use, including temporary wood walls, bar areas and any other items associated with the marquees.
92. The purpose of the notice must therefore be to remedy the breach of planning control. Accordingly, the appeal on ground (f) can only succeed if it is shown that the steps set out in the notice are excessive for that purpose.
93. The appellant disagrees that the steps required by the notice are the minimum required to remedy the current breach. However, the requirements tally with the breach, save that the former clarifies the associated fittings and chattels include temporary wood walls, bar areas and any other items associated with the marquees.

94. The appellant argues that is unclear, and that there are a number of external fixtures, most of which sit under the marquees, that are not considered by the appellant to be 'associated' with them (they do not support the marquees and the marquees do not rely on them to stay in place).
95. However, the breach relates to the fittings and chattels that facilitate the use of the marquees, so would not be restricted to those which keep them in place. The appellant will be best placed to know what those fittings and chattels are. As the requirements include bar areas the appellant is wrong to assume that they are acceptable and can be retained. Even if the acceptability of such aspects has not previously been considered, the appellant has not provided any specific details of any severable fittings or chattels which would allow me to consider whether a split decision could be issued for part of the matters.
96. The appellant is also critical of the Council for not considering that the steps should go so far as is necessary to remedy any injury to amenity which has been caused by any such breach. However, as explained, the purpose of the notice is to remedy the breach not the injury to amenity, so the latter is not applicable in this case.
97. As discussed under ground (a), the appellant has submitted three alternative schemes as part of his ground (f) case but, for the reasons explained, they would not form part of the matters such that it would be open to me to grant planning permission for them under s177(1)(a) of the 1990 Act.
98. The appellant argues that, in theory, there are almost innumerable possible lesser steps which would overcome any harm identified, but, for the purposes of ground (f), none are shown that would remedy the breach of planning control. The requirements in that regard are not excessive, save for the reference to marquees at the rear, which I will delete.
99. That is not the same as saying that the only way to avoid the harm to the listed buildings is to have no marquees, it just means that under ground (f) all of the marquees need to be removed in order to remedy the breach. A scenario in which they remain, remain in part or remain in an amended form would not achieve that purpose.
100. The appeal on ground (f) therefore succeeds only insofar as the reference to the marquees to the rear of No 133 should be deleted, as explained above.

The Appeal on Ground (g)

101. The ground (g) appeal is that the three months given to comply with the notice is too short and would cause material harm to the interests of the business at the site.
102. The appellant argues that at least 12 months would represent a far more reasonable period of time to undertake the works. The appellant refers to the need to honour existing bookings and business commitments and explains that the removal of the marquees would need to take place alongside ongoing business operations.
103. Clearly, for the most part, the removal of the marquees is likely to be a relatively quick and straight forward operation. Moreover, as noted, the marquees situated in front of Nos 125 and 127 have already been removed, thereby significantly reducing the scope of the requirements.

104. However, I understand the appellant's concern that they need to be taken down at a time that would minimise disruption to the business, considering contractor availability. Although the appellant has now benefitted from the marquees beyond the two years sought via the previous appeal, he is entitled to assume success in this appeal on any ground pleaded.
105. I therefore accept that three months, particularly during the summer season, is too short and would likely cause significant disruption to the business. Nevertheless, a period of 12 months is excessive and would amount to a temporary planning permission, which has already previously been dismissed at appeal, albeit for two years. A period of seven months would allow the marquees to be retained for the remainder of the summer and for the Christmas/New Years Eve period and would strike a reasonable and proportionate balance between any disruption to the business and the public interest in this case.
106. Should the appellant wish to implement the aforementioned planning permission sooner, that will be a matter for him.
107. The appeal on ground (g) succeeds to the extent explained.

Richard S Jones

INSPECTOR