



Appeal Decisions

Inquiry held on 7-9 November 2023

Site visit made on 6 November 2023

by Ms Watson BA(Hons), MCD, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 December 2023

Appeal A Ref: APP/U2370/C/23/3325409

Appeal B Ref: APP/U2370/C/23/3325410

Cube Bar Ltd, 2 Breck Road, Poulton-Le-Fylde, FY6 7AA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. Appeal A is made by Mr Paul Mellor (Cube Bar Ltd) and Appeal B is made by Mr Paul Mellor against an enforcement notice issued by Wyre Borough Council.
 - The notice, numbered PLG/6/144, was issued on 25 May 2023.
 - The breach of planning control as alleged in the notice is (1) a) The increase in the height of brick boundary walls to the western, northern, and eastern boundaries of the land respectively in the approximate locations marked yellow on the plan attached hereto to a height of approximately 2.25 metres from ground level; and
 - b) The erection of a polycarbonate roof, measuring approximately two metres in width projecting from each of western, northern and eastern boundary walls and a length approximately two metres in width joining the polycarbonate roof east and west respectively together to the south to create a rectangular covered area for seating (the "overhanging roof") in the approximate location shown shaded purple on the attached plan; and
 - (ii) On 17 May 2007 planning permission in respect of the Land was granted by the Council under reference 07/00319/FUL for a ground floor extension to form staircase and the change of use from car park to outside eating/drinking area, subject to conditions. One of those conditions, namely Condition 2 is as follows "*The use of the rear yard hereby permitted, shall only be used between the hours of 9am and 6pm (0900 and 1800). There shall be no customers in the yard at any other time.*" It appears to the Council that the condition has not been complied with, because the rear yard has been used outside the hours of between 9am and 6pm (0900 and 1800). There have been customers in the yard outside the hours between 9am and 6pm (0900 and 1800)
 - The requirements of the notice are: (i) Reduce the height of each of the brick boundary walls to the western, northern and eastern boundaries of the Land to the height that they were before the unlawful development took place, namely to 1.65 metres from the respective immediately adjoining ground levels; (ii) Remove from the land all debris and rubble that arises from compliance with sub paragraph 5(i) above; (iii) Remove the overhanging roof in its entirety from the land; (iv) Cease the use of the rear yard for the purposes of eating and drinking outside of the permitted hours of 9am and 6pm (09:00-18:00) and (v) Cease the presence of customers in the rear yard outside of the permitted hours of 9am and 6pm (09:00 – 18:00)
 - The periods for compliance with the requirements are: Steps (i), (ii) and (iii):- 3 months and steps (iv) and (v):- 1 month.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a), (c), (d) 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. Appeal B is proceeding on grounds (c), (d) and (f).
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Decision

1. Appeals A and B: It is directed that the enforcement notice be corrected by the deletion of the word "polycarbonate" in Section 3(i)(b).
2. Subject to the correction, the appeals are allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely, a) the increase in the height of brick boundary walls to the western, northern, and eastern boundaries to a height of approximately 2.25 metres from ground level; and b) an overhanging roof, measuring approximately two metres in width projecting from each of western, northern and eastern boundary walls and a length approximately two metres in width joining the roof east and west respectively together to the south to create a rectangular covered area for seating at Cube Bar Ltd, 2 Breck Road, Poulton-Le-Fylde, FY6 7AA as shown on the plan attached to the notice.

Applications for costs

3. An application for costs has been made by Mr Paul Mellor (Cube Bar Ltd) against Wyre Borough Council. This is the subject of a separate decision.

The Notice

4. The allegation in Section 3(i)(b) states "polycarbonate roof". The roof is not polycarbonate so it was agreed at the Inquiry that the word "polycarbonate" could be removed from the allegation.

The appeal on ground (c)

5. The ground (c) appeal is in relation to the use of the beer garden outside of the hours between 9am and 6pm. As I see it, there are two elements to the appellant's case for the ground (c) appeal. One is that planning permission was never required to use the outside area as a beer garden due to a previous 2001 planning permission and that this permission gave unrestricted use of the yard (01/00569). The other is that Condition 2 of 07/00319/FUL which restricts hours of use is not enforceable because the permission was not implemented.
6. Two permissions were granted in 2001. The first is 02/01/00167 for a "change of use to public house, two/three storey side extension and replacement windows to existing building". Condition 11 on that permission required that "The rear yard area shall be used for car parking and for the servicing of the premises only and shall not at any time be used for any other purpose relating to the use of the site." The Council say that it was this first permission, which did not allow the use of outside area as a beer garden that was implemented.
7. The second permission is 02/01/00569 for "amendments to approved scheme, enlargement of staircase tower, addition of external fire escape, second floor toilet extension and new doorway to front elevation." There is no condition on that permission relating to the rear yard. The Council claim that this was simply an amendment to the first permission. The appellants said at the Inquiry that the Council changed the description from that on the application form and that the application was not submitted as an "amendment".
8. On the second 2001 permission, the description of development on Section 4 of the application form is "bar/restaurant – inclusion of door to front elevation and

toilet block to second floor". The option "Full application for a change of use and/or new building/engineering work or alterations" at 5(c) of the application form has been ticked. Section 9 of the application form says "describe the existing use of the site. If vacant, state the last use". The use stated in this section is "Con Club" referring to the previous use as a Conservative Club. Therefore, the change of use was applied for in that application. The red edge of the application site is also larger than in the first permission as it incorporates 4 Breck Road.

9. I do not accept the Council's position, therefore, that the 2nd permission is simply an amendment to the first scheme. Notwithstanding the description on the second permission stating "Amendments to approved scheme", this second permission is a stand-alone permission. Two separate full planning permissions, both of which were for a change of use, were granted. The appellant was free to choose to implement either one of them.
10. I heard at the Inquiry that the second permission was implemented because 4 Breck Road, which was not part of the first scheme, has been incorporated into the site. There was no dispute at the Inquiry that this element of the 2nd permission had been implemented. Furthermore, the appellant and his architect both stated under Oath at the Inquiry that the development did not commence until after the second permission was granted. In any event, even if the use had changed prior to the second application, a permission can be implemented retrospectively. There is no suggestion that there is anything in the first permission that would prevent the appellant implementing the second. I consider that the second permission was for a change of use of the whole premises and that it was implemented.
11. On the balance of probabilities, therefore, this second permission is the one under which the use operates. On that basis, as there was no condition on the second permission to restrict the outside areas, the whole of the site has permission to be used as a bar/restaurant with no restrictions on the outdoor area. There are no conditions in relation to operating hours.
12. As I have found that the second 2001 planning permission granted an unrestricted permission and has been implemented and remained in effect in 2007, it follows that there was no need to obtain planning permission for the beer garden in 2007. The question of whether the 2007 permission was implemented, therefore becomes irrelevant as the site is operating under the second 2001 permission. Condition 2 on the 2007 permission therefore does not bite.
13. The ground (c) appeal succeeds and therefore there is no need for me to consider the ground (d) appeal which relates to the use only.

The appeal on ground (a)

14. As the matter of the hours of use succeeds under ground (c) the overhanging roof remains to be considered under ground (a).
15. The main issue is the effect of the development upon the living conditions of occupiers of nearby residential properties with particular regard to noise.
16. The wall around the beer garden has been made taller in order to fix a canopy on top of it. This canopy shelters the seating areas along the sides of the beer garden and there are heaters under it.

17. As the canopy allows for people to sit outdoors at times when it would not otherwise be comfortable or attractive to sit outdoors, the canopy facilitates a greater use of the beer garden compared to when before the canopy was constructed. However, the appellant has pointed out that if the canopy were removed, the pub could erect umbrellas with heat lamps underneath. Umbrellas could also facilitate people to sit outdoors like the canopy does.
18. The beer garden, as set out, has a capacity of some 126 customers. The Licence requires patrons to be seated which limits capacity, although, I saw at my visit that more tables and chairs could be put in the middle of the beer garden to increase occupancy. An increase in occupancy would make the beer garden noisier. It was agreed at the Inquiry that, even with the canopy, the internal noise in bedrooms of the dwellings at 4 and 5 Prudy Hill would be about 34dB whilst the beer garden was being used with some 126 occupants. If the occupancy were to increase by some 50% the noise levels would be likely to increase to around 37dB.
19. I appreciate that BS8233 and the World Health Organisation guidance¹ indicates that noise levels above 30dB would disturb sleep. I also understand that the sleep period described in these documents is between 23:00 and 07:00. The beer garden does not operate between 23:00 and 07:00 as the Licence does not allow for it. However, I recognise that people, including children would be asleep outside of these times as the beer garden is licenced to operate until 10pm at the latest. Therefore, it would be used during the sleep times of some people.
20. Nevertheless, the appellant has demonstrated within their noise report that the canopy and wall provide noise attenuation. Moreover, residents and the local Councillor say that the wall and canopy has improved the residents' quality of life due to the noise attenuation it provides and it has improved residents' privacy and security. Furthermore, one of the residents stated at the Inquiry that he was worried that if the canopy were removed then even more noise would come from the adjoining Cavo bar which has a very late-night beer garden, some of which has planning permission. The neighbour and the local Councillor pleaded with me at the Inquiry to allow the canopy to remain. I appreciate that the neighbours would prefer no beer garden at all. Nevertheless, it was very clear at the Inquiry that if the beer garden is to remain operative beyond 6pm, the preference from the neighbours is that the canopy remains. The lived experience of the neighbours attracts great weight in my considerations.
21. The Council considers that the neighbours have simply got used to the noise and that future residents would find it noisy with even with the canopy. However, the noise attenuation derived from the wall and the canopy would be the same regardless of who happens to live in the houses. If they were taken away, the residents would suffer additional noise, particularly in fine weather when it is more attractive to sit outside.
22. In addition, if the canopy were removed, umbrellas could provide shelter instead. Umbrellas do not attenuate noise like the wall and canopy. As umbrellas are common in beer gardens, and if moveable are not operational development, I think there is a realistic prospect that the appellant would use

¹ Guidelines for the prevention of Community Noise Annoyance, World Health Organisation & 1995 & BS 8233:2014 'Guidance on sound insulation and noise reduction for buildings'

them if the canopy were removed. Therefore, the increased use of the beer garden could be facilitated anyway, even without the canopy.

23. I therefore conclude that the development does not have a harmful effect upon the living conditions of occupiers of nearby properties. I therefore find no conflict with Policies SP2, CDMP1 and CDMP3 of the Wyre Local Plan (2011-2031). In combination and amongst other matters, these policies seek to ensure development promotes health and well-being; is compatible with adjacent uses with reference to noise and nuisance and does not have an unacceptably adverse impact upon the amenity of neighbours.
24. I do not consider that LP Policies EP4 and EP5 are directly relevant to the main issue.
25. I have come to a different conclusion to that of the Inspector in the 2022 S.78 appeal decision² for the canopy and walls. However, the Inspector in that case had objections to the proposal from residents at the time, whereas now the residents want the canopy retained. In addition, it appears from that Inspector's decision that evidence about noise from Cavo was not before her. Furthermore, I have placed more weight on the potential of using umbrellas. I am not bound to come to the same conclusion as a previous Inspector providing that my reasoning is clear.

Other Matters

26. As the site is located in Poulton-le-Fylde Conservation Area I have taken account of section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.
27. The character of the Conservation Area is urban in nature with tightly clustered buildings which are mostly terraced and late Victorian and Edwardian in origin. It has a commercial core with dwellings surrounding it. Streets are narrow and it has a bustling ambience. Its significance is derived from its association with the development of the town and its collection of old buildings.
28. The development is to the rear of the application site and it is surrounded by other buildings. It is not apparent in the street scene and is only glimpsed from Prudy Hill. The Council has not raised any objection in respect of the effect of the development upon the Conservation Area. The Inspector in the 2022 appeal found that the development preserves the significance of the conservation area. There is nothing before me to indicate that I should come to any other conclusion and therefore, I find that the development preserves the character and appearance of the conservation area.

Conditions

29. The Council mentioned an hours condition, but since I am allowing operational development rather than a use I do not consider that such a condition would pass the test of reasonableness.

Conclusion

30. For the reasons given above, I conclude that the appeals succeed on ground (c) in respect of the hours of use and Appeal A succeeds on ground (a) for the

² APP/U2370/W/21/3280992

wall and canopy. I shall grant planning permission for the overhanging roof and increase in height of the walls as described in the notice, as corrected.

31. The appeals on grounds (d) and (f) do not fall to be considered.

Siobhan Watson

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Kate Olley KC instructed by Mr Kingsley Smith LLB
Jane Fox MSc Dip, Fox Planning Consultancy
Mr Neil Martin BSc (Hons), PGDIP, EnvDipNEBOSH, CEnvHMCIEH, MIOA
Ronnie Preston
Paul Mellor
Danielle Mellor
Chris Bradley ARB RIBA RIAS
Bob Hewitt
Bashir Rassas
Antonia Duddle
Amanda Whitehead

FOR THE LOCAL PLANNING AUTHORITY:

Mr Philip Robson instructed by Carmel White of Wyre BC
Robert Clewes BSc (Hons) MCD, MSc
Mr Nicholas Clayton BSc (Hons) PG Dip

INTERESTED PARTIES:

County Councillor Alf Clempson

DOCUMENTS SUBMITTED AT THE INQUIRY

Council – Letter from N Barrett, Senior Licensing Officer to Mr Mellor, The Cube Bar, dated 29 April 2021

Appellant – Letter from Graham Avis, Planning Enforcement Officer to The Manager, The Cube, dated 8 September 2016.