
Appeal Decision

Site visit made on 29 June 2015

by Peter Rose BA MRTPI DMS MCM

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 18 September 2015

Appeal Ref: APP/K5600/W/15/3004566

Kensington Tavern, 54 Russell Gardens, London W14 8EZ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Sugar Bay Hill Limited against the decision of the Council of The Royal Borough of Kensington and Chelsea.
 - The application Ref: PP/14/06109, dated 18 August 2014, was refused by notice dated 21 January 2015.
 - The development proposed is erection of a basement and lower ground plus four storey building comprising 13 flats and 441 sqm of flexible use for A1, A3, A4 and/or B1 floorspace, cycle parking and storage.
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Decision

1. The appeal is allowed and planning permission is granted for erection of a basement and lower ground plus four storey building comprising 13 flats and 441 sqm of flexible use for A1, A3, A4 and/or B1 floorspace, cycle parking and storage at Kensington Tavern, 54 Russell Gardens, London W14 8EZ in accordance with the terms of the application Ref: PP/14/06109, dated 18 August 2014, and subject to the conditions set out in the attached schedule.

Procedural Matter

2. A further revised Unilateral Undertaking dated 4 September 2015 has been submitted as part of the appellant's evidence. This has been available to the local planning authority and I consider the appeal on that basis.

Main Issue

3. The main issue is the effect of the proposed development upon the living conditions of neighbouring occupiers during the construction period.

Reasons

4. The appeal site was formerly occupied by the Kensington Tavern public house. The site has been cleared and comprises vacant land. The surrounding area is predominantly residential in character, but with some shops and other non-residential use. The site is not part of a Conservation Area and the previous building was not statutorily listed.
5. The proposal is for a four-storey development with two basement levels. The development would provide commercial floorspace (A1, A3, A4 or B1), and 13 residential units.

6. The recently adopted Policy CL7 (Basements) of The Royal Borough of Kensington and Chelsea Core Strategy (the Core Strategy), supplemented by Policy CL5, seeks to limit basement developments to some 50% of the open part of a site and for basements not to comprise more than one storey.
7. Restricting the size of basements is seen by Policy CL7 to protect the living conditions of neighbouring occupiers from the impact of construction works by limiting the extent and duration of construction and by reducing the volume of soil to be excavated. Possible exceptions are identified to be 'large' sites, which are indicated to be sites within a commercial setting or generally bound by roads on all sides. The appeal site would not appear to come within this definition and, in principle, the development would not conform to criterion b. of Policy CL7.
8. Notwithstanding the requirements of Policy CL7, the appeal site benefits from extant planning permissions, however, and these include excavation of basements. Permission was granted at appeal by decision notice dated 26 March 2014 for a four storey building comprising 8 flats and commercial space (Appeal Ref: APP/K5600/A/13/2200324). A further, earlier permission was granted by the Council on 17 December 2013 for development of the remaining part of the appeal site as a house and garage (Council Ref: PP/13/04325).
9. The appellant states that the only part of the current appeal proposal which would require extended excavation relative to the approved schemes would be a small lower basement area on land adjacent to No 90 Elsham Road, and that the extent of excavation permitted at basement level by the appeal decision is identical to that now proposed. This is not disputed by the Council. The Council also recognises that both schemes could proceed independently, and at different times.
10. The appellant's evidence is that the excavation of the basement area additional to the extant schemes would require a maximum of 17 further days of such work across a construction period of some 2 years, assuming the existing schemes proceeded as part of a single building contract.
11. On this basis, I consider the existing permissions represent a significant fallback position and I attach weight accordingly.
12. The application is also accompanied by a Construction Traffic Management Plan which the Council considers to accord with the development plan, and a Construction Method Statement which addresses the authority's requirements with regard to its Subterranean Development Supplementary Planning Document May 2009 (the SPD). The SPD also refers to the relevance of related controls and duties which would be available to the Council to further limit construction impacts upon local living conditions and enforceable under other environmental legislation.
13. Compliance is also proposed with the national Considerate Constructors Scheme to ensure that development takes place in accordance with its accompanying Code of Considerate Practice.
14. As with much development, the proposed works would inevitably involve some accompanying environmental impact, and criterion l. of Policy CL7 seeks to ensure that construction impacts such as noise, vibration and dust are kept to

acceptable levels for the duration of the works. In the particular circumstances of the appeal scheme, I find, on balance, that the additional effect in this regard arising from the further excavation relative to the extant schemes, and in the context of the mitigation proposed, would not be unreasonable or fail to meet the broader expectations of that policy.

15. I therefore conclude that the proposed development would not significantly harm the living conditions of neighbouring occupiers during the construction period. Accordingly, the proposed development would not be contrary to the underlying aims of Policies CL5 and CL7 of the Core Strategy. These seek, amongst other matters, to ensure good living conditions for occupants of existing and neighbouring buildings, and for construction impacts of basement developments to be kept to acceptable levels for the duration of the works.
16. Further, as part of a wider planning balance, I find that such impacts would also be out-weighed by the overall net benefits of the scheme. The Council highlights greater benefits arising from the scheme now subject to appeal relative to those previously approved, particularly with regard to housing and townscape, but identifies some disbenefit regarding numbers of parking spaces. A lower basement to be occupied by predominantly service-related activities would also allow further capacity for more substantive beneficial use at upper levels.
17. I find the Council's policies broadly consistent with a core principle of the National Planning Policy Framework (the Framework) which seeks to achieve a good standard of amenity for existing and future occupants of land and buildings, but the Framework also seeks to support sustainable economic development through re-use of previously developed land, and to deliver quality homes.

Unilateral Undertaking

18. The Unilateral Undertaking makes commitments to affordable housing, public art, a monitoring fee, to highways works, and regarding the availability of parking permits to future occupiers.
19. It is incumbent upon me to assess the contributions required by the Council and set out in the Undertaking with regard to the tests identified in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010 (the Regulations), and with reference to the advice of the Framework, the government's Planning Practice Guidance (the Guidance), and with regard to the general expectations of the Planning Inspectorate's Procedural Guide Planning Appeals - England, published July 2015 (the Guide).
20. Regulation 122 makes clear that it is unlawful for a planning obligation to be taken into account in a planning decision unless it meets three tests. These are that the obligation is necessary to make the proposal acceptable in planning terms, that it is directly related to the scheme, and that it is fairly and reasonably related in scale and kind to the development, and these tests are more generally expressed in the Framework and Guidance. Further, Regulation 123 of the Regulations also now places limitations upon the number of pooled contributions for particular projects.
21. I note the Council's case for the contributions and the justification provided by its Planning Obligations Supplementary Planning Document adopted

- August 2010, and by accompanying submissions. On this basis, I find the contributions in relation to affordable housing and highway works would not contravene the requirements of either Regulation 122 or 123.
22. Subsequent to its decision, the Council has confirmed that the contribution for public art does not meet the requirements for pooled contributions set out in Regulation 123. Accordingly, this proposed contribution is not a factor I take into account as part of my decision. Given the other wider benefits of the development, I find the absence of such a contribution does not alter my assessment of the scheme in terms of its overall planning balance.
23. The Undertaking includes a commitment to a monitoring fee, but I consider such overseeing by the authority to be part of its mainstream service activities, and am unconvinced as to why such payment is necessary in this instance to make the development acceptable in planning terms. Accordingly, neither is this a factor I have taken into account as part of my decision.
24. Given the immediate traffic conditions and the commitments of the development plan and Framework to sustainable development, it is important for the scheme to minimise inconvenience and dangers arising from possible additional vehicle generation. Whilst the Undertaking seeks to control the availability of parking permits to future occupiers, paragraph N.6.7 of the Guide advises that care should be taken to ensure that obligations fall within the terms of section 106 of the Town and Country Planning Act 1990, and specific reference is made to *Westminster City Council v SSCLG and Mrs Marilyn Acons* [2013] EWHC 690 (Admin).
25. Although stated as a deed made under section 106, I have concerns in this regard towards the particular wording of the Undertaking as an effective restriction on the use of land. In particular, the obligations are not worded as restrictions upon the use of land but essentially as restrictions upon applications by future occupiers for parking permits. As such, I attach only limited weight to that aspect of the Undertaking.
26. Nevertheless, additionally to section 106, the amended Undertaking is also expressed as being made pursuant to section 16 of the Greater London Council (General Powers) Act 1974, and also refers to all other powers so enabling. I am satisfied this aspect of the drafting meets the general terms of section 16, that the Undertaking would be registered as a local land charge and would be effective for its stated purpose on those terms, and that such provision is both necessary and reasonable in order to minimise car usage and promote alternative modes of transport.
27. I therefore have regard in my decision to the Undertaking insofar as it relates to affordable housing, highway works and parking permits, but not in relation to public art or a monitoring fee.

Other Matters

28. I have considered all other matters raised, including all representations from interested parties.
29. A neighbouring resident at No 12B Russell Gardens raises concerns regarding possible loss of privacy to that property and implications of fumes. I note the Council raises no objection on those grounds. Ventilation and extraction details are submitted as part of the application. Whilst some overlooking would be

possible, on the evidence before me, including the position of No 12B relative to the development and the property's current setting, I find the development would not be materially harmful in that regard.

30. Concerns are also raised regarding the impact upon privacy at No 90 Elsham Road. The Council again raises no objection and concludes that, whilst closer to the development than the previous building, the relatively oblique siting of the development would not be unreasonable. The development would include balconies and windows from which some overlooking would be possible, but a gap between the buildings would be maintained. I also have regard to the extent and form of the property's existing flank wall, the existing setting of No 90, and its relationship to the former building. On balance, I agree with the Council's overall assessment and do not find the scheme would be materially harmful to the privacy of occupiers of that property.
31. I have also noted the limited level of response from neighbouring occupiers regarding the main issue.
32. None of the other matters raised are of such significance, either individually or collectively, that they would outweigh the considerations that have led to my conclusions on the main issue.

Conditions

33. I have noted the list of conditions suggested by the Council and the appellant's response. In considering such matters, I have regard to the advice set out in both the Guidance and in the Framework in terms of both the need for individual conditions and of appropriate wording.
34. For the avoidance of doubt and in the interests of proper planning, a condition is imposed to ensure the development is undertaken in accordance with the relevant drawings.
35. To protect the living conditions of neighbouring occupiers during construction, it is necessary to ensure compliance with the national Considerate Constructors Scheme. An updated Construction Traffic Management Plan is required to reflect latest known information regarding local traffic conditions. Whilst the Council suggests this should include a strategy for co-ordinating the connection of services on site with any programme for work to utilities upon adjacent land, I am unconvinced from the evidence before me of its relevance to traffic management.
36. Post-development, it is necessary to protect the living conditions of neighbouring occupiers through regulation of noise from building services plant and vents, and to mitigate any associated plant vibration. For similar reasons, conditions preclude use of the roof as a terrace, and limit the opening hours of the commercial units.
37. To ensure a satisfactory character and appearance of the development, it is necessary for further details to be agreed of external lighting and of shopfronts associated with the commercial floorspace.
38. To contribute to a sustainable development, conditions require compliance with BREEAM standards for non-residential floorspace, details are required to be agreed of electric vehicle charging points, and limitations are imposed relating to emission levels of boilers.

39. To ensure an accessible development, details are required of provision of access for people with disabilities.
40. The Council suggests a condition to preclude changes of use in relation to the commercial uses by virtue of Permitted Development rights. I am not satisfied from the evidence before me as to why the particular circumstances of the development and its surroundings would justify such a restriction. The Council also suggests further details are required of external materials, of details of equipment in relation to sewage flooding, and of ventilation. I find reasonable details have already been submitted in those regards, but a condition is necessary to ensure compliance with the submitted mitigation details in relation to flood risk. Details of professional site management of the works have previously been submitted to the Council and a further condition is not necessary.

Conclusion

41. At the heart of the Framework is a presumption in favour of sustainable development, and I am satisfied, in overall terms, that the scheme would accord with the relevant economic, social and environmental dimensions as expected by national guidance. For decision-making, the Framework's presumption in favour of sustainable development means approving proposals that accord with the development plan without delay. I find that the scheme, when considered in the context of the Framework and of the development plan taken as a whole, would meet those terms.
42. For the above reasons, the appeal is allowed.

Peter Rose
INSPECTOR

SCHEDULE OF CONDITIONS

1. The development hereby permitted shall begin not later than three years from the date of this decision.
2. The development hereby permitted shall be carried out in accordance with the following approved plans: 1307-01(GA)01B; 1307-01(GA)02; 1307-01(GA)04; 1307-01(GA)05; 1307-01(GA)06; 1307-01(GA)07; 1307-01(GA)08; 1307-01(GA)10; 1307-01(GA)11; 1307-01(GA)12; 1307-01(GA)13; 1307-02(GA)02 Rev A; 1307-02(GA)03 Rev A; 1307-02(GA)04 Rev A; 1307-02(GA)05 Rev A; 1307-02(GA)06 Rev A; 1307-02(GA)07 Rev A; 1307-02(GA)08 Rev A; 1307-02(GA)09 Rev A; 1307-02(GA)10 Rev A; 1307-02(GA)11 Rev A; 1307-02(GA)13 Rev A; 1307-02(C)201 Brick Details 1; 1307-02(C)201 Brick Details 2; 1307-02(C)201 Brick Details 3; 1307-02(C)201 Brick Details 4; 1307-02(C)201 Brick Details 5; 1307-02(C)201 Brick Details 6; 1307-02(C)201 Brick Details 7.
3. No development shall take place until full details of provision of access for people with disabilities have been submitted to and been approved in writing by the local planning authority, and the works shall be carried out and completed in accordance with the details as approved prior to the first occupation of each relevant part of the development.
4. The commercial floorspace hereby permitted shall not be occupied until full particulars have been submitted to and been approved in writing by the local planning authority of proposed shopfronts and external lighting, and the works shall be carried out and completed prior to occupation of each relevant part of that floorspace in accordance with the details as approved.
5. Notwithstanding the draft Construction Traffic Management Plan submitted, no development shall take place until an updated Construction Traffic Management Plan has been submitted to and been approved in writing by the local planning authority. The statement shall include the following matters and the development shall be undertaken in accordance with the details as approved:
 - a) routing of demolition, excavation and construction vehicles, including a response to existing or known projected major building works at other sites in the vicinity and local works on the highway;
 - b) access arrangements to the site;
 - c) the estimated number and type of vehicles per day/week;
 - d) details of any vehicle holding area;
 - e) details of the vehicle call up procedure;
 - f) estimates for the number and type of parking suspensions that will be required;
 - g) details of any diversion or other disruption to the public highway during preparation, demolition, excavation and construction work associated with the development;
 - h) work programme and/or timescale for each phase of preparation,

demolition, excavation and construction work associated with the development;

i) details of measures to protect pedestrians and other highway users from construction activities on the highway;

j) where any works cannot be contained wholly within the site a plan shall be submitted to the local planning authority and agreed in writing prior to any such works showing the site layout on the highway including the extent of hoardings, position of nearby trees on the highway or adjacent gardens, pedestrian routes, parking bay suspensions and remaining road width for vehicle movements.

6. No development shall take place until such time as the lead contractor, or the site, is signed to the national Considerate Constructors Scheme and its published Code of Considerate Practice, and the details of (i) the membership, (ii) contact details, (iii) working hours as stipulated under the Control of Pollution Act 1974, and (iv) Certificate of Compliance, are clearly displayed on the site so that they can be easily read by passing members of the public, and shall thereafter be maintained on display throughout the duration of the works forming the subject of this permission.
7. Noise emitted by all building services plant and vents shall not exceed a level of 10dBA below the existing lowest LA90(10min) background noise level at any time when the plant is operating, and where the source is tonal it shall not exceed a level of 15dBA below. The noise emitted shall be measured or predicted at 1.0m from the facade of the nearest residential premises or at 1.2m above any adjacent residential garden, terrace, balcony or patio. The plant shall be operated in accordance with the measures set out in the plant noise statement by Allaway Acoustics Ltd dated 21 May 2013. The plant shall be serviced regularly in accordance with the manufacturer's instructions and as necessary to ensure that the requirements of this condition are maintained. If at any time the plant is determined by the local planning authority to be failing to comply with this condition, it shall be switched off upon written instruction from the local planning authority and not used again until it is able to comply.
8. The plant shall not operate unless it is supported on adequate proprietary anti-vibration mounts to prevent the structural transmission of vibration and regenerated noise within adjacent or adjoining premises, and these shall be so maintained thereafter.
9. The non-residential floorspace shall achieve a BREEAM rating of Excellent, and none of this floorspace shall be occupied until a Post Construction Review Certificate has been issued for it certifying that a BREEAM rating of Excellent has been achieved.
10. No development shall take place until full details of a scheme of landscaping has been submitted to and been approved in writing by the local planning authority. The scheme shall include details of the proposed green roof, and of hard landscaping. The scheme shall be completed in full accordance with the details as approved and in accordance with a programme to be agreed by the local planning authority. Any planting in accordance with this condition which is removed, dies or becomes damaged or diseased within

five years of its introduction shall be replaced within the next planting season by planting of the same size and species.

11. The roof of the building hereby permitted shall not be used at any time as a terrace or similar facility.
12. No development shall take place until full details of vehicle charging points have been submitted to and been approved in writing by the local planning authority. The development shall be carried out and completed in accordance with the details as approved prior to the first occupation of the development and the approved details shall be thereafter maintained.
13. The boilers to be installed in the development hereby approved shall meet an emission standard of 40mg/kWh dry NO_x at 0% O₂.
14. The A1, A3, A4 or B1 uses shall not be open to members of the public other than between 0800 hours and 2300 hours, on any day.
15. The development shall be carried out in accordance with the mitigation measures identified in paragraph 11.1 of the Flood Risk Assessment by Herrington Consulting Limited dated October 2014, and such details shall be completed and be in place prior to the first occupation of the development and shall be retained thereafter.