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## Appeal Decision

Site visit made on 13 February 2017

**by S M Holden BSc MSc CEng MICE TPP FCIHT MRTPI**

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

**Decision date: 24 February 2017**

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**Appeal Ref: APP/U2235/W/16/3163575**

**11 Week Street (and warehouse to Rose Yard), Maidstone, Kent**

**ME14 1QW**

- 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 Moon A Ltd against the decision of Maidstone Borough Council.
  - The application Ref 15/502112/FULL, dated 3 March 2015, was refused by notice dated 20 May 2016.
  - The development proposed is a change of use of part of the ground floor (ancillary retail storage) together with conversion of warehouse to provide 14 residential units (5x1 bed and 9x2 bed flats).
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### Decision

1. The appeal is dismissed.

### Main Issue

2. The main issues are whether or not the proposed conversion would:
  - a) provide satisfactory living conditions for future occupants in relation to noise;
  - b) result in a need to place unreasonable restrictions on an existing business.

### Reasons

#### *Living conditions*

3. The appeal property, which for the sake of simplicity I will refer to as No 11, is a large three/four storey building, the majority of which was previously used as a warehouse. It is located in Maidstone town centre and surrounded by commercial properties including various retail units on Week Street. The western side of the building fronts Rose Yard. The proposal seeks to convert part of the ground floor and the whole of the upper floors into fourteen residential apartments. A similar scheme was approved in 2009, Ref: MA/08/1057, but was not implemented. Although this is a material consideration, that permission has now expired and it is therefore a matter of little weight in my consideration of the current proposal.
  4. Rose Yard is a minor thoroughfare that runs parallel to the buildings in Week Street and provides rear access to them. Its southern entrance from the High Street is via a pedestrian-only tunnel. Further north it is slightly wider and it provides limited vehicular access into the area. However, through views are
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- prevented by the varied building line, resulting in a sense of enclosure. No 11 is therefore only a few metres away from buildings on the other side of Rose Yard, and immediately opposite The Source Bar and nightclub.
5. The National Planning Policy Framework (the Framework) states that planning decisions should aim to avoid noise giving rise to significant adverse impacts on health and quality of life as a result of new development. The Planning Practice Guidance (PPG) advises that situations where there would be a *significant observed adverse effect* should be avoided. Such situations can arise when noise causes a material change in behaviour, such as keeping windows closed most of the time and or there is potential for sleep disturbance.
  6. The entrance to the Source Bar nightclub, which is a small enclosed porch, is very close to the western elevation of No 11. The nightclub has also been extended on its eastern elevation with the erection of an open sided structure that provides covered outdoor space at ground floor level and an open-sided first floor balcony. Loudspeakers are mounted within this outside structure. All these factors point to The Source Bar being a source of night-time activity and noise which would be generated in the confined space between the buildings. As these features are within a few metres of the western façade of No 11, the noise associated with the nightclub could cause significant disturbance to future occupants of the apartments, whose the main living rooms and bedrooms would be on this side of the building.
  7. The appellant submitted an acoustic report which largely relied on the advice set out in British Standard BS8233:2014. This standard provides guidance for the control of noise in and around buildings based on the World Health Organisation (WHO) guidelines, but takes the form of guidance and recommendations rather than a code of practice. It suggests that restricting noise to 35dB LA<sub>eq,16hour</sub> between 07.00-23.00hours and 30dB LA<sub>eq,8hour</sub> could provide sufficient mitigation to prevent unacceptable disturbance. These recommendations are based on undertaking and assessing average noise measurements over extended periods, namely 16 hours for daytime and 8 hours for night time. Nevertheless, it also recommends that the maximum noise levels in bedrooms during the night should not regularly exceed 45dB LA<sub>max</sub>.
  8. However, this standard primarily deals with sources which can be described as "anonymous noise", such as road traffic, rather than noise with a specific character, such as music or a gathering of people. Noise that contains features such as a distinguishable and continuous tone, is irregular enough to attract attention or has strong low-frequency content is likely to be much more disturbing than other sources of noise. Assessments undertaken in accordance with the standard which present averages over the 8 or 16 hour periods can therefore be significantly below short term readings (LA<sub>eq,5min</sub>). However, it is these short term readings that better reflect the actual noise level and the potential for disturbance.
  9. The acoustic report submitted to the Council provided evidence of the scale and extent of the noise that currently comes from the Source Bar. The short term readings show noise levels of 80-82dB LA<sub>eq,5min</sub> and 90-99dB LA<sub>max</sub> when the night club is in operation. Not only are these noise levels very high, but they also occur late in the evening and into the early hours of the morning. They are therefore likely to lead to significant disturbance for future residents trying

to sleep. The acoustic report goes on to recommend various mitigation measures in the form of glazing and ventilations systems. It suggests that these would reduce the average and typical maximum noise levels to 30dB  $LA_{eq,t}$  and 40dB  $LA_{Fmax}$  respectively while the Source Bar is operating between 23.00 and 03.00 hours.

10. However, the Council considered the approach set out in the report failed to adequately address the disturbance that can be caused by low frequency sound that is characteristic of dance music, particularly at 63Hz. These sounds can be transferred through a structure and therefore reduce the effectiveness of potential mitigation measures. In this context my attention has been drawn to an appeal decision<sup>1</sup>, which considered the need for sound insulation for a hotel in the same building as a nightclub. Whilst the situation here is different, it seems likely to me that the noise from the Source Bar would be capable of being transferred through the ground, the façade and the windows of No 11, particularly in view of the proximity of the two buildings to one another. In view of the Inspector's conclusions in relation to the hotel scheme, and in particular the reference to noise ratings using octave band analysis, the appellant was advised to undertake a further noise assessment to address the issue of low frequency sound. However, he chose not to do so and no additional assessments were carried out to support the appeal proposal.
11. The Council's environmental protection team did not provide any alternative evidence. However, in assessing the effects of the scheme they drew on the appellant's survey results, their own expertise in relation to acoustics and their experience of dealing with noise nuisance. They considered the acoustic report to be flawed due to its reliance on the BS 8233:2014 as the outputs did not adequately deal with problems of music noise. They pointed out that low frequency base noise in 50Hz, 60Hz and 80Hz octave bands are more penetrative of façade structures than higher frequencies. Consequently, they concluded that the ability of the proposed glazing to mitigate the effects of low frequency sound was likely to have been severely underestimated, resulting in unacceptable levels of noise within the apartments. Having read all the evidence before me, I find the overall conclusion that they could not imagine a worse place for residential accommodation, both persuasive and compelling.
12. Even in the absence of specific technical evidence to address the effects of low frequency noise, I share the concerns expressed by the Council's environmental protection team in relation to this proposal. Neither the British Standards nor the WHO guidelines have the same role or effect as development plan policies. They are not standards which need to be met in the context of the planning system's role in promoting healthy, inclusive communities. The results and recommendations of the assessment are material considerations for me to take account in my overall determination of the appeal. However, they do not represent a line which defines what may or may not be acceptable in this particular context.
13. The proximity of No 11 to the Source Bar, including its entrance, ground floor open area and first floor balcony is likely, in my view, to result in severe noise and disturbance to residents of the proposed apartments when the nightclub is in operation. In addition to any music there are likely to be people congregating in the area around the entrance who will also generate noise

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<sup>1</sup> APP/W5780/C/14/2219057

which would disturb anyone attempting to sleep. With the Source Bar operating under its standard licensing conditions this would occur several nights each week and would go on until the early hours of the morning, adversely affecting the living conditions of future occupants of the proposed apartments.

14. I am also aware that the Source Bar now has a license to operate occasional events in Rose Yard outside the building. These activities will significantly add to the potential for noise nuisance, albeit on a restricted number of occasions. These events add further to my concerns that the apartments would be adversely affected by noise and, given their proximity to the western façade of No 11, it would seem to be extremely difficult, if not impossible, to provide adequate mitigation.
15. Taking all these factors into consideration, I consider that the appeal site would be highly inappropriate for locating residential accommodation. Even with the mitigation measures proposed there would be a considerable risk that the apartments with windows on the western façade of the building, namely Nos 1, 2, 5, 6, 7, 10, 11, 12 and 14, would be exposed to noise which would cause occupiers to keep windows closed and to suffer sleep disturbance. Such levels of noise are above the *significant observed adverse effect level* and would be harmful to their health and quality of life.
16. I conclude that the proposal would result in unacceptable living conditions for future occupants arising from excessive noise and disturbance. The proposal would therefore conflict with the aims of the Framework and the PPG's advice in relation to noise.

#### *The existing business*

17. In relation to noise the Framework also states that existing businesses should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established. The Source Bar is a long-established night time venue that has been operating in Maidstone town centre for 18 years. It is part of the night time economy and has had a 7 day 24 hours trading license since 2005, since when I understand that they have also been holding concert style events in Rose Yard on approximately 20 days per year.
18. In 2015 a further license was granted for 10 special events in Rose Yard as part of the town's night time economy and the Fringe Music Festival held over each May Day bank holiday. These have been subject to scrutiny and formal process including the Safety Advisory Group, Kent Fire and Rescue Services, Kent Policy, the highway authority and other associated agencies. These are therefore authorised activities associated with the Source Bar, even though they are taking place in a public space. Consequently, they form part of the on-going business of the nightclub.
19. As the concerts are going to generate significant amounts of noise, immediately adjacent to No 11's western elevation, they could also generate complaints from future residents which could amount to a Statutory Nuisance. This could result in the need for restrictions on the existing business, such as reducing the number and altering the timing of existing and planned special events. If it was found necessary to issue Noise Abatement Notices this could not only affect the special events but could also affect the operation of the nightclub within its existing premises.

20. For these reasons I conclude that the proposal would be likely to result in the need for unreasonable restrictions to be placed on an existing business, contrary to the aims of the Framework.

### **Other Matters**

21. No 11 lies within the Maidstone Centre Conservation Area. I therefore have a duty to pay special attention to the desirability of preserving or enhancing the character or appearance of that Area. The Council considers the proposed conversion would be sympathetic to the character of the building and that the re-use of the building would be highly desirable. It also considered that the appeal proposal represented a positive improvement over the previous scheme. I see no reason to take a different view.
22. The appellant suggested that a residential development is the only viable means of achieving the conservation objectives. However, I have no specific evidence before me to substantiate this assertion. Nevertheless, as there would be no harm to the heritage asset arising from the proposal, the reuse of the building weighs in favour of the scheme.
23. No 11 is also within the core shopping area. However, it does not have a retail frontage and is not suitable for any active retail use. The town centre site is a sustainable location with excellent access to services, facilities and public transport. There is therefore no objection in principle to a change of use of the building to provide new residential units within the town centre.

### **Conclusions**

24. The Government is seeking to significantly boost the supply of housing and requires applications for housing development to be considered in the context of the presumption in favour of sustainable development. The proposal would provide an additional 14 units in a central location and in doing so would bring a characterful building into productive use. These are positive aspects of the scheme which, considered together, attract significant weight.
25. However, the close proximity of the scheme to an existing nightclub which is known to generate high levels of noise is a matter of considerable concern. In these circumstances it is for the appellant to demonstrate that the potential for noise nuisance could be adequately mitigated. From the evidence before me I am not satisfied that this could be achieved. I therefore consider that residents of several of the apartments would be subjected to unacceptable levels of noise which would seriously and adversely affect their living conditions. This is a matter to which I attach substantial weight and which outweighs the benefits of the scheme.
26. For this reason I conclude that the proposal would not represent a sustainable development and that the appeal should be dismissed.

*Sheila Holden*

INSPECTOR