
Appeal Decision

Site visit made on 24 January 2017

by Jonathan Tudor BA (Hons), Solicitor (non-practising)

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

Decision date: 15 March 2017

Appeal Ref: APP/X5990/W/16/3162906

11 Berwick Street, London W1F 0PL

- 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 Mr Richard Beatty (Polpo Ltd.) against the decision of City of Westminster Council.
 - The application Ref 16/04843/FULL, dated 23 May 2016, was refused by notice dated 13 September 2016.
 - The development proposed is adaptation of existing shopfront to provide for opening windows.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The description of development in the heading above has been taken from the planning application form. In Part E of the appeal form it is stated that the description of development has not changed but a different wording, which appears to have been taken from the Council's decision notice, has been entered. Whilst the Council states that it changed the description, there is no confirmation from the appellant that a revised description has been formally agreed. Accordingly, I have used the one given on the original application as it adequately describes the proposal.
3. The Council advises that when the application was determined, the relevant version of Westminster's City Plan (WCP) was that adopted in July 2016 but that an earlier version was referred to in the Council's decision notice. Furthermore, since that decision WCP has been updated with the latest version adopted in November 2016. It is not apparent that the policies relevant to this appeal have changed and, in any event, the main parties have had the opportunity to comment on all relevant policies during the course of the appeal. I am obliged to determine the appeal on the basis of the current development plan which includes the most recent WCP and the 'saved' policies of the Westminster Unitary Development Plan (UDP) (2007).

Main Issue

4. The main issue is the effect of the proposed development on the living conditions of the occupiers of nearby residential properties, with particular regard to noise and disturbance.
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Reasons

5. The appeal site is the ground floor of 11 Berwick Street which is in use as a restaurant. The property consists of a basement, ground floor with three floors above. It is located in a busy area comprising shops, cafes, restaurants and bars on ground floors with residential flats or offices above. Berwick Street Market, with its various stalls, trades along this part of the street between 0800 and 1800 from Monday to Saturday and the area is pedestrianised from 0700 to 1930 on those days.
6. The site lies in the 'West End Stress Area'. Paragraph 9.73 in support of saved Policy ENV 6 of the UDP, explains that 'Stress Areas' have already reached the point at which any increase in audible noise that would affect noise-sensitive properties is unacceptable. According to the Council, they are areas where the Council considers that the concentration of restaurants, cafes, takeaways and bars has reached a level where harm is already being caused to residential living conditions by noise.
7. The upper floors of the appeal building consist of three residential flats. There are also residential flats on the upper floors of 12 Berwick Street next door. Given their immediate proximity to the restaurant below, noise would be heard through its open windows by occupants of the flats above and adjoining. Whilst it may, in theory, be feasible to place limits on the level of music played in the evening, it would not be possible to mitigate the type of noise that is likely to emanate from a busy restaurant, which the Council terms as 'behavioural noise' from patrons. Paragraph 9.114 in support of saved Policy ENV 7 of the UDP recognises that intermittent noise can be more intrusive than continuous, louder noise. Heightened levels of conversation, shouting and laughter which create spikes of noise all fall within that category.
8. That type of noise, especially from larger groups eating close to open windows, would be likely to cause disturbance, notwithstanding existing background noise levels. Paragraph 9.108 in support of saved Policy ENV 7 of the UDP, explicitly states that the Council will discourage provision of openable shop fronts that would enable noise from inside the premises to be heard outside, is particularly relevant.
9. The appellant's case is reliant on a noise impact assessment which concluded that when Berwick Street Market is operating, the predicted noise impact of the restaurant, with its windows open, would not be significantly perceptible to nearby residents. However, on my site visit, I witnessed the effects of an open shop front at the 'Mediterranean Café at 18 Berwick Street. Even during daytime hours (1220), whilst the market was open, the music accompanying the sale of 'street food' at the premises was significantly exacerbating noise levels in the vicinity. Although only one example, this casts doubt on the reliability of the noise report in respect of daytime noise.
10. The Council draws attention to the fact that the noise assessment was carried out on a Tuesday night, which is not likely to be one of the busier evenings and is probably not comparable to a Friday or Saturday night. Moreover, it questions technical aspects of the assessment including the concentration in the text on L_{Aeq} noise indices rather than the L_{Amax} measurements that were also taken. The Council suggests that the L_{Amax} figures are more reflective of the type of 'behavioural noise' peaks already discussed. It also suggests that the assessment during market opening hours was inadequate because no daytime

noise measurements were taken inside the premises before 2000 hours. The appellant has not specifically disputed that analysis.

11. Further the noise assessment acknowledges at paragraph 3.4 that: *'In the evening and night time, if music is playing at current typical levels in the restaurant with the windows open the likelihood of disturbance to residents becomes higher.'* As a result, the appellant has suggested that conditions could be imposed to mitigate any adverse effects by turning down the music and closing the windows by 2100 every evening. It is unclear in what context the appellant cites the 'Duck & Rice', at 90 Berwick Street, in support of that suggestion, as the Council advise that it has no record of planning permission for openable windows at that site.
12. However, the turning down of music would not affect the type of 'behavioural noise' impact that has already been identified and closing the windows at 2100 would only provide relief in the latter part of the evening, assuming it was effectively enforced. Therefore, the suggested conditions would not provide sufficient mitigation.
13. My attention has also been drawn by the Council to three appeal decisions¹ concerning openable shop fronts, where consideration of noise and its effect on nearby residents was central. I note that all three appeals were dismissed. The appeal at 36-38 Old Compton Street also considered the possibility of allowing the windows to be open until a certain time, but the Inspector did not find that such a condition would satisfactorily overcome noise concerns.
14. Whilst I am conscious that businesses should not be subject to unreasonable restrictions, the above factors lead me to conclude that the proposal would harm the living conditions of occupiers of nearby residential flats, with particular regard to noise and disturbance. The harm would outweigh the benefit to diners or the restaurant business and could not be sufficiently mitigated by condition. It follows, therefore, that the proposal would conflict with the objectives of policies S29 and S32 of WCP and ENV 6, ENV 7 and ENV 13 of the UDP, insofar as they seek to safeguard residential living conditions especially with regard to noise recognising the adverse impact that it can have on the quality of life of residents. Consequently, it would also fail to accord with paragraph 17 of the National Planning Policy Framework, which seeks a good standard of amenity for all existing occupants of buildings.

Conclusion

15. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be dismissed.

Jonathan Tudor

INSPECTOR

¹ APP/X5990/C/12/2170326, APP/X5990/A/08/2088925 and APP/X5990/A/13/2189837