
Appeal Decision

Site visit made on 21 March 2017

by Alexander Walker MPlan MRTPI

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

Decision date: 11th April 2017

Appeal Ref: APP/K5600/W/16/3164251
43 Thurloe Street, London SW7 2LQ

- 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 Collier of Five Guys JV Ltd against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref PP/16/05437, dated 18 August 2016, was refused by notice dated 31 October 2016.
 - The development proposed is the change of use from nightclub (sui generis) to restaurant (Class A3) with ancillary takeaway.
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Decision

1. The appeal is allowed and planning permission is granted for the change of use from nightclub (sui generis) to restaurant (Class A3) with ancillary takeaway at 43 Thurloe Street, London SW7 2LQ in accordance with the terms of the application, Ref PP/16/05437, dated 18 August 2016, subject to the conditions contained within the attached Schedule.

Application for costs

2. An application for costs was made by Mr Richard Collier of Five Guys JV Ltd against The Council of The Royal Borough of Kensington & Chelsea. This application is the subject of a separate Decision.

Preliminary Matters

3. Following the refusal of the planning application, the appellant submitted a further application¹ to the Council addressing the Council's reasons for refusal, which related to odour emissions from the proposed use. The application was subsequently refused for the single reason pertaining to the effect of the overconcentration of A3 uses on the vitality of the Kensington District Centre. This reason for refusal was not included in the decision notice related to this appeal and, based on the evidence before me, the Council are not advancing this argument. Nevertheless, I shall address this issue later.
4. The Council contend that the appellant is submitting further evidence, an Odour Management Statement, which should not be considered as it was not submitted during the application submission. However, whether or not it was submitted as part of the planning application, the evidence seeks to address the Council's concerns and I do not consider that it alters the proposal; it merely seeks to clarify how the proposed ventilation/extraction system would

¹ LPA ref PP/16/08104

operate. All interested parties have had the opportunity to comment on this evidence and therefore I am satisfied that my consideration of it would not prejudice any parties. Accordingly, I have taken account of this evidence in my determination of the appeal.

Main Issue

5. In light of the above, I therefore consider that the main issue in this appeal is the effect of the development on the living conditions of the occupants of neighbouring residential properties, with regard to odour.

Reasons

6. The proposed use would include a commercial kitchen which would result in the emission of cooking odours. As such, an appropriate ventilation/extraction system is required to ensure that the use would not adversely harm the living conditions of the occupants of neighbouring residents.
7. The Council's main concern is that the details regarding the ventilation/extraction system submitted with the planning application were not sufficient to satisfactorily demonstrate that they would not cause harm to nearby residents. To address these concerns, the Odour Management Statement sets out how the system would deal with odours associated with the proposed use including how it would be cleaned and maintained. Whilst the Council argue that this evidence should not be considered in the determination of the appeal because it did not form part of the application submission, they raise no objection to its content.
8. I note the objections raised by interested parties concerning the information submitted by the appellant. Whilst the noise and odour mitigation measures may not have been designed specifically for the appeal site, there is no substantive evidence that they would not satisfactorily work.
9. Based on the evidence before me and the lack of any evidence to contrary, I am satisfied that the proposed ventilation/extraction system would adequately ensure that the proposed use would not have any significantly harmful effect on the living conditions of the occupants of the neighbouring properties, with regard to odour. As such, I find that the proposal would comply with Policy CL5 of the Royal Borough of Kensington and Chelsea Consolidated Local Plan (CLP) 2015, which seeks to ensure that all development ensures good living conditions for occupants of neighbouring buildings.

Other Matters

10. Whilst the Council do not attempt to advance the reason for refusal set out in the decision notice for planning application ref PP/16/08104, a large number of objections have been received from local residents raising similar concerns regarding the proposal's effect on the vitality of the Kensington District Centre.
11. I have been presented with various extracts of CLP policies, all of which I have considered. The most pertinent of these is Policy CF3 of the CLP. It states that it will seek to maintain at least 66% in shop (A1) use on secondary street frontages and that there shall be no more than three non-A1 uses in a row.
12. The area comprises a variety of commercial units, many of which are A3 uses. The National Planning Policy Framework (the Framework) identifies restaurants

as main town centre uses. However, there is no evidence before me to suggest that Policy CF3 seeks to prevent an overconcentration of A3 uses specifically but rather non-A1 uses as a whole. The existing use of the appeal building is a nightclub, which is *sui generis*. The proposed use would be an A3 use. Consequently, there would be no loss of A1 units within the centre or increase in non-A1 uses. Based on the evidence before me, I find no conflict with Policy CF3.

13. I have also had regard to the loss of the existing nightclub use and its potential effect on the culture of the area. However, I am not convinced that its loss would have a significantly harmful cultural effect that would warrant the dismissal of the appeal.
14. Overall, whilst I appreciate the apprehension of local residents with regards to the increase in the number of A3 uses in the centre, I do not find that there would be any significant harm to its vitality or the function of the area as a whole.
15. I note that the local plan is currently under review. However, based on its limited advancement I can only attribute very limited weight to the proposed enhanced protection for secondary frontages, which I find does not out-weigh Policy CF3 of the adopted CLP.
16. The proposal does not include for the storage of waste and recycling. I note the concerns raised regarding this matter and that the opening times of the proposed use would fall outside the restricted times for access along Thurloe Street. However, whilst the proposed opening hours are 11am, I find no reason why an appropriately worded condition could not restrict customer access to the premises prior to this time whilst still allowing access for staff. Whilst I note that the internal layout is constrained in areas, overall, I am satisfied that the storage of waste and recycling can be adequately addressed through the imposition of appropriately worded conditions.
17. I also acknowledge the concerns raised regarding the effect of the development on overcrowding, litter, highway safety, noise and disturbance and crime. However, there is no substantive evidence that the proposal would result in any significant harm in respect of these matters.
18. The appeal property is located within the Thurloe Smith Conservation Area (the CA). The Council have raised no objection to the proposal in respect of whether it preserves or enhances the character or appearance of the area. As the proposal would not involve any external alterations and as I have found that it would not harm the vitality of the Kensington District Centre, I find that that it would have a neutral effect on the significance of the CA and therefore would preserve its character and appearance.

Conditions

19. I have had regard to the various conditions that have been suggested by the Council. For the avoidance of doubt it is appropriate that there is a condition requiring that the development is carried out in accordance with the approved plans. In the interests of protecting the living conditions of neighbouring residents, a condition is necessary restricting the opening hours of the premises for customers.

20. The appellant states that that the Plant Noise Assessment produced by NSL was considered acceptable by the Council's Environmental Health Officer. However, I have no evidence of this. Furthermore, the assessment makes no reference to maintenance. As such, in the interests of residential amenity and for the avoidance of doubt, I find that the Council's suggested condition regarding plant and vents is necessary. However, the final sentence of the Council's suggested condition is not necessary and therefore I have omitted it. In addition, a condition regarding anti-vibration mounts for air-conditioning/extracting equipment is also necessary in the interests of residential amenity.
21. I have had regard to the appellant's contention that the condition suggested by the Council with regard to odours from extraction equipment fails the six tests set out in the Framework in that it is neither enforceable, nor precise nor reasonable. I agree with this view. It is likely that some odours would be detectable at the property boundary, although not necessarily harmful. Furthermore, the reference to the local planning authority determining whether or not the condition has been complied with is imprecise and unreasonable. I find that the appellant's suggested condition is also imprecise and unreasonable. Nevertheless, given the proximity of the site to residential properties, a condition controlling odours is necessary and as such I have imposed such a condition that requires the development to be carried out in accordance with the Odour Management Statement.
22. In the interests of promoting sustainable modes of transport and public health, a condition is necessary requiring cycle and refuge storage facilities.
23. Conditions requiring a Delivery and Servicing Management Plan and Hot Food Delivery Management Plan are necessary in the interests of highway safety and residential amenity.

Conclusion

24. For the reasons given above, having regard to all matters raised, the appeal is allowed.

Alexander Walker

INSPECTOR

SCHEDULE

- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: Block plan, Site location plan, 016-073-01 Rev. D, 016-073-02 Rev. B, 016-073-03 Rev. B, 016-073-04 Rev. E, FIV130-TF-01, FIV130-TF-02.
- 3) The premises shall only be open for customers between the hours of 1100 and 2300 on any day.
- 4) Noise emitted by all building services plant, including from atmospheric and vents shall not exceed a level 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 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 serviced regularly in accordance with the manufacturer's instructions and as necessary to ensure that the requirements of the condition are maintained.

- 5) 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.
- 6) The development shall be carried out in accordance with the Odour Management Statement.
- 7) Prior to the commencement of the use, details of cycle and refuse storage facilities shall be submitted to and approved in writing by the local planning authority. The approved cycle and refuse storage facilities shall be fully implemented and made available for use prior to the commencement of the use and thereafter be retained for use at all times.
- 8) Prior to commencement of the use, a Delivery and Servicing Management Plan shall be submitted to and approved in writing by the local planning authority. The approved details shall be fully implemented and the use carried out only in accordance with the approved details.
- 9) No delivery service in connection with the use shall commence unless a Hot Food Delivery Management Plan has first been submitted to and approved in writing by the local planning authority. Any such delivery service shall operate only in full accordance with any approved details.