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# Appeal Decision

Site visit made on 3 April 2017

**by C L Humphrey BA (Hons) DipTP MRTPI**

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

**Decision date: 13<sup>th</sup> April 2017**

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**Appeal Ref: APP/X5990/W/16/3166104**

**11 Berkeley Street, London W1J 8DS**

- 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 Berkeley Eats Limited against the decision of the City of Westminster Council.
  - The application Ref 16/01377/FULL, dated 16 February 2016, was refused by notice dated 1 December 2016.
  - The development proposed is described as 'Change of use of part-ground and part-basement levels from office (use class B1a) to restaurant (use class A3) and installation of associated plant.'
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## Decision

1. The appeal is allowed and planning permission is granted for the use of part-ground and part-basement levels as a restaurant (Use Class A3), installation of associated plant and creation of a smoking terrace on southern elevation at ground floor level at 11 Berkeley Street, London W1J 8DS in accordance with the terms of the application, Ref 16/01377/FULL, dated 16 February 2016, subject to the conditions set out in the Schedule to this Decision.

## Procedural Matter

2. Notwithstanding the description of development set out in the banner heading above, which is taken from the application form, it is evident from the submitted drawings that the appeal proposal also involves the creation of a smoking terrace at ground floor level between the south elevation and the site boundary. The description of development set out on both the Council's decision notice and the appeal form makes reference to this smoking terrace, and so I have included reference to it in the description of development used in the formal decision. This revised description more appropriately describes the proposed development, and I have therefore considered the appeal on that basis as no party would be prejudiced or caused any injustice by me taking this course of action.

## Main Issue

3. The main issue is the effect of the appeal proposal on the living conditions of local residents and whether the appeal proposal would preserve or enhance the character or appearance of the Mayfair Conservation Area.
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## Reasons

4. The appeal site is located on the eastern side of Berkeley Street within the Mayfair Conservation Area (the Conservation Area). The Conservation Area is characterised by typically 18<sup>th</sup> century high quality terraced buildings generally laid out in a grid-iron pattern around a number of public squares. Situated within the Core Central Activities Zone (CAZ), Berkeley Street is predominantly commercial and, although there are upper floor flats at 10 Berkeley Street adjacent to the appeal site, the street features art galleries, shops, hotels, food and drink and entertainment establishments and offices. However, whilst it has a vibrant ambience, the street is not located within any of the designated Stress Areas where the Council considers that the numbers of restaurants, cafes, takeaways, public houses, bars and other entertainment uses have reached a level of saturation.
5. The appeal property comprises a basement with 6 storeys above. It is proposed to use part of the basement and part of the ground floor of the property to create 499.5 sq m of restaurant floorspace within Use Class A3, and to install associated plant and create a small smoking terrace. Policy TACE 8 of the City of Westminster Unitary Development Plan (the UDP) applies to proposals for restaurant and café uses of between 150 and 500 sq m inside the CAZ and outside the Stress Areas. Whilst the proposed floorspace is at the upper level of the threshold, the appeal proposal should nevertheless be considered against this policy.
6. UDP Policy TACE 8 states that permission will generally be granted for entertainment proposals where the Council is satisfied that the proposed development has no adverse effect nor, taking into account the number and distribution of entertainment uses in the vicinity, any cumulatively adverse effect, upon residential amenity or local environmental quality as a result of noise, vibration, smells, increased late night activity or increased parking and traffic and no adverse effect on the character or function of its area.
7. The appellant has submitted a draft Operational Management Plan (OMP) which seeks to address these matters. The OMP states there would be a maximum of 150 seated covers with an additional 25 standing covers in the holding bar. Hours of operation are proposed to be in line with the Council's core opening hours for entertainment uses. With regard to external noise break-out, the OMP states that self-closing doors would be installed, a doorman would be on duty to oversee customers, designated taxi and limousine firms would be appointed and a car valet system would be offered. The proposed external smoking area is small, thereby limiting the number of customers able to use it any one time, and no tables or chairs would be provided outside the premises. Servicing and waste collection would only take place in the morning between Mondays and Saturdays. Extract equipment would ensure appropriate control of odours and particulates. The OMP also provides a commitment that local residents would be provided with a contact telephone number to report any complaints. Further to the measures set out in the OMP, the Noise Impact Assessment (NIA) submitted in support of the proposal concludes that appropriate attenuation and insulation would control noise and vibration emissions from plant and music reproduction equipment.
8. The comprehensive measures set out in the OMP and NIA would control the number of customers who may be present on the premises and the opening

hours, and would prevent disturbance from smells, noise and vibration. I note that the Environmental Health consultation response set out in the Council's Committee Report raises no objection to the proposal. Based on the evidence before me, subject to the implementation of the measures set out above which could be secured through planning conditions, I do not consider there would be any reasonable prospect of the appeal proposal significantly adding to the existing activity within the street or causing noise and disturbance that would result in material harm to the living conditions of adjacent residents.

9. Whilst I note that the Council's Licensing Team is currently looking into the impact of the evening and night time economy in Mayfair, and specifically the Berkeley Street and Shepherd Market areas, the findings of this assessment have not been put before me. Moreover, although the reason for refusal states that the proposal will lead to a saturation of restaurants in this part of Berkeley Street, the Council states that the area around the appeal site has less emphasis on entertainment and restaurant uses in comparison to the north western part of the street towards Berkeley Square. I further note that the site was recently granted a premises licence. Based on the submitted evidence and my observations on site, the appeal proposal would not unduly affect the balance of uses within Berkeley Street or the area's character and function.
10. The plant and smoking terrace associated with the proposed restaurant use would be located to the rear and side of the premises and would be fairly modest in scale. Subject to conditions controlling their materials and finished appearance, these elements of the proposal would preserve the character and appearance of the Conservation Area.
11. Both the appellant and the Council have drawn my attention to a number of entertainment uses which have been permitted in the vicinity of the appeal site. There is limited information before me regarding the planning history of these schemes, so it is not possible to draw direct comparisons with the appeal proposal. In any event I must determine the appeal on its own merits, and have done so.
12. Overall, for the reasons set out above, I conclude that appeal proposal would not have a harmful effect on the living conditions of local residents and would preserve the character and appearance of the Mayfair Conservation Area. As such, it accords with the aims of Policies S24, S29 and S32 of Westminster's City Plan, UDP Policies TACE 8, ENV 6 and ENV 7 and the National Planning Policy Framework (the Framework) in relation to noise, amenity protection and entertainment uses.

#### *Other matters*

13. The owners of the adjacent property at 38 Dover Street have objected on the grounds that extract equipment associated with the proposed restaurant would encroach onto land in their ownership and that attendant noise, vibration and smells would give rise to disturbance to the commercial occupants of the building. Attenuation measures to ensure the extract would not cause undue disturbance could be secured by condition, and I therefore give this matter limited weight. I have no evidence that planning permission would negate any legal rights relating to land ownership and therefore this matter has not had a material bearing on my assessment of the planning merits of the proposal.

14. In addition to the matters addressed in my consideration of the main issue above, local residents have raised wider concerns relating to traffic congestion and late night parking arising from the appeal proposal. The appeal site is in an accessible location close to public transport and within a Controlled Parking Zone, and the submitted draft OMP sets out measures to manage traffic and parking generated by taxis and customers' vehicles. I have no substantive evidence that the proposal would give rise to a material increase in traffic congestion or parking demand. Accordingly, I have given these matters little weight.

### **Conditions**

15. I have considered the Council's suggested conditions against the tests set out within paragraph 206 of the Framework and the advice in the Planning Practice Guidance, and have amended them where necessary in order to meet these tests.
16. I have imposed a condition specifying the relevant drawings as this provides certainty. To safeguard the living conditions of the occupants of neighbouring residential properties and preserve the character and function of the area, conditions are attached relating to construction hours, hours of use, number of customers within the premises, size and use of the bar, use of the void at ground floor level, the sale of takeaway food or drink, self-closing doors, an operational management plan, servicing, waste storage, cycle storage, noise emissions and vibration transmissions from plant and equipment. In order to ensure the satisfactory appearance of the development and preserve the character and appearance of the Conservation Area, I have imposed conditions relating to the materials, method of construction and finished appearance of all work to the outside of the building, the treatment of the external duct where it rises up the rear of 38 Dover Street and a visual screen to conceal the air handling equipment and ducting attached to the rear of the appeal premises.

### **Conclusion**

17. For the reasons set out above, and having had regard to all matters raised, I conclude that the appeal should be allowed.

*CL Humphrey*

INSPECTOR

## **Schedule of Conditions**

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: 2921-P-001, 2921-P-100 Rev H, 2921-P-102 Rev A, 2921-P-155 Rev A and 2921-P-156 Rev A.
3. Any demolition or construction work which can be heard at the boundary of the site shall only take place between 08:00 and 18:00 Monday to Friday and between 08.00 and 13.00 on Saturdays and not at all on Sundays or on Bank or Public Holidays.
4. Customers shall not be permitted within the premises before 08:00 or after 00:00 Sunday – Thursday or on Bank or Public Holidays, or before 08:00 and after 00:30 the following morning on Fridays and Saturdays.
5. No more than 175 customers shall be allowed within the premises at any one time.
6. Any bar and bar seating provided within the premises shall take up no more than 15% of the floor area of the premises, or no more than 15% of each unit if the premises is let as more than one unit. Any bar provided within the premises shall only be used to serve customers of the restaurant (Class A3) use hereby permitted before, during or after their meals eaten within the premises.
7. The void at ground floor level shall be kept open at all times in accordance with the details shown on approved Drawing No.2921-P-100 Rev H.
8. No take-away food or drink shall be sold on the premises, even as an ancillary part of the primary restaurant (Class A3) use hereby permitted.
9. The restaurant (Class A3) use hereby permitted shall not begin until self-closing doors have been installed at the entrance to the premises on Berkeley Street. These self-closing doors shall thereafter be retained and must not be left open except in an emergency or to carry out maintenance.
10. The restaurant (Class A3) use hereby permitted shall not begin until an Operational Management Plan which sets out measures to show how customers of the restaurant will be prevented from causing nuisance to people in the area, including people who live in nearby buildings, has been submitted to and approved in writing by the local planning authority. Thereafter, the measures set out in the Operational Management Plan shall be carried out in accordance with the approved details at all times that the premises are in use.
11. The restaurant (Class A3) use hereby permitted shall not begin until a Servicing Management Plan which identifies the hours of servicing, delivery process, storage locations, scheduling of deliveries and staffing arrangements, as well as how delivery vehicle size will be managed and how servicing will occur on a day to day basis, has been submitted to and approved in writing by the local planning authority. Thereafter, the measures set out in the Servicing

Management Plan shall be carried out in accordance with the approved details at all times that the premises are in use.

12. The restaurant (Class A3) use hereby permitted shall not begin until the waste store has been implemented in accordance with the details shown on approved Drawing No. 2921-P-100 Rev H. Thereafter, the waste store shall be retained at all times in accordance with the approved details. The waste store shall be clearly marked and shall be made available at all times to everyone using the restaurant (Class A3). The waste store shall not be used for any purpose other than the storage of waste associated with the restaurant (Class A3) use hereby permitted. Waste shall only be stored inside the premises and shall only be put outside just before it is going to be collected.
13. Notwithstanding condition 2, the restaurant (Class A3) use hereby permitted shall not begin details of secure cycle storage have been submitted to and approved in writing by the local planning authority and implemented in accordance with the approved details. Thereafter, the cycle storage shall be retained at all times in accordance with the approved details.
14. (1) Where noise emitted from the proposed plant and machinery will not contain tones or will not be intermittent, the 'A' weighted sound pressure level from the plant and machinery (including non-emergency auxiliary plant and generators) hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 10 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the local planning authority. The background level should be expressed in terms of the lowest LA90, 15 mins during the proposed hours of operation. The plant-specific noise level should be expressed as LAeqTm, and shall be representative of the plant operating at its maximum.
- (2) Where noise emitted from the proposed plant and machinery will contain tones or will be intermittent, the 'A' weighted sound pressure level from the plant and machinery (including non-emergency auxiliary plant and generators) hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 15 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the local planning authority. The background level should be expressed in terms of the lowest LA90, 15 mins during the proposed hours of operation. The plant-specific noise level should be expressed as LAeqTm, and shall be representative of the plant operating at its maximum.
- (3) Following installation of the plant and equipment, you may apply in writing to the local planning authority for a fixed maximum noise level to be approved. This is to be done by submitting a further noise report confirming previous details and subsequent measurement data of the installed plant, including a proposed fixed noise level for approval by the local planning authority. The submitted noise report must include:
  - (a) A schedule of all plant and equipment that formed part of this application;

- (b) Locations of the plant and machinery and associated: ducting; attenuation and damping equipment;
  - (c) Manufacturer specifications of sound emissions in octave or third octave detail;
  - (d) The most affected noise sensitive receptor location and the most affected window of it;
  - (e) Distances between plant and equipment and receptor location/s and any mitigating features that may attenuate the sound level received at the most affected receptor location;
  - (f) Measurements of existing LA90, 15 mins levels recorded one metre outside and in front of the window referred to in (d) above (or a suitable representative position), at times when background noise is at its lowest during hours when the plant and equipment will operate. This acoustic survey to be conducted in conformity to BS 7445 in respect of measurement methodology and procedures;
  - (g) The lowest existing LA90, 15 mins measurement recorded under (f) above;
  - (h) Measurement evidence and any calculations demonstrating that plant and equipment complies with the planning condition;
  - (i) The proposed maximum noise level to be emitted by the plant and equipment.
15. No vibration shall be transmitted to adjoining or other premises and structures through the building structure and fabric of this development as to cause a vibration dose value of greater than 0.4m/s (1.75) 16 hour day-time nor 0.26 m/s (1.75) 8 hour night-time as defined by BS 6472 (2008) in any part of a residential and other noise sensitive property.
16. All new work to the outside of the building must match existing original work in terms of the choice of materials, method of construction and finished appearance. This applies unless differences are shown on the approved drawings or are required by conditions to this permission.
17. Notwithstanding condition 2, the restaurant (Class A3) use hereby permitted shall not begin until a detailed scheme for the treatment of the external duct where it rises up the rear of 38 Dover Street, whereby the duct is boxed in, rendered and painted to match the colour and material of the building against which the duct rises, and including details relating to the regular repainting and future maintenance of the external duct, have been submitted to and approved in writing by the local planning authority and implemented in accordance with the approved details. Thereafter, the external duct shall be retained and maintained at all times in accordance with the approved details.
18. Notwithstanding condition 2, the restaurant (Class A3) use hereby permitted shall not begin until details of a visual screen to conceal the air handling equipment and ducting attached to the rear of 11 Berkeley Street have been submitted to and approved in writing by the local planning authority and implemented in accordance with the approved details. Thereafter, the screen shall be retained and maintained at all times in accordance with the approved details.