
Appeal Decision

Site visit made on 6 February 2017

by Diane Fleming BA (Hons) MRTPI

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

Decision date: 3 May 2017

Appeal Ref: APP/X5990/W/17/3166786
21-23 Nutford Place, London W1H 5YQ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Ali Heydari of Safa Restaurant against the decision of City of Westminster Council.
 - The application, Ref 16/01338/FULL, dated 10 February 2016, was refused by notice dated 15 July 2016.
 - The application sought planning permission for use of the public highway for the placing of 9 tables and 18 chairs in an area measuring 10m x 3m in connection with existing ground floor use without complying with a condition attached to planning permission Ref:13/08488/TCH, dated 21 January 2014.
 - The condition in dispute is No 4 which states that: *You can only put the tables and chairs on the pavement between 11.00 and 23.00.*
 - The reason given for the condition is: *To protect neighbouring residents from noise and disturbance as set out in S29 and S32 of Westminster's City Plan: Strategic Policies adopted November 2013 and ENV 6 and TACE 11 of our Unitary Development Plan that we adopted in January 2007.*
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The address of the appeal site given on the application form is Nos 22-23 Nutford Place whereas the address stated on the appeal form includes No 21. Unfortunately the block plan accompanying the application is not helpful in this instance. The address of the other appeal relating to the same site, (Reference APP/X5990/C/16/3161343, subject of a separate decision) also includes No 21 on the appeal form and so to be consistent I have decided to include this number in the address for this decision.
3. The Council have referred to Policy ENV 7 from the Unitary Development Plan¹ (UDP) in their reason for refusal. However, this is concerned with controlling noise from plant, machinery and internal activity whereas the condition relates to a seating area outside a restaurant. Accordingly it has not formed part of my considerations in determining this appeal.

¹ Adopted in 2007 and subsequently saved by the Secretary of State

Background and Main Issue

4. The appellant's restaurant is a long established business and the Council advise that since 1992 this has included an outdoor seating area which has been limited in its hours of use since 2006 to 2300 hours every evening. In 2014 the appellant sought to extend the hours of use of the outdoor seating area to 0100 hours but this application was refused and dismissed at appeal in April 2015.² The Inspector in that case observed that no noise readings had been provided and so there was no accurate assessment of existing background noise levels both during the operating hours and during the proposed extended operating hours. Without such information it was not possible to make a fully informed assessment of the likely noise and disturbance that would be experienced by local residents as a result of the proposed extended hours.
5. The application which is the subject of the current appeal is accompanied by a noise assessment. The main issue is therefore the implication the variation of the condition would have on the living conditions of nearby residents, having regard to noise and disturbance.

Reasons

6. The appeal relates to a ground floor unit within a large building known as Forset Court which is in mixed use with commercial uses on the ground floor and over 100 flats above. Forset Court is situated on the corner of the busy Edgware Road, a key route into London and Nutford Place. There are a number of bars and restaurants in the area. The appeal site is at the rear of the building overlooking the pedestrianised part of Nutford Place, where it meets the junction with Forset Street. The surrounding area is mixed in character with predominantly large blocks of commercial uses on or near Edgware Road. These commercial uses gradually reduce in number further away from the main road and a school, a hotel and residential uses then become prevalent along Nutford Place and Forset Street. The school is on one corner of Forset Street and Nutford Place and adjacent to it there are a number of residential units. The hotel is on the opposite corner and is a modern, multi-storey building.
7. Policy S32 from the Council's most up to date plan³ adopted last year states that the Council will work to reduce noise pollution. They will do this by requiring development to minimise noise to protect Noise Sensitive Receptors and will also secure improvements to Westminster's sound environment. This policy reflects the approach taken in the older UDP Policy ENV 6. The supporting text to that policy states that in Westminster noise from bars and restaurants form a significant element of 'mixed source' disturbance to residents.
8. Whilst the Council recognises the contribution of restaurants to the local economy, this is balanced with the need to protect residential neighbourhoods that are often in close proximity. The appeal premises lie within the Council's Core Central Activities Zone and they are also in a designated Stress Area where the Council considers the number of restaurants has reached saturation point. In these areas they have found that extending opening hours only adds to the problems in the environment.

² Ref: APP/X5990/W/14/3001831

³ Westminster City Plan Consolidated with all changes since November 2013, adopted November 2016 (WCP)

9. The Council's planning policy approach is also aligned with policies set by its Environmental Health (EH) service based on their experience of the night time economy. The appellant too recognises the close relationship between planning and licensing control. The appeal site lies within an EH Cumulative Impact Policy Area. The Council are concerned that the extension of opening hours in this area would add to the public nuisance concerns for residents and visitors. For these reasons the Council has found that a 2300 hours closure time in the area of the appeal site avoids the general degradation of the immediate environment which borders a residential area. Furthermore, I note that the adjoining restaurant and the one opposite close their outside eating areas at 2200 and 2230 hours respectively on a Sunday.
10. The appellant has sought to address the Council's concerns by submitting a Noise Assessment Report (NAR). Noise measurements were taken between 2100 and 0200 hours for seven days from the nearest residential premises, a flat at first floor level above the appeal site. The measurements were taken in August 2015 at 15 minute intervals. The NAR concluded that there was no significant noise reduction when eating outside ended at 2300 hours. The level of noise in the bedroom above already exceeded the guidance level of 30dB set by BS8233 as it was found to be 47dB. Maximum noise levels were consistently above 80dB and mainly arose from traffic. The appellant submits that maximum noise levels are more likely to cause sleep disturbance than continuous ambient noise. The NAR was revised in January 2017 at the request of the Council's EH service to take into account outside speech levels. It was found that the restaurant's awning attenuated these to below background noise levels.
11. Whilst it is the appellant's view that background noise levels remained steady with little variance after 2300 hours at the point of measurement, this assessment does not take account of all the disturbance aspects of the proposal. These would include customers arriving at or departing from the premises by car which would occur over a wider area with accompanying door slamming and potentially audible farewells. This is because immediately outside the site the road has been pedestrianised so it is likely that vehicles would be driven through the residential area to drop off/pick up in Forset Street/Nutford Place as well as make use of Edgware Road.
12. For those customers leaving on foot and dispersing throughout the area there is potentially disturbance from raised voices with customers having had a relaxing evening. The appellant submits that his licence has always been retained with no requests to review it, nevertheless planning permission is not personal to the appellant and other owners could operate the business in a different fashion. Although the appellant seeks to 'marshal' his customers within the premises, in the interests of neighbourliness, no planning condition could prevent customers from dispersing across the nearby residential areas.
13. The NAR also emphasises that a reduction in noise levels by 3dB is only just perceptible and from the Summary of Results in Table 1 it would appear that noise levels remained steady after 2300 hours. However, when viewing the actual results in Appendix 1, it is clear that there were many evenings when a reduction by 3dB occurred after 2300 hours. It is my view that this might be welcome by some people who are very noise sensitive, particularly in the summer when windows might be open for ventilation.

14. The appellant submits that the Council received no response from individual residents to his proposals but I note The Portman Estate, who are the freeholders of Forset Court and nearby residential buildings, and the Head Leaseholder of Forset Court both submitted representations. Comments included that the outside seating area is intensively used and any extension in hours would adversely affect nearby residents. These comments were also supported by the Marylebone Association. I consider residents have a reasonable expectation of a quieter environment after 2300 hours. The appellant points out there are numerous premises open 24 hours in the area but the Council advise that these are long established and they operate within the envelope of the building which helps reduce noise emissions. I also saw that there are no such premises either opposite or adjacent to the appeal site.
15. In addition, the appellant argues that no complaints have been made when the outside seating area has been used after 2300 hours, the extension in hours would increase natural surveillance and reduce the threat of crime and the use is controlled by other regulations. Notwithstanding these submissions, some of which were addressed in the previous appeal, I consider to allow this appeal would make it more difficult for the Council to resist other similar proposals. There could then be a cumulative impact of increased noise and disturbance that could frustrate the Council's planning objectives of dealing with the cumulative issues of such uses. Although my decision does not turn on this matter, it adds some weight to my conclusion on the main issue.
16. It is therefore concluded, for the reasons given, that it is necessary and reasonable to continue to impose condition No 4. To allow the proposal for increased hours of use would harm the living conditions of nearby residents, having regard to noise and disturbance. Accordingly the development would conflict with Policies S29 and S32 of the WCP and Policies ENV 6 and TACE 11 of the UDP. These policies not only seek to protect residential amenity but also require that developments should improve it. I give weight to the UDP policies as they are consistent with the National Planning Policy Framework's requirement to seek a good standard of amenity for existing occupiers.

Conclusion

17. For the reasons given I conclude that the appeal should be dismissed.

D Fleming

INSPECTOR