

Appeal Decision

Site visit made on 9 May 2017

by Daniel Hartley BA Hons MTP MBA MRTPI

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

Decision date: 12 May 2017

Appeal Ref: APP/U5360/W/17/3168383

136-138 Stoke Newington Church Street, Hackney, London N16 0JU

- 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 R Gustein (Avon Group) against the decision of the Council of the London Borough of Hackney.
 - The application Ref 2016/1396, dated 18 April 2016, was refused by notice dated 1 August 2016.
 - The development proposed is change of use of Nos 136-138 from Use Class A1 (retail)/A2 (financial and professional services) and B2 (general industrial) to Class A3 (restaurant); erection of a single storey rear infill extension at ground floor level of No 138 (following demolition of the existing storage sheds), installation of exhaust extract to the rear elevation of No 138 and alterations to the shopfront of Nos 136 and 138.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The main parties have confirmed that the description of development should be taken from the Council's refusal notice and the appellant's appeal form as this accurately describes the appeal proposal. I have therefore used this description of development. In addition, the appeal site address is 136-138 Stoke Newington Church Street and not 136 Stoke Newington Church Street as indicated on the planning application form. I have therefore used the former correct site address.

Main Issues

3. The main issues are (i) the effect of the proposal upon the vitality and viability of the local shopping centre; (ii) the effect of the proposal upon employment provision in the Borough as a result of the loss of B2 floorspace; (iii) whether or not the proposal would preserve or enhance the character or appearance of the Stoke Newington Conservation Area; (iv) the effect of the use of the ducting and extraction flue upon the living conditions of the occupiers of adjoining premises in respect of noise and disturbance and (v) whether or not the proposed servicing and waste storage arrangements would be acceptable from a highway capacity and safety point of view.
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Reasons

Site and Proposal

4. The appeal site comprises a mid-terraced building on the northern side of Stoke Newington Church Street which was last used for use class A1 retail purposes (No 136). To the rear is a single storey flat roofed attached building/yard which was last used as a car repair garage (No 138) which can be accessed via a vehicular undercroft from Stoke Newington Church Street. The site falls within a terrace of other commercial uses.
5. It is proposed to demolish buildings to the rear, to erect a single storey infill extension to the rear, to install exhaust extraction/flues to the rear and to use No 136 and the proposed rear extension as a 40 seat restaurant with a bar. A new shop front would be provided in the place of the existing vehicular undercroft and the existing shop front to No 136 would be refurbished.

Vitality and viability of Local Shopping Centre

6. The appeal site falls within the Stoke Newington Church Street Local Shopping Centre (LSS). Policy 13 of the Hackney Local Development Framework Core Strategy 2010 (CS) states that shops that provide day-to-day needs for the local community *"will be protected from changes of use away from retail"*. Policy DM9 of the Hackney Local Development Framework Development Management Local Plan 2013 (LP) supplements Policy 13 and states, inter alia, that the Council will only permit changes of use at ground floor level from an existing Class A1 retail use where *"(i) the proposal will not result in the number of units in retail (Class A1) use falling below 50% (as a proportion of total units measured across the total Local Shopping area), taking into account unimplemented planning permissions for changes of use"* and *"(ii) the shop unit has been marketed for a minimum of one year and it has been demonstrated that there is no realistic prospect of the unit being used for A1 retail purposes in the foreseeable future"*.
7. Whilst No 136 Stoke Newington Church Street is currently vacant (the appellant says since 2013), it has not been marketed for sale or rent since this time. I note the comments made by the appellant who indicates that it is unlikely to be used again for A1 retail purposes. However, marketing efforts for a minimum period of one year or more will determine whether there is actually market interest in occupying the property for A1 retail purposes on either a sale or rental basis.
8. There is no dispute between the parties that the restaurant proposal would result in the number of units in retail (Class A1), and in the LSS, falling below 50%. In fact, a Council 2013 survey indicated that only 42.5% of the units were in A1 use. I acknowledge that Policy DM9 of the LP appears to have introduced a 50% threshold at a time when this was already breached, but I have not been provided with any compelling reason to indicate why the number of A1 retail units in the LSS should not increase. In any event, the proposal would seek to reduce the overall number of A1 retail units in the LSS and so this would undermine the Council's aim of ensuring an appropriate mix of uses in such a LSS. The proposal would not accord with all of the requirements of Policy DM9 of the Local Plan and this weighs against the proposal.

9. The appellant asserts that the restaurant use would make a positive contribution to the vitality and viability of the Local Shopping Centre in so far that it would increase footfall in the area. Whilst this may be the case, there is no reason why a continuation of an A1 and B2 use would not also attract a reasonable amount of footfall in the locality. Even if it could be proven that the proposed restaurant would attract more footfall than re-using the site for its existing lawful uses, the Council's adopted development plan strategy seeks to ensure that there remains an appropriate mix of uses in the LSS including no less than 50% of units in retail (class A1). Therefore, the potential for increased footfall does not outweigh the requirements of Policy DM 9 of the LP.
10. The appellant has indicated that there is an Article 4 Direction which relates to the LSS which has removed flexible change of use permitted development rights (i.e. including change of use from A1 to A3 use). I have not been provided with a copy of the Article 4 Direction, but I have no reason to doubt what the appellant says about it. The appellant states that the Article 4 Direction does not remove permitted rights under Class C of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) which would permit the change of use of use from class A1 to A3. However, the permitted change of use from use from class A1 to use class A3 is subject to the submission of a prior approval application which would require an assessment, inter alia, of the impact of the change of use on the "*sustainability of that shopping area*". There is no guarantee that a prior approval application would be approved and such a proposal is not before me. I cannot second guess the approval or otherwise of a prior approval application and hence I afford this matter limited weight.
11. In the absence of any marketing of the property, and taking into account the resultant number of A1 retail units that there would be in the LSS, I conclude that the proposal would not accord with the town centre vitality and viability aims of Policy 13 of the CS; Policy DM9 of the LP and Chapter 2 of the National Planning Policy Framework.

Employment Provision

12. The appeal site includes use class B2 floorspace (No 138 Stoke Newington Church Street) which was, until very recently, used as a repair garage. Policy DM 14 of the LP requires that existing employment sites should be marketed in accordance with the requirements of appendix 4 of the LP. The repair garage became vacant relatively recently and the appellant has not submitted any marketing information. In particular Policy DM 14 states that the loss of employment floorspace will only be permitted where "*additional robust marketing evidence is submitted which demonstrates that there has been no demand for the existing and vacant land and floorspace for its current or former use, and the possibility of retaining, reusing or redeveloping it for similar or alternative smaller or more flexible units for employment generating use has been fully explored*".
13. I acknowledge that the former car repair use facilitated the employment of a one full time and one part time member of staff when compared to the proposed restaurant which could, according to the appellant, employ in the region of five full time and 10 part time members of staff. The proposal is speculative and hence the actual number of staff to be employed in the proposed restaurant cannot be specifically quantified. However, I do consider

that it is likely that there would be more staff employed in the proposed restaurant than the former B2 use. However, the proposal also includes the loss of an A1 retail unit and so the differential in the number of jobs is not necessarily as great as that suggested by the appellant.

14. In addition to the above, it is possible that that No 138 Stoke Newington Church Street could be used in a more intensive 'B' use employment manner. In other words marketing efforts may reveal interest in re-using No 138 by a different 'B' use operator(s) with potentially more people employed than was previously the case. Indeed, Policy DM14 of the LP states "*when considering the redevelopment of sites, applicants must firstly consider the commercial opportunities and potential of that land and floorspace, and demonstrate in the first instance that the maximum economically feasible amount of employment land and floorspace possible has been examined through the submission of marketing evidence*". I have not been provided with any such marketing evidence.
15. I acknowledge the appellant's comment that the existing B2 use is not compatible with surrounding residential properties, but I have not seen or been made aware of any complaints about nuisance, odour, traffic generation or disturbance. Whilst it has been suggested that the occupier of the former repair garage was prohibited from spraying/welding in the area, this would not prohibit all 'B' use activity from the site. I note that the previous occupier of the garage struggled, at times, to pay the rent. However, this does not mean that all 'B' use occupiers would struggle to make a profit or to pay the rent.
16. The appellant states that the CS was based upon the definition of economic development in PPS 4 which has now been cancelled. They state that as the definition of economic development is now found in the glossary to the National Planning Policy Framework (the Framework), which defines it as "*development including those within the B use classes, public and community uses and main town centre uses (but excluding housing development)*", the proposal would be acceptable as a restaurant is a main town centre use.
17. Whilst the definition of economic development has changed since the adoption of the CS, I do not consider that this means that Policies 16, 17 and 18 are out of date or have limited weight. Such policies were prepared and adopted against an evidence base which indicated that there was a need to both provide and retain 'B' class floorspace in the Borough. I have no evidence before me to indicate that there is no longer a requirement to retain sites in existing 'B' use, and I do not consider that the aims of such policies are at odds with the economic development aims of the Framework. Indeed, in accordance with paragraphs 21 & 22 of the Framework the CS sets out "*a clear economic vision and strategy*" and the emphasis on marketing efforts and the submission of marketing information ensures that such policies allow for alternative uses of land or buildings to "*be treated on their merits having regard to market signals and relative need for different land uses to support sustainable local communities*".
18. For the reasons outlined above, I conclude that the proposal would not accord with the employment aims of Policies 16, 17 and 18 of the CS; Policy 4.1 of the London Plan 2016 and the Framework. Any benefits associated the proposal, including the potential for the creation of more jobs compared to the previous

use of Nos 136 and 138 Stoke Newington Church Street, do not outweigh the conflict with the aforementioned policies.

Conservation Area

19. The proposed alterations to the shop front, coupled with the provision of a new shop front to replace the vehicular undercroft, would have the effect of improving the appearance of the host property and the wider terrace. In this respect, the proposal would enhance the character and appearance of the street-scene and the CA. Indeed, the Stoke Newington Conservation Area Appraisal indicates that Nos 136 to 148 Stoke Newington Church Street would benefit from a thorough refurbishment: the provision of new/refurbished shop fronts would deliver this.
20. I have taken into account the appellant's kitchen ventilation system summary report prepared by Delta Green and the accompanying drawing No 16026DGXXGFDRM5101S2P3. I acknowledge that final design details cannot be concluded as there is currently not a proposed restaurant operator in place. However, the proposed extraction ducts, flues and equipment would appear prominent and visually incongruous on the rear of the property particularly when viewed from surrounding properties.
21. I acknowledge that the rear of the property does not face a road or a footpath and so would not be viewed by significant number of people. However, the duty to preserve or enhance the character or appearance of the CA applies to all development, irrespective of whether or not it is public facing. In this case, I do not consider that such development would preserve or enhance the CA. This does not mean that it would not be possible to screen or conceal such development in a more sensitive manner, but such a proposal is not before me. The appellant has suggested that a planning condition could deal with this matter, but as the appeal site falls within the CA, I consider it to be a pre-requisite that extraction details are considered up front.
22. In the context of Paragraphs 133 and 134 of the Framework, I conclude that the harm caused by the proposed extraction ducting, flue and equipment to the significance of the CA would be less than substantial. Whilst there would be some public and visual benefits associated with the refurbishment of the shop front/provision of a new shop front, I do not consider that such benefits would outweigh the aforementioned harm to the CA. The development as a whole would fail to preserve or enhance the character or appearance of the CA and hence would be contrary to the conservation and design aims of Policies 7.4, 7.6 and 7.8 of the London Plan 2016; Policies 24 and 25 of the CS; Policy DM1 and DM28 of the LP and the Framework.

Living Conditions

23. The appellant has submitted a Plant Noise Assessment prepared by Cole Jarman. The report includes background noise surveys undertaken at the site and an assessment of the likely impact of the use of the proposed mechanical services plant to the rear of the building. The cold store would run 24 hours per day, with all other plant equipment operational during opening hours (0700-0000).
24. The results indicate a background noise level of 39 LA90 dB between 0700 – 0000 hrs and 32 LA90 dB between 0000 – 0700 hrs. In respect of other

proposals in the Borough it is understood that the Council has imposed planning conditions which require that newly installed plant equipment should not exceed a level 10dB below the minimum existing LA90 background noise level for the relevant time period. However, I have not been provided with a development plan policy or any other Council guidance which specifically refers to a level 10dB below the minimum existing LA90 background noise level for the relevant time period. Consequently, it was necessary for me to ask the main parties for further comments about this matter including an assessment of the proposal against relevant policy and guidance in the Framework and Planning Practise Guidance (PPG).

25. The appellant's noise assessment concludes that it would be possible to achieve 30dB during the day and 26dB at night against the identified background noise levels of 39dB and 32dB. Therefore, in both cases the proposed plant and equipment would be below the lowest measured background noise level. The appellant has referred me to guidance in BS4142 (Methods for rating and assessment industrial and commercial sound) 2014 which states that *"where the rating level does not exceed the background sound level, this is an indication of the specific sound source having a low impact, depending on the context"*.
26. In respect of the noise hierarchy table as detailed in the PPG, I consider that the proposal would be capable of operating at a "No observed adverse effect" noise level. I recognise the proposal is speculative and that currently there is no operator lined up for the proposed restaurant. However, I am satisfied that it would be possible for a restaurant to operate without any plant or equipment having a significantly detrimental impact upon the living conditions of neighbouring residential properties. The imposition of a planning condition would address this matter. I note, notwithstanding the Council's reasons for refusal, that the Council's Environmental Health service raised no objection to the proposal in principle subject to the imposition of conditions.
27. I have considered the representations made from other interested parties about the potential for noise and disturbance from pedestrians coming and going at night. However, hours of use could also be controlled by planning condition.
28. I conclude that the subject to the imposition of planning conditions the proposal would not lead to unacceptable or significant levels of noise or disturbance for the occupiers of neighbouring residential properties. Therefore, the proposal would accord with the amenity and noise aims of Policies 7.4, 7.6 and 7.15 of the London Plan 2016; Policies 15 and 24 of the CS ; Policies DM2, DM11 and DM43 of LP; the PPG and paragraph 123 of the Framework.

Servicing and Waste Storage

29. There would be no on-site servicing space for the restaurant. Any servicing would have to take place from Stoke Newington Church Street which includes double yellow lines on each side of its length. I have not been made aware that there is a loading/unloading ban on this road and hence the presence of double yellow lines would not prohibit servicing from the street. In this case, whilst No 138 Stoke Newington Church Street does have some space off the highway, it is too small to enable vehicles to leave in forward gear. Reversing onto Stoke Newington Church Street would be a hazardous manoeuvre given

the volume and speed of vehicles using such a road. Furthermore, the existing A1 unit has no servicing space.

30. I acknowledge that the absence of on-site servicing space is not ideal, but nonetheless any redevelopment proposal needs to be considered in the context of the existing use of the site. On balance, I do not consider that the proposal would, in relative terms, have a materially greater impact upon highway safety and capacity issues in the locality when compared to the existing use of the appeal site.
31. The appellant has shown an area for the storage of waste in the proposed kitchen area on drawing No 288P (20) P 00. The appellant indicates that refuse would be collected in sacks both regularly and privately and that it would be placed on the pavement within an hour of collection. As long as the sacks were placed close to the building, in an orderly fashion, and collected regularly, I can see no reason why it would cause a significant obstruction to pedestrians. Any concerns about waste collection could, therefore, be alleviated by means of the submission of a recycling/waste planning condition to also include details relating to private waste collection frequency/times.
32. For the reasons outlined above, and subject to the imposition of planning conditions, the proposal would be acceptable in respect of servicing and waste storage and therefore would accord with the highway safety, waste and amenity aims of Policies 6.3 and 6.10 of the London Plan 2016; Policies 6, 32 and 33 of the CS and Policies DM44 and DM45 and DM46 of the LP and the Framework.

Other Matters

33. I have taken into account comments made by other interested parties. The comments made have already been addressed in the reasoning above. None of the comments made alter or outweigh my overall conclusion on the main issues.

Conclusion

34. The proposal would be acceptable, subject to planning conditions, in respect of waste storage, highway safety and noise. Furthermore, there would be some benefits associated with the enhancement of the appearance of the frontage of the properties and hence the character and appearance of the CA. However, these matters do not overcome or outweigh the loss of B2 floorspace or the identified harm that would be caused to the vitality and viability of the LSC. Furthermore, the proposed flues/exhausts/ducts on the rear of the building would neither preserve nor enhance the character and appearance of the CA. These are matters of overriding concern and therefore, and taking into account all other matters raised, I conclude that the appeal should be dismissed.

Daniel Hartley

INSPECTOR