



Appeal Decision

Site visit made on 27 June 2017

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

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

Decision date: 02 August 2017

Appeal Ref: APP/X5990/W/17/3172739

100-101 St Martin's Lane, London WC2N 4AZ

- 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 Bishopsgate Long Term Property Fund Nominees No.1 Limited and Bishopsgate Long Term Property Fund Nominees No.2 Limited against the decision of City of Westminster Council.
 - The application Ref 16/10998/FULL, dated 17 November 2016, was refused by notice dated 14 February 2017.
 - The application sought planning permission for redevelopment of 100 and 101 St Martin's Lane for office and retail purposes, redevelopment behind retained facades of 8-10 and 18 Charring Cross Road for office, retail and residential purposes without complying with a condition attached to planning permission Ref 87/03993/FUL, dated 30 March 1988.
 - The condition in dispute is No 3 which states that: *'The roof of the building and terraces on the north of the central building shall not be used for any purpose (including that of sitting out) other than that indicated on the submitted drawings, as a means of escape in case of fire or as shall have been previously approved by the City Council as local planning authority'.*
 - The reason given for the condition is: *'To safeguard the amenity of the adjoining premises and the area generally'.*
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Decision

1. The appeal is dismissed.

Procedural

2. Since the determination of the original application, the appellant has commissioned a second acoustic report¹ which has been submitted with the appeal. Relevant parties have had the opportunity to comment upon it during the course of the appeal.

Background

3. The appellant wishes to use the building's flat roof terraces on the third, fourth and fifth floors, and part of the lower ground floor, outdoor amenity spaces for office workers to gather in during breaks and for informal meetings, albeit subject to suggested restrictions. Associated works are also proposed, including the installation of trellis and 'faux buxus' screening, a new door and an external staircase from ground to courtyard level.

¹ RBA Acoustics – Acoustic Assessment – prepared 17 March 2017

4. Planning permission was granted in 1993 varying the condition to allow use of the fourth floor terrace by Carlton Television for a temporary period, during their tenancy.

Main Issue

5. The main issue is the effect that varying the condition would have on the living conditions of neighbouring residential occupiers, with particular regard to noise and disturbance.

Reasons

6. The appeal site is an unlisted seven storey office building (comprising lower ground, ground and five upper floors) with a retail unit on part of the ground floor. It is located between St. Martin's Lane and Charring Cross Road and lies within the Trafalgar Square Conservation Area (CA). The terraces are on the north side of the appeal building which is enclosed by 8-16 Charring Cross Road (including Faraday House and Garrick Mansions) to the west, Cecil Court (including Burleigh Mansions) to the north and 97-99 St Martin's Lane (including Talbot House) to the east. Their upper floors are in residential use and the rear of the buildings face towards the relevant parts of the appeal site.
7. Essentially therefore, the courtyard and terraces are bounded by residential flats on three sides. Covent Garden Community Association (CGCA) advises that approximately 45 flats would be directly affected, whilst about 70 residential windows face towards the terraces. It also points out that for many of the flats their only windows face the appeal site. The Burleigh Mansions Residents' Association (BMRA) confirms that their south facing flats are one bedroom or studio flats with a single aspect facing the appeal site. CGCA states that residents include retirees, elderly people, families, theatre workers and people with disabilities or limited mobility. The varied demographic suggests that many of the flats are likely to be occupied during normal working hours.
8. The Council advises that the proximity of the tiered terraces, including the courtyard, to residential windows varies from approximately 8 to 18 metres, which has not been questioned. The appellant has produced two acoustic reports which attempt to predict the likely noise levels that would result from the proposal. However, a predicted noise level can never be as accurate as measured one. The Hoare Lea noise impact assessment² (the first report) states that: *'There is no set guidance for this type of assessment, nor is there a simple relationship between sound and noise levels and the impact on those affected.'* Whilst there are methodologies for such assessments they are reliant on a variety of assumptions being made and correction factors incorporated, as detailed in the reports.
9. The first report found existing background noise levels to be between 53-55 dB L_{Aeq 10hr}, which is at or just below the World Health Organisation (WHO) guideline³ level for outdoor areas, marking the onset of health effects from noise exposure. The first report describes that ambient noise level as moderately high, but says that it is representative of a busy London location. It attributes much of that background level to building services equipment and other sources, such as road traffic on Charring Cross Road and St Martin's

² 2016

³ WHO Guidelines for Community Noise 1999

- Lane. However, the BMRA's perception is that the flat's facing south in Burleigh Mansions are protected from traffic noise and uniquely quiet for such a central London position. Whilst the measurements are not disputed, those comments do illustrate the central role of subjective perception in noise issues.
10. The relevant Planning Practice Guidance (PPG) recognises that '*where noise sensitive locations already experience high noise levels, a development that is expected to cause even a small increase in the overall noise level may result in a significant adverse effect occurring even though little to no change in behaviour would be likely to occur.*'⁴ The appeal location would fall into that category.
 11. The first report's predictions appear to be based on the assumption that a limit of 50 people in total would use the outdoor spaces. It recommended that some areas of courtyard and terrace should not be used at all, such as the western courtyard area and the eastern 5th floor terrace, which have not been included in the proposal. Whilst it considers that there would be no observed adverse effect in a number of areas, it recommends mitigation, in the order of 3dB, to reduce the effect of noise from use of the 4th floor terrace, from moderate to minor. Therefore, the report recognises that there would be increased noise in some areas at the Lowest Observed Adverse Effect Level (LOAEL), referred to in the PPG⁵. That is the threshold above which the noise starts to cause small changes in behaviour or attitude. It is also when mitigation becomes necessary.
 12. During the course of the application, the appellant suggested reducing the limit on the numbers of people allowed to use the outdoor areas further, from 50 to 28 in total. In an addendum to its original report, Hoare Lea estimated that the proposal could reduce the levels of sound from speech by 3dB, relative to the ambient noise level. The further noise assessment, submitted with the appeal, from RBA Acoustics based on a limit of 28 people using the terraces, states that the increase in noise levels would be slightly less than the first report. It suggests that the difference in the predicted results is the result of its 3D modelling software, but it also demonstrates that the results of such assessments can vary.
 13. Both noise assessments are also predicated on effective control of the numbers of people using the outdoor areas and numerous other assumptions and correction factors, albeit following available methodologies. Given that it is acknowledged that there is no set guidance for such assessments, it is reasonable to consider the actual experience and perception of residents. The CGCA advises that the terraces have been used in the past by officer workers, without permission, and that residents raised objections about the resulting noise. A number of individual residents have referred to various instances of use by workmen, when conversations and use of mobile phones have been clearly audible, even through closed windows. Other residents refer to the noise generated by recent works carried out at the building, although it is accepted that those noise levels may be of a different order.
 14. Therefore, whilst I note the predictions and conclusions of the noise reports, they appear at odds with the actual past experience of residents. Although there are relatively high existing background noise levels, the type of noise

⁴ Paragraph: 006 Reference ID: 30-006-20141224

⁵ Paragraph: 005 Reference ID: 30-005-20140306

produced by building services equipment and traffic is quite different in character from that produced by human voices. The noise reports attempt to account for that difference by using a 3dB penalty. However, it is accepted that the human voice has an inherent variability and is tonal, intermittent and impulsive in character. Laughter and high spirits are also often engendered by informal social interaction. In my judgement, given the proximity of the surrounding residential flats and the acknowledged amplification effects of the setting, the noise generated would be likely to be noticeable to nearby residents and have an adverse effect.

15. The terraces and outdoor areas would be used more frequently during the summer months, which is also the time when adjacent residents are likely to have their windows open for ventilation purposes. That would increase their vulnerability to such social noise, even allowing for background levels.
16. It is recognised that the appellant has put forward a range of mitigation measures including: restricting use of the outdoor areas to 0800 to 1800 Monday to Friday; forbidding the playing of music or the holding of events; limiting the total number of users to 28 at any one time (divided between 6 on lower ground floor, 6 on the third floor, 10 on the fourth floor and 6 on the fifth floor). Nevertheless, although intended for use during breaks, lunchtimes and for informal meetings, there is no evidence to predict how often through the day the various multiple terraces would be used and nothing in the proposals to restrict frequency of use during that 10 hour daily period. The noise associated with use throughout the day would be likely to adversely affect the adjacent residents, especially during the summer when their windows would be likely to be open.
17. Furthermore, it is suggested that only the eastern corner of the lower ground courtyard would be made available for use. That area would be demarcated, according to the plans, by a polyresin planter but a gap would be left to allow for the fire escape route from surrounding buildings. It seems to me that in practical terms, as the area would have to remain without any physical barrier, it would prove difficult to prevent unauthorised use of other parts of the courtyard, identified in the noise reports as having a more detrimental effect.
18. The usable size of the 4th floor terrace would be limited by a pebble boarder, which may be more effective. An access control system, CCTV, the use of licences rather than leases have all been put forward as control methods. Some of these measures are incorporated in a Management Plan, although the version provided with the appeal documentation supported by a letter from Savills, the proposed managing agent, refers to a total capacity of 50 for the terraces and does not include individual terrace limits. Head height trellis with faux buxus screening is also proposed, which the noise assessments suggest would have a marginal noise reduction effect.
19. Whilst the proposed management plan and associated measures appear stringent, I am not persuaded that they would be reasonably enforceable. Other than stating that Savills would be responsible and that there would be an on-site management team, it is not clear to me how it would be practically managed or successfully implemented over a 7 storey building with potential multiple tenants. It would presumably rely on constant monitoring throughout the day to ensure the number limits were respected. From the information before me, I am not convinced that it is a feasible proposal. The draconian

nature of the restrictions could arguably negate any benefit perceived by prospective tenants.

20. That leads me to the rationale for the appeal proposal. On the one hand, the appellant suggests that the terraces would be used infrequently; weather permitting, but on the other hand, that the outdoor use would be of valuable assistance in the letting of the building and in retaining tenants. Furthermore, that it is a particularly important objective given the current uncertainties in the occupier market due to Brexit. However, no specific evidence is provided to support the claim that the availability of outdoor space would be considered an important factor by prospective tenants, especially given the proposed restrictions. Other parties have referred to a variety of alternative outdoor spaces available in the area including Leicester Square, Trafalgar Square, the gardens of St. Pauls and the banks of the Thames, in addition to the array of cafes and restaurants in the surrounds. All of those could be used by office workers during their lunch hours. Any direct connection with Brexit and the implied effects on the occupier market is not evidenced.
21. According to the appellant, the scheme would benefit local residents by, amongst other things, mitigating significant and harmful 'window to window' overlooking, reducing light spill, removing visual clutter and softening the appearance of the appeal building. Whilst that is positive and presumably refers to the installation of the trellis and artificial screening, those benefits could also be achieved without the use of the outdoor areas. It is submitted that the proposal would introduce a formal management regime to the building. Whilst that may of some benefit, its primary function would appear to be to attempt to control and mitigate the potentially adverse effects of the proposal. Therefore, in the round, I do not consider that the suggested benefits are substantive.
22. The appellant refers to other planning permissions to use outdoor amenity space in the area but no details or specific examples have been provided. Therefore, I am unable to take them into account. The temporary permission from 1993, already referred to, is cited but no additional evidence is provided regarding its effect. In any event, it allowed use of only the 4th floor terrace for a temporary period, which limits its relevance to a proposal for permanent use of multiple terraces.
23. The most pertinent planning permission is the original 1988 consent. That allowed for the redevelopment of the site in the context of pre-existing part-residential buildings. At that time it was considered necessary to impose a condition preventing use of the terraces for amenity purposes to safeguard the living conditions of the surrounding residents. I do not find any material change in the sensitive physical relationship between the appeal site and the surrounding residential flats to justify reaching a different conclusion.
24. It is submitted by the appellant that paragraph 14 of the National Planning Policy Framework (the Framework)⁶ indicates that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits. However, as the fourth bullet point of paragraph 14 makes clear, that 'titled balance' only applies in circumstances where the development plan is absent, silent or relevant policies are out-of-date. The policies referred to in the Council's decision notice are S29 and S32

⁶ Published 2012

of Westminster's City Plan (WCP), consolidated with changes in November 2016, and saved policies ENV 6 and ENV 13 of the Unitary Development Plan (UDP), adopted in January 2007. Along with the Mayor of London's London Plan (2015), they form the development plan for Westminster.

25. WCP is relatively recent and would have been subject to independent public examination, prior to formal adoption, to ensure its consistency with the Framework. Whilst the UDP is older, paragraph 211 of the Framework says that policies should not be considered out-of-date simply because they were adopted prior to the publication of the Framework. Paragraph 215 advises that due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework. I am satisfied that the relevant policies are consistent with the Framework and no case has been made to suggest otherwise. Therefore, the policies carry full weight. Consequently, as the development plan is not absent, silent and relevant policies are not out-of-date, the fourth bullet point of paragraph 14 of the Framework is not engaged and the 'tilted balance' does not apply. Therefore, the proposal must be determined in accordance with the development plan unless material considerations indicate otherwise.
26. Policy S29 of WCP, dealing with health, safety and well-being, states that the Council will resist proposals that result in an unacceptable material loss of residential amenity and that development should aim to improve the residential environment. Its 'reasoned justification' advises: *'Growth in the Westminster context means mixed use areas and sites, infill development and high density living. It is therefore vital that exceptional attention is paid to protecting existing residential amenity and providing good quality residential accommodation for future residents...Poor quality residential amenity can make homes less attractive to permanent residents and threaten the sustainability of residential neighbourhoods. High standards of residential amenity will benefit Westminster's residents in terms of life, health and well-being'*. Policy S32 of WCP and ENV 6 of the UDP relate specifically to noise and require development to minimise and contain noise to protect noise sensitive properties, which includes all residential properties.
27. I have considered the noise reports' predictions along with the proposed restrictions, controls and mitigation measures. As the development plan and the Framework recognise the central importance of good living conditions and their relationship with health and wellbeing, it is appropriate to adopt a precautionary approach when considering proposals which may adversely affect them. Given the close proximity of the appeal site to a large number of surrounding residential flats, the nature and character of the noise that would be generated, its potential cumulative impact and my concerns about the effectiveness and practicality of the management plan, I am not persuaded that harm to the living conditions of nearby residents would be avoided or could be sufficiently mitigated by condition.
28. Whilst the proposal may offer some benefit to the appellant in making the office space more attractive to prospective tenants, that commercial benefit along with the other suggested benefits does not outweigh the adverse effects on the living conditions of neighbouring residents.
29. I conclude, therefore, that the original condition is reasonable and necessary and that varying it to enable use of the terraces by office workers would harm

the living conditions of neighbouring residential occupiers, with particular regard to noise and disturbance. Varying the condition, as suggested, would conflict with policies S29 and S32 of WCS and policies ENV 6 and ENV 13 of the UDP, which seek to protect living conditions and minimise and contain noise.

Other Matters

30. The appeal site is located within the Trafalgar Square CA. The proposal to allow use of the terraces involves no significant physical development and, as the location is largely concealed from public view, it would not have an adverse effect on the character or appearance of the CA. Notwithstanding that, I have dismissed the appeal on other grounds.

Conclusion

31. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be dismissed and the condition retained in its present form.

Jonathan Tudor

INSPECTOR