



Appeal Decision

Site visit made on 10 September 2019

by W Johnson BA(Hons) DipTP DipUDR MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 October 2019

Appeal Ref: APP/X5990/W/19/3230681

Avery House, 1-3 Avery Row, London W1K 4AJ

- 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 Lemonthree Limited against the decision of City of Westminster Council.
 - The application Ref 18/08502/FULL, dated 28 September 2018, was refused by notice dated 8 January 2019
 - The development proposed is described as: 'Use of the roof area at first-floor level to provide an external terrace for use by patrons of the approved restaurant premises at 1-3 Avery Row; provision of partial enclosure through erection of canopy structure and the provision of glazed balustrade and planters adjacent to the northern edge of the site'.
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Decision

1. The appeal is allowed, and planning permission is granted for the use of the first-floor flat roof as a smoking area in association with the basement to second floor restaurant, erection of metal pergola structure, glazed balustrade and the installation of planters at Avery House, 1-3 Avery Row, London W1K 4AJ in accordance with the terms of the application, Ref 18/08502/FULL dated 28 September 2018, subject to the conditions in the attached schedule.

Procedural Matter

2. For clarity and precision, the description of the development in the banner heading above is taken from the application form. However, in my decision, I have taken the description of the development from the Council's decision notice since this more accurately describes the proposal.
3. Whilst not cited on the Council's decision notice, a listing description for No 13 Lancashire Court was provided with the Council's Questionnaire. Additionally, listing descriptions were requested for No 4 Avery Row and No 12 Lancashire Court due to their proximity to the site. The main parties have been given the opportunity to provide any comments in relation to these listed buildings. Consequently, I will not prejudice either party in considering these Grade II Listed Buildings in the determination of this appeal.
4. Reference has been made by both parties to comments received from the occupiers of No 12 Lancashire Court. However, these comments relate to a different application on a different site and therefore do not relate to the appeal scheme before me. I do not consider that these comments to be relevant in the context of this appeal and have therefore not taken them into consideration.

Main Issues

5. The main issues are:

- the effect of the proposed development on heritage assets, with particular regard to No 13 Lancashire Court which is Grade II Listed, and to the Mayfair Conservation Area (MCA); and,
- whether the proposal would adversely affect the living conditions of existing neighbouring residents at No 12 and No 13 Lancashire Court, with particular regard to outlook and privacy.

Reasons

Character and appearance

6. The host property is a commercial property, comprising a restaurant that is located at the corner of Avery Row and Lancashire Court, which is in turn located in the MCA. The proposed development is to create a smoking area for customers of the restaurant on an area of flat roof located off Lancashire Court at first floor level.
7. There are a number of additional designated heritage assets in the immediate vicinity of the site, namely: No 4 Avery Row; No 12 and No 13 Lancashire Court, which are all Grade II listed. I observed all of these properties during my visit. I find that the proposed development falls within the setting of No 4, No 12 and No 13 due to its proximity. The setting of a heritage asset is defined in the Glossary of the National Planning Policy Framework (the Framework) as: 'The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral'.
8. Turning to the effect on the setting of No 13, the listing identifies the 4no. storey property with parapet roof to date from the mid to late 18th Century that comprises a house and shop at ground floor. The shop front dates from early 19th Century with a thin pilaster frame doorway under entablature. The upper floors have sash windows with no glazing bars in simple moulded frames. The site faces No 13 and I find that the proposed development is of a scale that does not dominate the site, which is contained within walls of the host and adjoining buildings.
9. The design of the proposal ensures the host building is still visible and clearly identifiable. The structure is lightweight, of metal frame construction with glazing, resulting in a contemporary appearance. This results in a modern building technology and is therefore easily distinguishable from the traditional host building. Although, concerns have been raised by the Council in respect of the potential reflective properties in the glazing, I am confident that this would not be an issue. In any event, I consider that through the imposition of a suitably worded condition an appropriate material could be sourced. An area of planting is also proposed in front of the structure adjacent to Lancashire Court, that would effectively screen a large proportion of the proposal from view. Accordingly, the proposed development, through its design and materials to be used in construction would provide an effective solution to ensure that no harm occurs to the setting of No 13. With regard to No 4 and No 12, I find that as

they do not directly face the site like in the case of No 13, there is further mitigation against any harm to their setting.

10. I have a statutory duty under Section 66 (1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act) which requires me to have special regard to the desirability of preserving or enhancing a listed building or its setting or any features of special architectural or historic interest which it possesses. I consider the proposed development would accord with this duty.
11. The site whilst forming part of a section of flat roof is visible from Lancashire Court, but due to its first-floor location and the narrow width of Lancashire Court, it is not overly prominent in the wider street scene. During my visit, I noted that whilst there are many traditional features in Lancashire Court, it also exhibits numerous modern elements on its buildings, such as fenestration details, canopies, lighting and external displays. Whilst, the proposal is likely to be illuminated in the evenings, existing glazing on the host building will already provide a degree of illumination to the site. Overall, I find that the proposal, through its modern lightweight design and landscaping would not be at odds with the prevailing character of this part of the MCA.
12. Having regard to the above, I conclude that the proposed development would preserve and enhance the character and appearance of the conservation area. It would, therefore, comply with the statutory duty under Section 72(1) of the Act concerning the desirability of preserving or enhancing the character or appearance of the conservation area.
13. For the reasons above, I conclude that the development would not have a significantly detrimental impact on the character and appearance of the appeal site, No 13 or the surrounding MCA, and hence it would accord with the design, character, appearance and heritage aims of Policies S25 and S28 of the Westminster's City Plan 2016 (City Plan), Policies DES 1, DES 5 and paragraphs 10.108 to 10.128 of Westminster's Unitary Development Plan 2007 (UDP).
14. Accordingly, the proposal would not conflict with national policy contained within section 16 of the Framework, where it advocates great weight should be given to the conservation of heritage assets. It would not cause harm to the significance of the designated heritage assets for the purposes of the Framework. Hence, there is no requirement for me to consider public benefits to be weighed in a balancing exercise.

Living conditions

15. It is common ground between the main parties that noise is not an issue. On the evidence before me, I have little reason to disagree with the main parties on this matter. I noted that the site is not a notable distance from No 12 and No 13 and that from the site it would be possible to look into their facing first floor windows, as they are sited at a slightly lower level compared to the first-floor level at the host building. However, I found that the windows located on the second floor of No 12 and No 13 to be less of an issue, due to their increased height when compared to the site, which results in them overlooking the proposed smoking area.
16. Although, the distance from the site and No 12 and No 13 is modest, I recognise that the appellants have taken this into consideration with the proposed area of planting in front of the smoking area. I find that this area is

twofold as it would provide some mitigation in preserving the privacy of neighbouring residents and it would also provide a screen to the development reducing its visual effect.

17. The lightweight structure and 'pergola' styled roof of the proposed development do not raise the same issues as if it were a solid structure, as light would still be able to penetrate through the development. Additionally, the proposed area of planting would create an attractive feature, that would provide suitable mitigation to the outlook from any of the first-floor windows at No 12 or No 13, which is already limited due to the existing buildings opposite.
18. Whilst planting is proposed, I find that due to the modest distance and raised level of the site that obscure glazing to at least head height from floor level would also be required in the elevation facing No 12 and No 13 to ensure that the privacy of neighbouring occupiers is maintained. I consider that the inclusion of such glazing would not raise any additional issues with regards to their living conditions due to its translucent nature. Consequently, I am satisfied that both the area of planting and the obscure glazing could be secured through suitably worded planning conditions. Additionally, I note that the Council's Environmental Health Officer raises no objection to the scheme, subject to conditions, which I consider to be a material consideration in the determination of this appeal.
19. For the reasons above, I therefore conclude that the development would not significantly harm the living conditions of No 12 and No 13. As a consequence, it accords with the amenity aims of City Plan Policy S29, UDP Policy ENV 13 and the Framework.

Other Matters

20. Both main parties reference a development at No 123 New Bond Street, and the Council has referenced various appeal decisions¹ in support of their submission. However, in all instances, relatively little detail has been provided regarding the particular planning backgrounds to these schemes and I do not know what evidence was before the Inspectors at the time of their decisions. Consequently, I cannot be sure that these are entirely representative of the circumstances in the appeal before me. In any event all appeals are judged on their own individual merits and where appropriate the relevant legislative provisions. Accordingly, that is how I have assessed this appeal scheme.

Conditions

21. I have considered the conditions suggested by the Council, having regard to the six tests set out in the Framework. For the sake of clarity and enforceability, I have amended the conditions as necessary.
22. For certainty, it is necessary that there is a condition requiring that the development and materials used in construction are carried out in accordance with the approved plans and that the number of customers using the smoking area should not exceed twelve persons during its operation from 12:00hrs to 23:00hrs.
23. I find it necessary to ensure that the glazing facing Lancashire Court is obscure glazed and is fixed shut when the smoking area is in use, and that the

¹ APP/X5990/W/19/3219889; APP/X5990/A/09/2098598 and APP/X5990/A/09/2105524

construction times are controlled in the interests of the living conditions of neighbouring occupiers.

24. However, I do not find it necessary or reasonable to insist on opening the glazing in a downwards position outside the operational hours as this would be unnecessary and unreasonable as it would not serve a specified purpose. Additionally, I do not find it necessary to restrict machinery or other equipment being sited in the smoking area, as this would likely require planning permission in its own right.

Conclusion

25. For the reasons given above, the appeal should be allowed.

W Johnson

INSPECTOR

Schedule of Conditions

- 1) The development hereby permitted shall be begun before the expiration of three years from the date of this permission.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: C12.a rev A; C12.b Rev A; C12.c Rev A.
- 3) The external surfaces of the development hereby permitted shall be constructed in the materials shown on plans: C12.a rev A; C12.b Rev A.
- 4) The smoking area/terrace hereby approved shall be limited to a maximum of twelve people at any one time and shall only be available for use between 12:00hrs to 23:00hrs, and at no point outside of these hours.
- 5) The proposed development hereby permitted shall not be occupied until the glazing facing Lancashire Court has been fitted with obscured glazing, and no part of that glazing shall be capable of being opened when the smoking area is in operation. Details of the type of low or non-reflective obscured glazing shall be submitted to and approved in writing by the local planning authority before it is installed and once installed the obscured glazing shall be maintained and retained for the life of the development.
- 6) The proposed development hereby permitted shall not be occupied until details of soft landscaping works (including cultivation and other operations associated with plant establishment; schedules of plants noting species, plant supply sizes and proposed numbers/densities where appropriate) has first been submitted to and approved in writing by the local planning authority. The soft landscaping works shall then be implemented fully in accordance with the approved details, maintained and retained for the life of the development. Any trees or plants that die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species.
- 7) Demolition or construction works shall take place only between 08:00hrs to 18:00hrs Monday to Friday and between 08:00hrs to 13:00hrs on Saturday and shall not take place at any time on Sundays or on Bank or Public Holidays.