



Appeal Decisions

Site visit made on 17 November 2020

by D.R McCreery MA BA (Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 20 November 2020

Appeal A Ref: APP/C5690/W/20/3251578 125-131 Kirkdale, London SE26 4QJ

- 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 M Bernard (Bernard Construction UK LLP) against the decision of the Council of the London Borough of Lewisham.
 - The application Ref DC/20/115790, dated 17 February 2020, was refused by notice dated 9 April 2020.
 - The development proposed is change of use of the vacant ground floor and basement of No 125-131 Kirkdale, London SE26 4QJ from its permitted use as a public house (Class A4) to a café (Class A3) including dedicated co-working space (Class B1a) and a meeting room available to hire by members of the community.
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Appeal B Ref: APP/C5690/W/20/3251806 125-131 Kirkdale, London SE26 4QJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for 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 M Bernard (Bernard Construction UK LLP) against the Council of the London Borough of Lewisham.
 - The application Ref DC/19/114493, is dated 1 November 2019.
 - The development proposed is Application to vary the wording of Condition 7 attached to planning permission Ref DC/19/112637 which provides for: "A part retrospective application for the construction of a three storey, plus lower ground level, building comprising 2x one bedroom and 6x two bedroom self-contained flats (Class C3), and a public house (Class A4) with ancillary floorspace at ground floor level, together with associated cycle and refuse storage, and amenity space."
 - Condition 7 attached to Ref DC/19/112637 states that :
 - (7) (a) Prior to installation of the internal fit-out of the public house, plans (1:50 scale) with details showing the physical fit out, including but not limited to floor finish, ceilings, ventilation, sanitary ware and entrances for the A4 Public House hereby approved must be submitted to and approved in writing by the local planning authority.
 - (b) The internal fit out of the public house shall be completed in full accordance with the details approved under part (a) prior to first occupation of the residential dwellings, and maintained for the life of the development.
 - The reason for the condition is:

To ensure that the fit-out of the units is sufficient to ensure that they are an attractive and commercially viable option and to demonstrate the developers commitment to delivering the commercial units as part of this development in accordance with Policy 19 Provision and maintenance of community and recreational facilities of the Lewisham Core Strategy (2011) and Policy 20 Public Houses of the Development Management Local Plan (2014).
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Decision

1. Appeal A : The appeal is dismissed.
2. Appeal B : The appeal is dismissed and permission is refused.

Procedural Matter

3. Appeal B is made as no notice of a decision on the application for planning permission was given within the relevant time period (or within an extended period agreed in writing). Appeal B will therefore consider whether planning permission for the proposal should be granted or refused.

Main Issues

4. The main issues in the appeal are:
 - Whether the ground floor of the property should continue to be available as a public house when regard is had to local and national policy.
 - Whether condition 7 attached to planning permission Ref DC/19/112637 is reasonable and necessary to meet the aims set out in the reason for the condition.

Reasons

Public house use

5. The appeal site comprises a three storey building with residential units on the upper floors. The ground and lower ground floors are authorised for use as a public house (class A4). The site has a complex planning history that indicates that a larger public house closed in 2013, prior to redevelopment following permission given in 2017.
6. Policy DM20 of the Development Management Local Plan sets out specific policy for considering changes of use involving public houses. Paragraphs 2.151 and 2.152 are relevant in giving an indication of the sort of viability and marketing material that could be presented to meet the requirements of Policy DM20(1a). These paragraphs are a starting point for assessing the proposal but should be applied sensibly.
7. As the public house has not been operational since the redevelopment there is no evidence relating to trading or whether the business has been run positively. Although the comments from interested parties indicate some demand for a public house use in the area, whether this would translate into a viable commercial activity cannot be proven either way.
8. This leaves a gap in the evidence to demonstrate compliance with DM20(1a). It therefore means that the proposal is to be assessed mainly on how the redeveloped property has been marketed to prospective operators.
9. The current space available for public house use is materially different in size and nature to that which existed prior to the redevelopment. As such, the Appellant's material relating to viability and marketing of the pre-existing public house is an unreliable source of evidence to establish whether the requirements of DM20(1a) are met.

10. I have carefully reviewed the Appellant's report and other evidence relating to the marketing that was undertaken. The Council appear prepared to accept that marketing of the new public house commenced around August 2017, although the precise date is unclear from the evidence. It is also unclear whether the asking price was pre-agreed with the Council following an independent valuation. The evidence of exchanges with the Council on the contents of the marketing exercise appears to be partial and lack context to show what information was being reacted to.
11. At the time the appeal was made and substantive evidence was submitted, the period of marketing fell slightly short of the 36 months required under DM20(1a). In addition, there was a short and acknowledged break in online marketing due to IT issues. Whilst these factors are deficiencies, they are minor and do not alone render the entire exercise invalid.
12. The details of marketing activity provided mostly consists of commentary about what has been undertaken. The evidence lacks a level of depth in relation to documentary proof, including copies and details of when specific activities on top of online marketing were undertaken, to fully confirm whether the marketing was sufficiently thorough.
13. It is not the purpose of this appeal to comment on the specifics of the planning history of the site. It is also not unusual to market properties during their construction. However, the date on which the appeal property was fully ready for legal operation is unclear from the evidence and uncertainty around this may have affected the marketability of the property. However, the influence of this factor is unproven one way or another in the evidence and is therefore given more limited weight.
14. Overall, when taken as a whole and viewed in the context of the wider intentions of the policy, the viability report and other evidence does not demonstrate that the use would not be economically viable and that appropriate marketing has been undertaken.
15. Notwithstanding the specific protections offered for public houses, use as a café/co-working space has the potential to meet the needs of the local community. Such a use is also capable of meeting the aims of the London Plan and National Planning Policy Framework (the Framework) around planning positively for community needs and therefore has the potential to weigh in favour of the proposed development.
16. Notwithstanding the potential attractiveness of the proposed use, the available evidence on the need for it is very generalised. This includes evidence of any specific engagement with the wider community on the matter. As such, although I give some weight to the potential of the proposed use to meet community needs, the evidence is not strong or specific enough to weigh heavily in favour of the proposal.
17. In conclusion, unnecessarily requiring an unneeded public house use at the site would not be consistent with the overall aims of the Framework around planning positively for communities. However, the evidence presented does not demonstrate that a public house use would not be viable or that the proposed use would better meet the needs of the local area. The existence of other public houses in the local area does not in itself show that demand is met or that a further public house would not add further welcome choice.

18. Consequently, I find conflict with development plan policies, including Policy DM20 of the Development Management Local Plan and Policy 4.8 of the London Plan which includes a policy framework designed to protect against the unjustified loss of public houses.

Condition 7

19. The provision of a public house, albeit smaller than the one that was previously on the site, was a significant factor that led to the Council granting permission for redevelopment. As such, it was legitimate in planning terms for the Council to include mechanisms that would ensure delivery of it as a priority.
20. Condition 7 serves to meet this aim by preventing occupation of the residential parts of the building prior to the public house being fit out internally. Without condition 7 the evidence does not indicate that there would be a robust mechanism to ensure delivery of the public house.
21. The requirements of the condition appear to amount to approving details of a basic fit out rather than one that could be regarded as final and detailed. As such, I do not agree that this would be an onerous requirement or a wasted exercise if the Appellant were to choose to discharge the condition in advance of identifying an operator of the public house. Given the constraints of the site there are also limited variations to how the basic fit out could be achieved. As such, the risk of a future operator wanting to do something radically different from the basic fit out is low.
22. For the reasons set out above, and on the basis of the evidence before me, I conclude that condition 7 is reasonable and necessary to meet the aims set out in planning permission Ref DC/19/112637.

Other Matters

23. Comments from interested parties supporting the scheme are noted and addressed above where they relate to the main issues.
24. The COVID 19 pandemic is likely to have a number of far reaching effects going forwards, which may include longer term increase demand for co-working space and other types of local community facility. As the long term effects of the pandemic cannot be reasonably judged at present, I am unable to afford this consideration significant weight.

Conclusion

25. For the above reasons and having regard to all other matters, I conclude that Appeal A and Appeal B should be dismissed.

D.R. McCreery

INSPECTOR