
Appeal Decision

Site visit made on 11 May 2021

by Gary Deane BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 June 2021

Appeal Ref: APP/K5600/W/20/3264937

226 Westbourne Grove, London W11 2RH

- 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 Chucs Bar and Grill against the decision of the Council of The Royal Borough of Kensington and Chelsea.
 - The application Ref PP/20/04969, dated 9 September 2020, was refused by notice dated 17 November 2020.
 - The application sought planning permission for a change of use of existing A1/A3 retail unit to A3 use without complying with a condition attached to planning permission Ref PP/15/01229 that was allowed on appeal ref APP/K5600/W/15/3131999, dated 9 February 2016.
 - The condition in dispute is No 4 which states that: No customers shall use the outdoor areas at the rear of the premises, including the rear balcony at upper ground floor level, between the hours of 18:00 and 10:00 the following day on Mondays to Sundays and public holidays and between which hours all windows and external doors to these areas shall be kept closed at all times except when required for the incidental entry or exit of goods.
 - The reason given for the condition is: In the interests of the living conditions of adjacent residents.
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Decision

1. The appeal is dismissed.

Background and main issue

2. The proposal simply seeks to allow customers of the restaurant to use the outdoor area at the rear of the premises into the evening throughout the week and on Saturdays. This rear outdoor area comprises an external terrace at lower ground floor level and a small upper ground floor balcony.
3. Unlike the development that was approved on appeal in February 2016, the proposal is supported by an Assessment of Noise Impact (AoNI), which includes the results of a noise survey undertaken within the rear outdoor area. While the AoNI refers to the site and the nearest residential properties being on Westbourne Road, this appears to be a typographical error since the findings clearly relate to properties on Westbourne Grove.
4. The proposal is also made in the context of an undertaking in the form of an Operational Management Statement (OMS). The OMS covers the management and operation of the restaurant. It promotes best practice and includes, amongst other things, measures specifically designed to minimise noise levels.

5. Against that background, the main issue is the effect of the proposal on the living conditions of the occupiers of nearby residential properties, particularly in terms of potential noise and general disturbance.

Reasons

6. The appeal premises is a 3-storey (above ground) mid-terrace building that fronts a busy road within a parade of mainly commercial ground floor units in the Westbourne Grove Special District Centre. There are residential properties above ground floor level on either side of No 226 and also a mainly residential area just beyond the rear boundary of the site.
7. By allowing customers to use the rear outdoor area, as proposed, the proposal would introduce activities such as dining, drinking and socialising up until 2230 hours on each day apart from Sundays. It would do so at a time when residents are more likely to be at home and reasonably expect quieter conditions within which to relax and enjoy their properties.
8. From what I saw, the rear outdoor area is enclosed on all sides by substantial solid walls and by the outriggers of the adjoining properties on each side. This arrangement would serve to funnel the sounds associated with the use of the rear outdoor area upwards and towards the residential properties on either side of the site and beyond its rear boundary. As these residential properties are close to the rear outdoor area and are generally above ground floor level, several local residents are understandably concerned about the consequences of the proposal for their living conditions.
9. The AoNI indicates that there would be a modest uplift in noise levels during the evenings (1800 to 2230 hours) compared to the daytime period (up to 1800 hours). Nevertheless, it concludes that the impact of the extended hours of use on the occupiers of Westbourne Grove, located closest to the site and so most likely to be affected, would be insignificant to slight with only a minor impact particularly given the site's urban location.
10. During my early afternoon site visit, I would characterise the use of the rear outdoor area as 'quiet dining'. This is consistent with the description given in the AoNI, which notes that the conversations between the restaurant's guests will be the main source of noise. However, noise can be generated from other activities and levels can vary with those that are intermittent having a different impact compared to those that are steady and continuous. In this case, a shriek of laughter, raised voices, a clink of glasses or a crash of plates are all examples of activities that could arise and generate a loud and sudden noise. Such noise could be particularly intrusive and disturbing to nearby residents especially later into the evening when background noise levels tend to subside. It is unclear whether the AoNI explicitly takes the effects of these or other possible intermittent sources of noise into account in reaching its conclusions.
11. Despite the efforts of the appellant and the measures outlined in the OMS, it seems to me that it is possible if not inevitable that even loud chatter or laughter from customers within the rear outdoor area would disturb the occupiers of nearby residential properties. Therefore, I agree with the concerns of several interested parties who value the quieter conditions in the evening and already find that the restaurant harms this.

12. I accept that a degree of noise is to be anticipated for residents of properties within bustling commercial areas such as this. However, I saw that most units in the parade to which No 226 belongs are shops and commercial units with mainly daytime opening hours. To my mind, the permitted hours of use, which allow customers to use the rear outdoor area until 1800 hours on any day strikes an appropriate balance between allowing the restaurant to attract custom and recognising that nearby residents have a reasonable expectation of quieter conditions, particularly during the evenings.
13. While reference is made to other bars, restaurants and leisure outlets in residential areas that have later opening hours than those sought, local conditions will vary including their relationship to residential properties. From the limited information provided, I cannot be certain that the cases cited by the appellant are similar to the particular circumstances in this case. In any event, each proposal should be determined on its own merits, which I have done.
14. Overall, I find that some disturbance to local residents into the evenings would be almost inevitable if the appeal scheme were to be allowed notwithstanding the findings of the AoNI. That outcome would render even a temporary permission for 12 months or a trial period up to 2000 hours, as suggested by the appellant, inappropriate. For the same reason, relying on the controls available through the licensing regime or environmental protection legislation would be an unsatisfactory way to proceed.
15. Therefore, I conclude on the main issue that the effect of the proposal on the living conditions of nearby residential occupiers would be unacceptably harmful. It therefore conflicts with Policy CL5 of the Consolidated Local Plan, which requires all development to ensure good living conditions for the occupants of existing and neighbouring buildings. As a copy of the Council's Supplementary Planning Document, *Noise*, has not been provided, I have not assessed the proposal against its content.

Other matters

16. Reference is made to the current licensing arrangement for the restaurant, which allows the rear outdoor area to be used between 0800 and 2000 hours. The planning and licensing regimes involve consideration of different, albeit related, matters. For instance, licensing considers public nuisance whereas planning considers amenity. Therefore, it does not necessarily follow that planning decisions should be bound by licensing decisions, or vice versa. For the same reason, a variation between the planning and licensing regimes as it applies to a property is not necessarily evidence of a lack of joined up regulatory control. Similarly, the lack of objection to a license application by an interested party such as the Council's Environmental Health Team or to an application for a Temporary Event Notice should not affect their interests with regard to an application for planning permission or any subsequent appeal.
17. If permitted, the proposal would positively contribute to the local economy. It would enhance consumer choice, create jobs and support the vitality of the shopping centre, which are matters that attract policy support. These factors are particularly important given that the economic climate has worsened since 2016 when condition No 4 was imposed. The coronavirus pandemic has also had a profound impact on the hospitality sector. For many businesses, the opportunity to trade outdoors has, and continues to be, a lifeline. Several interested parties including local businesses, residents and customers strongly

support the proposal. I note that there is demand to book tables in the rear outdoor area and that it is the only realistic outdoor option for the restaurant to offer to customers as the frontage is constrained by the nearby bus stop.

18. On the other hand, people have been encouraged to work from home during the pandemic and the Council states that the number of residential properties in the vicinity of the site has increased since the decision to grant planning permission was made in 2016. On balance, it is my view that the benefits to the appellant, its customers and the local economy do not outweigh the significant harm that I have identified to the living conditions of local residents.
19. As no external alterations are proposed to the appeal premises, the proposal would have no noticeable effect on the character and appearance of the Pembridge Conservation Area (CA), within which the site falls. Consequently, the character and appearance of the CA would be preserved.

Conclusion

20. Nevertheless, for the reasons given above, and taking into account all of the evidence before me, I conclude that the appeal should be dismissed.

Gary Deane

INSPECTOR