
Appeal Decisions

Site visit made on 19 October 2021

by Diane Cragg DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 November 2021

Appeal A: Ref: APP/X5990/W/21/3270770 68-70 Wardour Street, London W1F 0TB

- 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 Sapcote Group PLC against City of Westminster Council.
 - The application Ref 20/06834/FULL is dated 27 October 2020.
 - The application sought planning permission for flexible use of the ground and basement floors for either retail (Class A1) or restaurant use (Class A3). without complying with a condition attached to planning permission Ref 20/01448/FULL, dated 23 June 2020.
 - The condition in dispute is No 6 which states that: You must not sell any hot-food take-away on the premises, nor operate a delivery service, even as an ancillary part of the primary Class A3 use.
 - The reason given for the condition is: We cannot grant planning permission for unrestricted use in this case because it would not meet TACE 9 of our Unitary Development Plan that we adopted in January 2007.
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Appeal B: Ref: APP/X5990/W/21/3270773 68-70 Wardour Street, London W1F 0TB

- 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 Sapcote Group PLC against City of Westminster Council.
 - The application Ref 20/06833/FULL is dated 27 October 2020.
 - The application sought planning permission for flexible use of the ground and basement floors for either retail (Class A1) or restaurant use (Class A3). without complying with a condition attached to planning permission Ref 20/01448/FULL, dated 23 June 2020.
 - The condition in dispute is No 10 which states that: You must apply to us for approval of details of secure cycle storage for the retail or restaurant use. You must not occupy the retail or restaurant use hereby approved until we have approved what you have sent us. You must then provide the cycle storage in line with the approved details prior to occupation. You must not use the cycle storage for any other purpose.
 - The reason given for the condition is: To provide cycle parking spaces for people using the development as set out in Policy 6.9 (Table 6.3) of the London Plan 2016 (R22FA)
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Decision

1. **Appeal A** -The appeal is allowed, and planning permission is granted for flexible use of the ground and basement floors for either retail or restaurant use at 68-70 Wardour Street, London W1F 0TB in accordance with the

application Ref 20/06834/FULL dated 27 October 2020 without complying with condition 6 previously imposed on planning permission Ref: 20/01448/FULL, dated 23 June 2020, and subject to the conditions set out in the schedule at the end of this decision.

2. **Appeal B** - The appeal is allowed, and planning permission is granted for flexible use of the ground and basement floors for either retail or restaurant use at 68-70 Wardour Street, London W1F 0TB in accordance with the application Ref 20/06834/FULL dated 27 October 2020 without complying with condition 10 previously imposed on planning permission Ref: 20/01448/FULL, dated 23 June 2020, and subject to the conditions set out in the schedule at the end of this decision.

Procedural Matters

3. As set out above there are two appeals on this site. Each appeal seeks to vary a different condition of the original planning permission. I have considered each proposal on its individual merits. However, to avoid duplication I have dealt with the two schemes together, except where otherwise indicated.
4. The appeals relate to variation of condition applications that were not determined by the Council within the prescribed period. The Council has provided a statement of case which sets out the reasons why it would not support the discharge of the conditions although for reasons I come to later the Council accepts that condition 6 could be varied. I have had regard to the parties' submissions in establishing the main issues which I set out below.
5. Since the variation of condition applications were submitted the Westminster City Plan 2019 – 2040 (the WCP) was formally adopted in April 2021; the London Plan 2021 (the LP 2021) was formally adopted in March 2021; and a revised version of the National Planning Policy Framework (the Framework) was published on 20 July 2021. The main parties have had the opportunity to comment on the implications of these changes for their cases. My decision is made in the context of the relevant policies and guidance within the WCP, the LP 2021 and the Framework. I am satisfied that the parties' interests have not been prejudiced by this approach.
6. The Government reformed the Town and Country Planning (Use Classes) Order 1987 (as amended) (Use Classes Order) from 1 September 2020 to, among other things, revoked Class A1 and Class A3 and create a new 'E' use class. Although Class A1 and Class A3 are referred to in the banner heading above, I have had regard to the changes to the Use Classes Order in my consideration of the appeals and my decisions omit references to Class A1 and Class A3 to reflect these changes.

Background

7. Planning permission was granted for the basement and ground floor of the appeal premises as a mixed-use café /bakery (sui generis) in 2011¹. Subsequently variations to the conditions of that permission were allowed². Conditions on both permissions require cycle parking and restrict the operation of a hot food delivery service from the premises. The Council confirms that this permission was implemented.

¹ RN: 11/06088

² RN: 14/09082

8. In 2018 Planning Permission was granted for use of the basement and ground floor for retail and restaurant purposes together with various works concerning plant and machinery³. I have been provided with a copy of the decision notice. There is no condition on this permission restricting cycle parking and whilst a delivery service is restricted, takeaways are not.

Use of the ground floor and basement

9. The Council considers the appeal site can be occupied in accordance with the 2011 planning permission, as amended by the 2014 permission, for uses within Class E of the Use Classes Order, this would include the sale of food and drink for consumption (mostly) on the premises. Within the context of an appeal under section 78 of the Act it is not for me to formally determine the lawful use of the site. Nevertheless, the Council accepts that the building can operate as a restaurant with an ancillary take away facility and does not therefore seek to pursue the takeaway restriction within condition 6.

Main Issues

10. Having regard to the above, in respect of Appeal A, the main issue is whether condition 6 restricting a delivery service from the premises is reasonable and necessary having regard to the effects of the development on living conditions of neighbouring properties and the need to support sustainable forms of transport.
11. In respect of Appeal B, the main issue is whether condition 10 requiring cycle parking is reasonable and necessary having regard to the need to promote cycling as a sustainable transport mode.

Reasons

12. The appeal site is the vacant ground floor and basement of a four-storey building last occupied as a Latin food and wine bar within Soho Conservation Area. The upper floors of the building are in residential use.
13. Wardour Street includes a mix of uses; generally, there are commercial premises at ground floor with offices and residential uses at upper floors including residential dwellings above and opposite the appeal site. Within the commercial premises at ground floor, there are a range of uses including cafes and restaurants.
14. A one-way system for traffic operates outside the appeal site. In the general vicinity of the appeal site, there are sections of single and double yellow lines together with lengths of on-street permit holders/pay & display parking bays. There is secure cycle parking on the pavement at the end of Meard Street, and a public bicycle hire scheme and motorcycle parking on Wardour Street close by. A pedestrian crossing adjacent to the appeal site restricts parking to part of the appeal site frontage and the pavement here is relatively narrow.

Appeal A

15. Spatial Policy 2 of the WCP identifies that Wardour Street is within the West End Retail and Leisure Policy Area where over the plan period certain priorities will be delivered including a diverse evening and night-time economy and

³ RN 18/05649/FULL

- enhanced cultural offer. Policy 16 supports food, drink and entertainment proposals of a type and size appropriate to their location.
16. The Council and third parties are concerned that a delivery service would expand the catchment area and the number of non-eat in dinners, reduce limited available cycle and vehicle parking spaces, and detract from the pedestrian environment with particular concern about queuing outside the site and non-compliance with highway rules. There are also concerns about the potential for increased noise and disturbance resulting from a delivery service.
 17. The changes to the Use Classes Order, including the revocation of Class A and its partial replacement with Class E is recognised as better reflecting the diversity of uses found on high streets, and providing flexibility for businesses to adapt and diversify to meet changing demands. By creating a broader use class, the revised Order acknowledges the importance of a flexible approach to the use of commercial buildings, and the acceptance that a wider range of uses can be accommodated in town centres. Concerns about potential harms associated with some businesses, and recognition of the need for local control to be retained, is reflected in the exclusion of certain uses from Class E including former Class A5 hot food takeaway uses. The limitations in Class E and exclusion of hot food takeaways from it is reflected in Policy 16 of the WCP which only supports deliveries from restaurants and cafes where it is demonstrated that the facilities do not result in a change of use to a hot food takeaway.
 18. Although the area is likely to be busy during the day many of the premises near to the appeal site are in uses that will open later into the evening and the area around the appeal site will also experience elevated levels of noise and disturbance, vehicles and footfall in the evenings and later at night. Within the terms of the planning permission hours of opening are restricted to protect the environment of residents adjacent to the building after certain hours. Moreover, a restaurant use, to comply with the parameters of Class E sale of food and drink for consumption (mostly) on the premises, would place a limitation on the delivery of food.
 19. I acknowledge that there is limited spare capacity in the cycle stands and parking bays within close proximity to the appeal premises, however, there is no evidence before me that a delivery service would occupy more cycle and parking spaces than customers collecting their food from a takeaway service. Further, as part of a street in which there are a variety of uses including other restaurants and cafes, there are no site-specific circumstances that distinguish the appeal site from its immediate surrounding commercial ground floor uses that would suggest the need to restrict a delivery service.
 20. The Council refers to there being no information provided about how products would be packaged to encourage the consumption of take away food at home rather than on the street. However, it is likely that where a delivery service is used food will be packaged to be eaten at the delivery destination and unlikely to be consumed on the street.
 21. Overall, I conclude that condition 6 is not necessary to protect the living conditions of neighbouring properties or to support sustainable forms of transport and there would be no conflict with Policies 7, 16 E, 25, 28(B), 32(D), 33, 38(c), 43 (D) of the WCP where these policies seek to protect the living

conditions of residents, promote sustainable transport and restrict take away facilities in certain circumstances.

Appeal B

22. Access to the building is from Wardour Street for staff and customers. There is no outside space to the rear of the building which is in close proximity to a residential block accessed from Bouchier Street. The internal layout contains an entrance with limited width and a spiral staircase to the basement which is not suitable to allow bikes to be taken downstairs. There was no evidence at my site visit that cycle parking has previously been provided inside the building.
23. Policy T5 of the LP 2021 seeks to remove barriers to cycling and create a healthy environment by, among other things, securing the provision of appropriate levels of cycle parking which should be fit for purpose, secure and well located. In this case the LP 2021 has a minimum cycle parking standard of two spaces. Even so, Policy 25 of the WCP does not require the application of the LP 2021 standards where the development is not a major development as is the case here.
24. I note that the Council acknowledged in granting permission in 2018 that requiring cycle parking within the building would not be reasonable given the building's existing use and none was sought by condition.
25. In this specific case the configuration of the internal layout, and the lack of a space to the rear of the building provides limited options for provision of convenient and secure cycle parking within the appeal building. Additionally, the property is vacant, and the appellant has confirmed that the restrictions placed on the permission including the requirement of onsite cycle parking is affecting the ability to let the property. Although limited there is cycle parking and a cycle hire scheme close to the appeal site and the site is accessible by public transport.
26. Taking the above matters together, I conclude that condition 10 is not necessary to promote sustainable transport modes. The removal of the condition would not conflict with the LP 2021 where it seeks cycle parking that is fit for purpose and well located or the WCP which requires secure cycle parking in accordance with the LP 2021 where the proposal is a major development.

Other Matters

27. The appeal site is located within the Soho Conservation Area (SCA). Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act) requires that special attention is paid to the desirability of preserving or enhancing the character or appearance of the conservation area.
28. Within Wardour Street many of the ground floor of building's are in commercial use and commercial uses are part of the character of the area. The proposal would bring an existing vacant unit back into use without external alterations to the building. In the context of the street scene, the character of the conservation area would be preserved. Consequently, the impact on the character, appearance, and significance of this part of the SCA would be neutral. As such, the proposal would accord with the Act and the Framework where it seeks to protect the significance of designated heritage assets.

Conditions

29. The Planning Practice Guidance makes it clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. As I have no information before me about the status of the other conditions imposed on the original planning permission, I shall impose all those that I consider remain relevant. If some have in fact been discharged, that is a matter which can be addressed by the parties.
30. I have removed references to Class A1 and Class A3 as these classifications are no longer relevant, and I have amended the time limit referred to in the Council's covering letter with their decision to reflect the date of expiry of the original permission. I have taken into account the comments received in relation to condition 13 of the planning permission. In light of these comments, I have re-imposed this condition (condition 12 in the attached schedule) in accordance with the Council's suggested wording.

Conclusions

31. For the reasons set out above, Appeal A and Appeal B are allowed, and planning permission is granted for the discharge of conditions 6 and 10 as set out in the formal decision above.

Diane Cragg

INSPECTOR

Schedule of conditions

- 1) The development hereby permitted shall begin not later than 22 June 2023, which is the expiration date of the approved planning permission ref: 20/01448/FULL.
- 2) The development hereby permitted shall be carried out in accordance with the drawing No WS-PP-02 and any drawings approved subsequently by the City Council as local planning authority pursuant to any conditions on this decision letter.
- 3) Should the premises be used for restaurant purposes, the provision of a bar and associated bar seating must not take up more than 15% of the floor area of the restaurant/retail premises. You must use the bar to serve restaurant customers only, before, during or after their meals.
- 4) Should the premises be used for restaurant purposes, customers shall not be permitted within the premises before 09:00 or after 24:00 on Monday to Saturday (not including bank holidays and public holidays) and before 09:00 or after 22:30 on Sundays and bank holidays and public holidays.

- 5) Should the premises be used for restaurant purposes, you must not allow more than 115 people onto the premises at any one time.
- 6) Notwithstanding the detail shown on the approved drawings, you must apply to us for approval of revised details of how waste and recycling is going to be stored on the site. You must not occupy the retail or restaurant use hereby approved until we have approved what you have sent us. You must then provide the waste and recycling store in line with the approved details prior to occupation, and clearly mark it and make it available at all times to everyone using the premises. You must not use the waste and recycling store for any other purpose.
- 7) You must not play live or recorded music on your property that will be audible externally or in the adjacent properties.
- 8)
 - (1) Where noise emitted from the proposed internal activity in the development will not contain tones or will not be intermittent, the 'A' weighted sound pressure level from the internal activity within the retail or restaurant use hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 10 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the City Council. The background level should be expressed in terms of the lowest LA90, 15 mins during the permitted hours of use. The activity-specific noise level should be expressed as LAeqTm, and shall be representative of the activity operating at its noisiest.
 - (2) Where noise emitted from the proposed internal activity in the development will contain tones or will be intermittent, the 'A' weighted sound pressure level from the internal activity within the retail or restaurant use hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 15 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the City Council. The background level should be expressed in terms of the lowest LA90, 15 mins during the permitted hours of use. The activity-specific noise level should be expressed as LAeqTm, and shall be representative of the activity operating at its noisiest.
 - (3) Following completion of the development, you may apply in writing to the City Council for a fixed maximum noise level to be approved. This is to be done by submitting a further noise report including a proposed fixed noise level for approval by the City Council. Your submission of a noise report must include:
 - a) The location of most affected noise sensitive receptor location and the most affected window of it;
 - b) Distances between the application premises and receptor location/s and any mitigating features that may attenuate the sound level received at the most affected receptor location;
 - c) Measurements of existing LA90, 15 mins levels recorded one metre outside and in front of the window referred to in (a) above (or a suitable representative position), at times when background noise is

- at its lowest during the permitted hours of use. This acoustic survey to be conducted in conformity to BS 7445 in respect of measurement methodology and procedures;
- d) The lowest existing LA90, 15 mins measurement recorded under (c) above;
 - e) Measurement evidence and any calculations demonstrating that the activity complies with the planning condition;
 - f) The proposed maximum noise level to be emitted by the activity.
- 9) Prior to occupying the premises for restaurant purposes, you must apply to us for approval of details of all separating structures (walls, ceilings and glazing) demonstrating that the internal activity will comply with the Council's noise criteria as set out in Condition 8 of this permission. You must not occupy the restaurant use hereby approved until we have approved what you have sent us. You must then install the separating structures in line with the approved details prior to occupation and retain them for as long as the restaurant is in situ.
- 10) The restaurant use hereby approved shall not commence until details of how odours in connection with the kitchen have been submitted to and approved by the City Council. The duct must then be installed in accordance with the approved details and must thereafter be retained at all times that the premises is in use as a restaurant.
- 11) In the event that the restaurant use is implemented, you must apply to us for approval of new Operational Management Statement which should detail how staff and customers who wish to smoke will be managed. You must not start the restaurant use until we have approved what you have sent us. You must then carry out the measures included in the approved Operational Management Statement at all times that the restaurant is in use.
- 12) Notwithstanding the provisions of Class E of the Town and Country Planning (Use Classes) Order 1987 (as amended September 2020) (or any provision equivalent to that class in any statutory instrument revoking or re-enacting that order) the retail accommodation hereby approved shall not be used for food/supermarket purposes.