
Appeal Decisions

Site visit made on 5 May 2022

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 19 July 2022

Appeal Refs: APP/A5840/C/21/3286511 (Appeal A), APP/A5840/C/21/3286512 (Appeal B), APP/A5840/C/21/3286513 (Appeal C), APP/A5840/C/21/3286514 (Appeal D), APP/A5840/C/21/3286515 (Appeal E) & APP/A5840/C/21/3286516 (Appeal F).

138 Rye Lane, London SE15 4RZ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Miss Olga Zajac (Appeal A), Mr Jason Hoffman (Appeal B), Mr Azeem Mahmood (Appeal C), Mr Faheem Mahmood (Appeal D), Ms Yasmin Akhtar Mahmood (Appeal E) & Ms Shamas Mahmood (Appeal F) against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The enforcement notice is dated 7 October 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission, the change of use of the Property from a mixed use consisting of café and hot food takeaway (Sui Generis) to a mixed use consisting of a drinking establishment (bar) and café (Sui Generis) ("the Unauthorised Change of Use").
 - The requirements of the notice are: Cease the use of the Property or any part of the Property as a mixed use of Drinking Establishment (bar) and café (Sui Generis).
 - The period for compliance with the requirements is three months.
 - The appeals are proceeding on the grounds set out in section 174(2)(f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal Ref: APP/A5840/W/21/3280523 (Appeal G)

138 Rye Lane, London SE15 4RZ

- 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 Miss Olga Zajac against the decision of the Council of the London Borough of Southwark.
 - The application Ref 21/AP/1692, dated 17 May 2021, was refused by notice dated 5 August 2021.
 - The development is described as 'Retrospective permission for café/bar (Use Class A3/A4) over ground and first floor with ancillary manager's accommodation at second floor, and new shopfront and bi-fold doors at rear (ground floor); Hours of operation Su-Th 06:30 to 00:00, F and Sa 06:30 to 01:00 (next day)'.
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Decisions

1. It is directed that the enforcement notice be varied by the deletion of the text 'three months' from the period for compliance, and the substitution of it by the text 'four months'.
 2. Subject to this amendment, Appeals A, B, C, D, E and F are dismissed and the enforcement notice is upheld.
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3. Appeal G is dismissed.

Application for costs

4. An application for costs was made by Miss Olga Zajac against the Council of the London Borough of Southwark. This application is the subject of a separate Decision.

Appeal G – section 78 appeal

Background and main issues

5. The appeal site is a three storey mid-terraced property located on Rye Lane, which is primarily commercial in character, but includes residential premises on the upper floors. Housing is located to the rear of the site.
6. Previously, the ground floor of No 138 operated as a café/takeaway business, whilst the first and second floors were in residential use, and were accessed from a neighbouring property. I note that the current café/bar business has been operational at the appeal site since July 2019, except for the required periods of closure during the coronavirus pandemic.
7. A planning application ref: 19/AP/7345 was submitted seeking permission for the development. This application resulted in an appeal, ref: APP/A5840/W/20/3252179, against non-determination which was subsequently dismissed. I have taken this planning history into account in my assessment below.
8. Whilst the main parties agree that the principle of the use at the site is acceptable, the main issues of the appeal are:
 - the effect of the development on the living conditions of nearby residents, with particular regard to noise and disturbance; and
 - whether the development provides adequate fire safety measures for occupants of the second floor accommodation.

Reasons

Living conditions

9. The Council raise concerns over the effect of the development on the living conditions of immediate neighbours at 136 Rye Lane. Of particular concern is the use of the bi-fold screen door at the back of the ground floor, which leads to an outdoor space described by the appellant as a garden/yard area. Also, at the rear of the appeal site, is the residential area of Choumert Square, which is close enough for the nearest dwellings to experience noise spill from the premises when the back door is opened.
10. In response to these concerns, the appellant has provided a noise impact assessment (NIA) report by KP Acoustics, dated 2 March 2021. The report relates only to No 136 and makes no investigation of the receptors at Choumert Square.
11. Sound insulation investigations were undertaken as part of the assessment, and a noise survey was undertaken at a location chosen in order to collect data representative of the ambient noise profile in the area to the rear of the site, where the closest noise sensitive receivers are located.

12. Continuous automated monitoring was undertaken for the duration of the survey between 11:35 on Friday 15 January 2021 and 14:34 on Sunday 17 January 2021. It is reported that, at the time of the survey, the background noise climate was typical of a quiet residential urban area with not much variation of noise levels between daytime and night-time. Weather conditions were generally dry with light winds and therefore considered suitable for the measurement of environmental noise.
13. However, issues arise here with regard to how representative this monitoring exercise is likely to be. Firstly, it was carried out over a weekend in mid-January, usually one of the quietest times of the year for the night-time economy under normal circumstances. Secondly, with reference to the coronavirus pandemic, the UK was in its third national lockdown on those dates. These circumstances would suggest to me that the results are unlikely to be typical of the noise levels that would normally be experienced by occupants in the vicinity of the appeal site.
14. Nonetheless, turning to the findings of the NIA, the report calculates a maximum permissible source sound level of 84 dBA in Scenario 1, which is outside the adjacent first floor rear window at 136 Rye Lane. This scenario assumes that the bar windows and doors are closed. When allowing for the rear door to be open, the NIA finds that music levels at the maximum allowance 'would be particularly noticeable at night', and 'could potentially generate some nuisance if the receiver's windows are open'. The report concludes that, 'if it is absolutely necessary to open the rear bi-fold door for ventilation purposes, the inclusion of a mechanical ventilation system in the ground floor bar is recommended'.
15. In the planning statement, the appellant states that such a ventilation system would mitigate any need to open the rear door for ventilation. The plant would be located on the flat roof of the single storey element of the ground floor facing Rye Lane, and details have been provided of the intended unit, although it is not clear how much noise it would generate.
16. However, it is apparent from the evidence that the rear door is and would be opened for purposes other than ventilation. The appellant states that the development that is the subject of the appeal involves no use of the rear garden by customers. However, she says that occasional access to the area is needed for general maintenance, but she does not elaborate on the nature of this maintenance or how frequent the access is.
17. Furthermore, in the appellant's suggested condition 4, the door would remain closed during the hours of operation 'except for incidental maintenance and access required by staff'. She then suggests that the disposal of bottles, glass and other waste should be limited to between 9am and 9pm each day.
18. However, disposal of bottles and waste from a bar is usually a daily task that could not reasonably be described as general maintenance needing occasional access. It is therefore of concern that the appellant's evidence is so vague about the frequency of the opening of the rear door and use of the yard in practice, even though the business has been up and running for some time.
19. At the time of my visit, a volume limiter had been installed reducing the music level when the door was open. The appellant suggests a condition ensuring the continued use of the device, but this would be difficult to enforce. Also, it is

unlikely that patrons would be tolerant of the volume of music rising and falling. This is a concern, given that it is unclear how frequently the door is used in any given time period. The appellant suggests a condition controlling the access to the yard, but this condition is too vague to be enforceable, due to its reliance on an interpretation of the terms 'incidental maintenance' and 'emergency access'.

20. The Council also raise issues with the nature of the music that is played at the venue. With reference to its impulsive nature, they state that the peak levels of such music might significantly exceed the peak measurement. They also state that the recommended maximum level of 84 dBA is unlikely to be adhered to, as this level will not generate the ambiance expected by bar patrons.
21. Drawing these threads together, it has not been convincingly demonstrated that the development is or will be acceptable in terms of its effect on the living conditions of nearby residents, contrary to Strategic Policy 13 of the Southward Council Core Strategy 2011, insofar as it requires high standards for reducing noise pollution, and Saved Policy 3.2 of the Southwark Plan 2007, which resists development that would cause the loss of amenity, including disturbance from noise, to present and future occupiers in the surrounding area.

Fire safety

22. It is proposed to use two rooms on the second floor of the premises as sleeping accommodation for the café/bar manager. No physical changes to the second floor are proposed in connection with the new use. I note that although the previous appeal was dismissed, the Inspector found the proposed residential accommodation to be acceptable in principle. In particular, the Inspector concluded that fire safety requirements would need to be addressed through the Building Regulations regime, and found no policy conflict in relation to this issue.
23. Nonetheless, Policy D12 of the London Plan 2021 requires that all development proposals should achieve the highest standards of fire safety. At paragraph 3.12.2, the LP states that the matter of fire safety compliance is covered by Part B of the Building Regulations. However, it says, 'to ensure that development proposals achieve the highest standards of fire safety ... applicants should consider issues of fire safety before building control application stage'. It is the case that no Fire Statement is needed here.
24. However, in that instance, the Council's local list of validation requirements seeks a Reasonable Exception Statement (RES) where the applicant considers parts of or the whole of Policy D12 do not apply. This applies to all applications, regardless of the ancillary nature of the accommodation in this case, but I have not been provided with an RES.
25. The appellant considers that there is no significant fire risk to the manager's sleeping accommodation as there is no cooking of hot food at the premises, and in any event, the use of the accommodation would occur outside the hours of operation of the business. However, the source of a potential fire is not at issue here, as buildings may catch fire for all sorts of reasons, whether or not food is being cooked. Instead, the key consideration is whether or not a person located on the second floor in the event of a fire would be able to escape the building safely.

26. Following on from Policy D12, the LP details the information that applicants need to provide on a site plan, including the appropriate positioning of fire appliances and appropriate evacuation assembly points. Developments need to be planned around issues of fire safety and a robust strategy for evacuation from the outset. Furthermore, LP Policy D5 requires that Design and Access Statements should include an inclusive design statement, part and parcel of which is incorporating safe and dignified emergency evacuation for all building users.
27. In this case, the only means of escape from the second floor accommodation is down the stairs through the first and ground floor where the commercial premises are located. The appellant gives little substantive detail of how fire safety and evacuation issues have or will be addressed within the development. However, she suggests a condition requiring the submission of a Fire Risk Assessment and evacuation plan within 90 days, were I to allow the appeal.
28. Providing that such a condition was worded to preclude the occupation of the upper floor until these matters were addressed, I conclude that such a condition would make the development acceptable in terms of fire safety, and therefore no conflict would arise with LP Policies D5 and D12.

Other Matters

29. The appeal site is located in the Rye Lane Conservation Area, and so I am required to have special regard to the desirability of preserving or enhancing the character or appearance of the conservation area. From my observations and the available evidence, I am satisfied that the development does not affect the character or appearance of the CA, and so this duty is satisfied.
30. I have taken into account the representations of support for the development, but these have not led me to a different conclusion on the detailed matters outlined above.

Conclusion on Appeal G

31. For those reasons, I conclude that the development conflicts with the development plan as a whole, and so Appeal G is dismissed.

Appeals A-F on ground (f)

32. Ground (f) is that the steps required to comply with the requirements of the notice are excessive.
33. The appellant suggests that the requirement to 'Cease the use of the Property as a mixed use of Drinking Establishment (bar) and café (Sui Generis)' should be omitted in its entirety. However, this would not achieve the purposes of the notice. I have taken into account the suggested requirements relating to the sound limiter, the cooling and ventilation plant, and the submission of fire information. However, for the reasons discussed above, these would be insufficient to address the matters at hand.
34. The appeals on ground (f) therefore fail.

Appeals A-F on ground (g)

35. Ground (g) is that the time given to comply with the notice is too short.

36. The appellant argues that the three month compliance period would result in an undue and onerous burden on the operation of the business, much to its detriment. She considers that nine months is a reasonable compliance period, which would allow the tenant to find and relocate to suitable premises, after securing permission for the use at the new site, and then to wind up operations at the appeal site.
37. However, nine months is too long a time frame to allow injury to amenity to continue. Conversely, a balance needs to be struck in terms of the impact of the requirements on the business and its staff. I therefore consider that four months is reasonable to allow time for the appellant to consider the available options and take the necessary steps.
38. To that limited extent, the appeals on ground (g) succeed.

Conclusion

39. Appeals A-F are dismissed, and the enforcement notice, as varied, is upheld. Appeal G is dismissed.

Elaine Gray

INSPECTOR