



Appeal Decision

Site visit made on 15 June 2022

by Andrew McGlone BSc MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 July 2022

Appeal Ref: APP/X5990/W/21/3289818

20 Berkeley Street, London W1J 8EE

- 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 Midas Two Limited against the decision of City of Westminster Council.
 - The application Ref 21/02115/FULL, dated 31 March 2021, was refused by notice dated 5 August 2021.
 - The application sought planning permission for use of the basement, lower ground floor and ground floor as a restaurant (Class A3). Erection of full height extract duct, alterations to the front fenestration in Hay Hill to create a new shopfront, and alterations to the rear lower ground floor fenestration and lowering of the lower ground floor by 500mm without complying with conditions attached to planning permission Ref 20/05970/FUL, dated 22 December 2020.
 - The conditions in dispute are Nos 12 and 13 which state that:
 - Condition 12: Customers shall not be permitted within the premises except between 07.00 to 00.30 Monday to Saturday and 08.00 to 23.00 on Sundays and Bank Holidays.
 - Condition 13: The plant/machinery hereby permitted shall not be operated except between 07:00 to 00:00 Monday to Saturday and 08:00 to 00:00 on Sundays and Bank Holidays.
 - The reasons given for the conditions are:
 - Condition 12: To protect the environment of people in neighbouring properties as set out in S24, S29 and S32 of Westminster's City Plan (November 2016) and ENV6, ENV7 and TACE8 of our Unitary Development Plan that we adopted in January 2007.
 - Condition 13: To safeguard the amenity of occupiers of noise sensitive properties and the area generally by ensuring that the plant/machinery hereby permitted is not operated at hours when external background noise levels are quietest thereby preventing noise and vibration nuisance as set out in S32 of Westminster's City Plan (November 2016) and ENV6 and ENV7 of our Unitary Development Plan that we adopted in January 2007.
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Decision

1. The appeal is allowed and the planning permission Ref 21/02115/FULL for the variation of conditions 12 and 13 of planning permission dated 22 December 2020 (RN: 20/05970/FULL) for the use of the basement, lower ground floor and ground floor as a restaurant (Class A3). Erection of full height extract duct, alterations to the front fenestration in Hay Hill to create a new shopfront, and alterations to the rear lower ground floor fenestration and lowering of the lower ground floor by 500mm at 20 Berkeley Street, London W1J 8EE granted on 5 August 2021 by City of Westminster Council, is varied by deleting conditions 12 and 13 and substituting for them for the conditions found in the schedule at the end of this decision.

Background and Preliminary Matters

2. Planning permission was granted in March 2015 for the use of the basement, lower ground floor and ground floor of the appeal property as a restaurant, subject to numerous conditions. Since then, there have been three further planning permissions¹ granted by the Council which have in effect seen variations to conditions, 1, 5, 8, 12 and 13. There has been no change to the original description of development despite these subsequent planning permissions. The planning application now subject of this appeal seeks to vary conditions 12 and 13 of the planning permission Ref: 20/05970/FULL.
3. The appellant proposes to extend the hours in which customers are permitted within the premises from 07:00 – 00:30 Monday – Saturday and 08:00 – 23:00 on Sundays and Bank Holidays to 07.00 - 02.30 Monday - Saturday and 08.00 - 02.00 on Sundays and Bank Holidays. The same change in hours is also applied for in respect of the operation of plant/machinery.
4. The Council does not raise issue with the proposed hours for plant and machinery based on the submitted Acoustic Assessment (AA) which explains that any plant operating would not increase the background noise nor cause disturbance or effect neighbouring residents' living conditions. Although I note the representations received, I agree with the Council's stance and their view that a planning condition could be imposed to obtain mitigation details and the treatment of the plant to ensure that it does not cause undue disturbance.
5. The current versions of condition Nos 12 and 13 both refer to policies from the Council's Unitary Development Plan. However, the Council has subsequently adopted its City Plan 2019 – 2040 in April 2021 and now solely relies on policies from the City Plan. Furthermore, the Council's case relies on different policies to those stated in the reasons for conditions Nos 12 and 13. I have considered the appeal on this basis.

Main Issue

6. The main issue in respect of condition No 12 is the effect of the proposed extended customer hours on the living conditions of nearby residents, with regards to noise and disturbance.

Reasons

7. The appeal premises occupies the ground floor of Berkeley House, an eight-storey building with residential flats on the floors above the restaurant. The building lies at the corner of Berkeley Street and Hay Hill. Entrance into the residential flats is from Hay Hill. The nearby area is mixed use in nature with commercial, leisure and residential uses. There are several bars, restaurants, nightclubs, casinos and other late night uses along Berkeley Street, Berkeley Square, Grafton Street and Bruton Lane. Hence, the area can be characterised as busy during day and night-time hours with regular comings and goings and associated activity generally from either vehicles or persons on foot.
8. The restaurant has been vacant for eight years. Feedback from interested parties has pointed to the existing permitted opening / operational hours as being too restrictive. It is on this basis that the appellant is seeking later opening / operating hours so to remain competitive with nearby late-night restaurants and to accommodate persons who often dine later in the evening.

¹ Council Refs: 17/06242/FULL; 19/08031/FULL; and 20/05970/FULL

- The appellant submits that the extended hours are needed to secure a long-term operator and tenant and to ensure the property is brought back into use.
9. The AA (and updated AA) is based on an attended survey and a computer model which is based on a worst-case scenario of the restaurant being fully occupied (200 patrons) and all those persons leaving in the last hour of the proposed trading hours. The model is also based on persons leaving in groups of four and at least one person speaking in a raised voice constantly. The appellant's assessments can only ever be an assessment of potential effects, given that the restaurant is not currently open, and secondly, as it does not operate during the extended hours that have been applied for. However, in my mind, reasonable endeavours have been made to predict the potential effect. The AA's have shown that the extended hours would have no material additional adverse effect.
 10. The assessments will not be able to predict every potential effect such as incidents whereby persons leaving are unduly noisy due to the consumption of alcohol. In this regard, they could contribute to the overall noise environment in the area, which residents say is currently problematic. The potential nature of noise from persons entering or leaving the premises can vary in terms of volume, tone and duration, and it will not be a steady state. However, it is highly unlikely that the restaurant will be full every day of the week during the last hour of trading, and that this number of people will all leave the premises in the last hour. People will usually leave at staggered and irregular intervals. In any event, the local noise environment is heavily influenced by traffic, comings and goings and those linked to other premises that operate into the night near to residential premises such as those above the appeal premises. Therefore, to pinpoint the potential effect of noise from persons entering or leaving a single premises with later opening hours would be difficult, especially as the public can use the nearby footways anyway.
 11. Potential exists for complaints to be made by nearby sensitive receptors in relation to noise and disturbance from the extended hours, but there is no substantive evidence to suggest that complaints have been made in connection with other late opening commercial premises in the area, whether that be the hours permitting under licensing or the hours the premises operate in practice. Whilst this does not diminish the potential effect, it is an indication of the effect of late opening premises in the area.
 12. An Operational Management Plan (OMP) is suggested by the Council. An OMP would only relate to the premises itself and not the public domain. That said, it could include operational measures, even in this accessible location, to help minimise the potential effect of noise and disturbance whether that be from taxis stopping outside or nearby, persons loitering outside the premises, the flow of people in or out of the premises or to manage how the area to the rear of the site is used.
 13. Accordingly, I conclude that the proposed extension of customer hours would, on balance, having regard to the site's location and subject to planning conditions, minimise noise impacts and prevent noise intrusion to residential developments so that there would be no material additional adverse effects. On this basis, the proposal would accord with Policies 7, 16, 33 and 36 of the City Plan 2019 – 2040 and Policy MRU1 of the Mayfair Neighbourhood Plan. Jointly, these seek, among other things, food and drink and entertainment uses to be

neighbourly, not adversely affect the health and wellbeing of existing and future occupiers from noise and disturbance.

Other Matters

14. I note a representation refers to the lowering of the lower ground floor, but this does not form part of the scheme that is before me, and I understand that these works have already been granted planning permission.
15. The appeal site lies within the Mayfair Conservation Area, but given the nature of the proposal and having regard to the variety of uses found within the Conservation Area through the day and night, along with its central location, I consider the proposal would have a neutral effect on the significance of the Conservation Area. Hence, the Conservation Area would be preserved.

Conditions

16. The Planning Practice Guidance makes 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. I have a list of suggested planning conditions before me, but I am unclear on the status of them. However, 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.
17. In the interests of certainty, I have imposed an approved plan condition and conditions around the sale of take away food or drink and bar seating. I have imposed a condition concerning waste and recycling to ensure adequate storage facilities are provided. In the interests of the character and appearance of the Conservation Area, conditions are needed concerning matching materials, ductwork and detailed drawings of the shopfront.
18. In the interests of neighbouring residents' living conditions, I have imposed conditions in respect of: piling, excavation and demolition work; customer numbers; a plant screen; sound insulation; live and recorded music; noise levels; plant and machinery; vibration; customer hours; plant and machinery hours; servicing hours; a supplementary acoustic report; and an OMP. However, I have amended the Council's version of the OMP to ensure that it satisfies the six tests.

Conclusion

19. For the reasons given above, I conclude that the appeal should succeed. I will grant a new planning permission without some of the disputed conditions but substituting others and restating those undisputed conditions that are still subsisting and capable of taking effect.

Andrew McGlone

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall be carried out in accordance with the drawings and other documents listed on this decision letter, and any drawings approved subsequently by the City Council as local planning authority pursuant to any conditions on this decision letter.
- 2) Except for piling, excavation and demolition work, you must carry out any building work which can be heard at the boundary of the site only:
 - between 08.00 and 18.00 Monday to Friday;
 - between 08.00 and 13.00 on Saturday; and
 - not at all on Sundays, bank holidays and public holidays.

You must carry out piling, excavation and demolition work only:

- between 08.00 and 18.00 Monday to Friday; and
- not at all on Saturdays, Sundays, bank holidays and public holidays.

Noisy work must not take place outside these hours unless otherwise agreed through a Control of Pollution Act 1974 section 61 prior consent in special circumstances (for example, to meet police traffic restrictions, in an emergency or in the interests of public safety).

- 3) You must not sell any take-away food or drink on the premises. You may sell cold food for take-away from the area coloured green on drawing number: 02-04 A.
- 4) If you provide a bar and bar seating, it must not take up more than 15% of the floor area of the property, or more than 15% of each unit if you let the property as more than one unit. You must use the bar to serve restaurant customers only, before, during or after their meals.
- 5) You must not allow more than 200 customers (including customers seated at the bar) into the property at any one time.
- 6) You must put up the plant screen shown on the approved drawings before you use the machinery. You must then maintain it in the form shown for as long as the machinery remains in place.
- 7) You must carry out the development in accordance with the details on how the restaurant will be insulated to reduce noise passing from the restaurant to the flats above approved by the City Council as Local Planning Authority on 23.09.2015 under reference RN:15/07808/ADFULL or in accordance with other sound insulation details as submitted to and approved by the City Council.
- 8) You cannot play live music on your property and any recorded music within the restaurant premises must not be audible externally.
- 9) The design and structure of the development shall be of such a standard that it will protect residents within the same building or in adjoining buildings from noise and vibration from the development, so that they are not exposed to noise levels indoors of more than 35 dB LAeq 16 hrs daytime and of more than 30 dB LAeq 8 hrs in bedrooms at night. In the event that you play amplified music within the restaurant; the design of the separating wall/ceiling should be such that the received value in the residential habitable spaces, with music playing, should be 10dB below that measure without music events taking place, at the quietest time

of the day and night, measured over a period of 5 minutes and in the indices of Leq and L_FMax in the octave bands of 63 Hz and 125 Hz.

- 10) (1) Where noise emitted from the proposed plant and machinery will not contain tones or will not be intermittent, the 'A' weighted sound pressure level from the plant and machinery (including non-emergency auxiliary plant and generators) 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 proposed hours of operation. The plant-specific noise level should be expressed as LA_{eqTm}, and shall be representative of the plant operating at its maximum.
- (2) Where noise emitted from the proposed plant and machinery will contain tones or will be intermittent, the 'A' weighted sound pressure level from the plant and machinery (including non-emergency auxiliary plant and generators) 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 proposed hours of operation. The plant-specific noise level should be expressed as LA_{eqTm}, and shall be representative of the plant operating at its maximum.
- (3) Following installation of the plant and equipment, 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 confirming previous details and subsequent measurement data of the installed plant, including a proposed fixed noise level for approval by the City Council. Your submission of a noise report must include:
- (a) A schedule of all plant and equipment that formed part of this application;
 - (b) Locations of the plant and machinery and associated: ducting; attenuation and damping equipment;
 - (c) Manufacturer specifications of sound emissions in octave or third octave detail;
 - (d) The location of most affected noise sensitive receptor location and the most affected window of it;
 - (e) Distances between plant & equipment and receptor location/s and any mitigating features that may attenuate the sound level received at the most affected receptor location;
 - (f) Measurements of existing LA₉₀, 15 mins levels recorded one metre outside and in front of the window referred to in (d) above (or a suitable representative position), at times when background noise is at its lowest during hours when the plant and equipment will operate. This acoustic survey to be conducted in conformity to BS 7445 in respect of measurement methodology and procedures;
 - (g) The lowest existing LA₉₀, 15 mins measurement recorded under (f) above;
 - (h) Measurement evidence and any calculations demonstrating that plant and equipment complies with the planning condition;
 - (i) The proposed maximum noise level to be emitted by the plant and equipment.

- 11) No vibration shall be transmitted to adjoining or other premises and structures through the building structure and fabric of this development as to cause a vibration dose value of greater than 0.4m/s (1.75) 16 hour daytime nor 0.26 m/s (1.75) 8 hour night-time as defined by BS 6472 (2008) in any part of a residential and other noise sensitive property.
- 12) Customers shall not be permitted within the premises except between 07.00 to 02.30 Monday to Saturday and 08.00 to 02.00 on Sundays and Bank Holidays.
- 13) The plant/machinery hereby permitted shall not be operated except between 07.00 to 02.30 Monday to Saturday and 08.00 to 02.00 on Sundays and Bank Holidays.
- 14) Before anyone moves into the property, you must provide the separate stores for waste and materials for recycling shown on drawing number 0203 D. You must clearly mark them and make them available at all times to everyone using the restaurant use.
- 15) All new work to the outside of the building must match existing original work in terms of the choice of materials, method of construction and finished appearance. This applies unless differences are shown on the drawings we have approved or are required by conditions to this permission.
- 16) You must carry out the development in accordance with the detailed drawings (elevations and sections) of the new shopfront on Hay Hill as approved by the City Council as Local Planning Authority on 04.12.2015 under reference RN:15/10323/ADFULL or as approved on 14.03.2016 under reference RN:16/01696/ADFULL or in accordance with other detailed drawings of the new shopfront as submitted to and approved by the City Council.
- 17) You must finish the ductwork in black. You must then keep it that colour.
- 18) All servicing must take place between 07.30 and 11.30 on Mondays to Saturdays and between midday and 16.00 hours on Sundays. Servicing includes loading and unloading goods from vehicles and putting rubbish outside the building.
- 19) You must apply to us for approval of details of a supplementary acoustic report demonstrating that the insulation measures will comply with the Council's noise criteria as set out in Condition 9; of this permission. You must not start work on this part of the development until we have approved what you have sent us.
- 20) An operational management plan shall be submitted to and approved by the Local Planning Authority before the use hereby permitted commences. The operational management plan shall include measures to ensure customers leaving the premises will not cause nuisance for people in the area, including people who live in nearby buildings, and how the rear external areas of the site will be managed and used to ensure there is no noise nuisance or disturbance for people who live in nearby buildings. The development shall be carried out in accordance with the approved operational management plan.

END OF SCHEDULE