



Appeal Decision

Site visit made on 29 November 2022

by H Jones BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 January 2023

Appeal Ref: APP/A5840/W/22/3302297

1 Valmar Road, London SE5 9NG

- 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 carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Hassan Hassan against the decision of the Council of the London Borough of Southwark.
 - The application Ref 21/AP/3780, dated 1 November 2021, was refused by notice dated 6 April 2022.
 - The application sought planning permission for *erection of a single storey rear extension at ground floor level and installation of extract duct to rear, in connection with change of use at ground floor level from betting office (use class A2) to cafe/restaurant (Use class A3)* without complying with a condition attached to planning permission Ref 10-AP-0549, dated 23 June 2010.
 - The condition in dispute is No 9 which states that: *There shall be no use of the back garden/outdoor open space at the rear of the building by customers.*
 - The reason given for the condition is: *To avoid the potential for noise and disturbance from the use of this space that would harm the amenities of adjoining occupiers, in accordance with Policy 3.2 Protection of amenity of the Southwark Plan 2007.*
-

Decision

1. The appeal is dismissed.

Background and Preliminary Matters

2. The appellant seeks a varied planning permission which would permit the use of the back garden/outdoor space by customers of the cafe/restaurant between the hours of 09:00 – 17:00 Monday to Sunday from 1 November until 31 March each year and between 09:00 – 19.30 Monday to Sunday from 1 April until 31 October each year. The appellant also seeks the varied planning permission on the basis that it would be a personal permission.
3. Planning permissions¹ have previously been granted, permitting the use of the back garden area for temporary periods, though these temporary periods have now passed.
4. It appears from the evidence before me that a breach of condition notice has been served by the Council. It being alleged that the use of the back garden area by customers has taken place and that a cessation of that use is required. It is not clear to me whether any use of the back garden area by customers is ongoing. The planning application form states that at the time of the application the development being applied for had not started. Whether or not

¹ Application references 20/AP/1871 and 21/AP/1001

a breach of condition has occurred and whether or not this is ongoing is not for my determination under this appeal.

5. The Council's second reason for refusal relates to the absence of a fire safety strategy submission. The appellant has included, as an appendix to their appeal statement, a fire risk assessment document which was not before the Council when they made their decision. The Planning Inspectorate's guidance² provides advice on the circumstances whereby amendments proposed during the appeal process can be taken into account having regard to the Wheatcroft High Court judgement³. It established that the main, but not the only, criterion is whether the development is so changed that to grant it would deprive those who should have been consulted on the changed development of the opportunity of such consultation. An integral part of the legal test is the issue of fairness to third parties.
6. The Council has had opportunity to comment on the fire strategy submissions and do so in their appeal submissions. Similarly, I note that third party representations on the appeal also include comment on the appellants submissions. In these particular circumstances, I consider no party would be prejudiced and I accept the additional submission and determine the appeal with regard to it.

Main Issues

7. The main issues are:

- The effect that varying the condition would have on the living conditions of the occupants of nearby properties with particular reference to noise and disturbance; and
- The effect that varying the condition would have on fire safety.

Reasons

Living conditions

8. The appeal site is located on the corner of Valmar Road and Coldharbour Lane. At the rear of the host property a terraced garden area contains several tables and chairs. It is enclosed by a combination of fencing and brick walls with soft planting to its edges.
9. Coldharbour Lane contains a number of ground floor commercial premises with residential properties on upper floors and, therefore, has a mixed character. Adjacent to Coldharbour Lane properties on Valmar Road, Morna Road and Crawford Road form a street block where the character differs and is predominantly residential. At the rear of these residential properties there are gardens which abut one another, including a large communal garden which appears to serve flats on Crawford Road, and some roof terraces. Properties vary in height but are generally between 3 and 5 storeys. Owing to the terraced nature of many properties within this street block, the adjoining gardens and the height of the properties, the immediate surrounds of the site exhibit a dense built form. The rear gardens, terraces and windows of these properties will be afforded some protection from some of the noisier activities in the area given the intervening buildings. This would include the likes of

² Procedural Guide: Planning appeals – England Updated 12 April 2022

³ Wheatcroft (Bernard) Ltd v Secretary of State for the Environment and Harborough DC (1982)

traffic and commercial activities on Coldharbour Lane and noise from a school farther along Valmar Road.

10. The back garden area of the host property is therefore very closely located to both garden spaces and windows within neighbouring properties. The number of occupants that could be within the garden area and the degree of noise that could emanate from conversations, serving and clearing tables and other like activities would be likely to be significant and intrusive. Given their proximity, this noise and disturbance would be likely to affect gardens, terraces and rooms within properties. Although the use of the garden area would not occur very early in the morning or late into the evening, and even if there is no intention to host parties or particular events, its use would, nevertheless, occur for prolonged periods throughout the year and could be occupied by a relatively high number of patrons.
11. Given the predominantly residential nature of the immediate area the activities that would take place within the garden space, and the noise and disturbance that would result, would be uncharacteristic.
12. It has been put to me that, irrespective of the occupation of the garden space, noise levels in the area are high and, that the noise and disturbance that has been created from use of the space previously has been both unsubstantiated and exaggerated. However, it has not been shown to me through any compelling evidence nor noise assessment what the prevailing noise levels are or that the aforementioned forms of noise and disturbance would not readily occur with the proposal.
13. The appellant has suggested that landscaping works could be undertaken in the garden area, controlled via condition, which could act as a potential sound barrier and a limitation on occupancy. I have no substantive evidence before me which demonstrates that the planting itself would reduce noise to any meaningful degree. I accept that fewer customers using the garden would potentially lower noise levels. However, even with a reduction in the useable area of the garden for customers the effect of the garden use would be unacceptably harmful.
14. The rear garden space is not substantially higher than surrounding gardens and is enclosed by walls and fencing which provides screening. The Council have not raised objections to the proposal on the grounds that neighbouring occupiers would be overlooked or lose privacy, and I have no reason to disagree.
15. The appellant seeks the varied planning permission on the basis that it would be personal to the appellant. Planning permission usually runs with the land and it is rarely appropriate to provide otherwise. It has not been shown to me that a condition controlling that the planning permission would subsist only for the appellant would meet the tests for conditions.
16. Therefore, and for the reasons given, I find that the proposal would cause harmful levels of noise and disturbance which would unacceptably adversely affect the living conditions of nearby occupants. Consequently, the proposal would conflict with policies D13 and D14 of the London Plan, adopted 2021 (LP) and policies P56 and P66 of the Southwark Plan 2019-2036, adopted 2022. In summary and amongst other matters, these policies require that development results in no unacceptable effects upon the living conditions of occupiers and

appropriately mitigates the adverse effects of noise. I also find that the development would conflict with content within the National Planning Policy Framework (the Framework) which, at paragraph 174 states that existing development should be prevented from being adversely affected by unacceptable levels of noise, and amongst advice at paragraph 185, states that development should mitigate and reduce to a minimum potential adverse noise effects.

Fire safety

17. Although the garden space would have an occupancy greater than the residential gardens nearby and therefore, in the event of a fire, more people at the back of the property could be affected, the submitted fire risk assessment proposes that a fire assembly point could be located at the edge of the rear garden space and at a point distant from the rear of the building where the kitchen is located. Further measures proposed within the risk assessment include advisory signage and self-closing doors so as to contain the fire spread. Therefore, an assembly point has been identified to serve as an evacuation point for the outside space, whilst fire safety measures which could be deployed are identified.
18. In the event of a fire, passage back through the building may well be unsafe and therefore the fire risk assessment proposes a stay put principle. It is submitted that evacuation could take place via the adjacent communal garden and Crawford Road, and I have no substantive evidence before me that this could not occur.
19. In the event that the appeal were to be allowed, a mechanism so as to ensure that the measures proposed were deployed and adhered to would be necessary, however, provided that this was the case, the submitted risk assessment incorporates acceptable and proportionate fire safety measures.
20. Consequently, the development would accord with policy D12 of the LP, which in summary and amongst other matters, requires that all development proposals ensure the safety of all building users including through the use of evacuation assembly points, and the use of passive and active fire safety measures.

Other Matters

21. Content within Policy E6 of the LP does support local retail and related services and, similarly, content at paragraph 93 of the Framework states, amongst other matters, that decisions should plan positively for the provision and use of community facilities, ensure shops and services are able to develop and modernise, and guard against the unnecessary loss of valued facilities. Furthermore, I note the representations made in support of the proposal and the petition submitted in the evidence. I accept that the use of the garden space would bring benefits to the community including providing an outdoor facility for relaxation and at a time when patrons may well be attracted to using outdoor spaces. I also accept that use of the garden space would support the existing business.
22. Therefore, the benefit that the use of the garden space would bring to sustaining the business and serving the needs of the community are matters to which I attribute a moderate amount of weight. However, it has not been

shown to me that the use of the garden space is essential to the future of the enterprise nor do the effects of the proposal with more merit outweigh the harm I have identified in the first main issue.

23. The number of representations made raising objection to the development may not have constituted a significant proportion of all those consulted but this does not in itself render the scheme appropriate nor overcome my concerns.
24. Some representations state that the proposal is preferable to some other uses of land which they would consider to be more disturbing. This may be the case, but I must consider the scheme on its own merits, and I have identified harm.
25. The appellant has put to me that they have not breached a number of planning conditions. Whether or not these conditions have in the past been complied with or breached has little to do with the merits of the case. Furthermore, the condition in dispute in this appeal is No 9.
26. The appeal site is located beside the Camberwell Green Conservation Area. The Council have not identified that the development would have any particular effects upon the character, appearance, setting or significance of the designated heritage asset and I have no reason to disagree. Furthermore, the rear garden area is acceptably design and landscaped, however, that the occupation of the space would cause no harm to the character or appearance of the area is neutral in the planning balance and does not outweigh the harm which I have identified in the first main issue.
27. I note the previous appeal decision at the site⁴. There are similarities in the circumstances of that proposal and those in this case though a quite considerable passage of time has occurred since that appeal decision. Irrespective, I have come to my own findings on this case.
28. The Council's Officer Report may have been heavily redacted, but this has little to do with the merits of the case and, furthermore, an unredacted version is before me for my assessment.
29. Finally, given I am dismissing the appeal there is no requirement for me to conclude on whether or not the proposal should be subject to the community infrastructure levy.

Conclusion

30. Whilst I have concluded that the effects of varying the condition would be acceptable in fire safety terms, this does not outweigh the harm that would be caused to the living conditions of the occupants of nearby properties and the conflict with the development plan in that regard. There are no material considerations of sufficient weight to indicate a decision other than one in accordance with the development plan. The appeal is therefore dismissed.

H Jones

INSPECTOR

⁴ Appeal reference APP/A5840/A/13/2203882