



Appeal Decision

Site visit made on 22 March 2023

by J Downs BA(Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 May 2023

Appeal Ref: APP/V5570/W/22/3310410

236 Upper Street, Islington, London N1 1RU

- 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 Mr V Kizilkaya against the decision of the Council of the London Borough of Islington.
 - The application Ref P2021/1571/S73, dated 28 May 2021, was refused by notice dated 7 October 2022.
 - The application sought planning permission for Retrospective Change of use from a retail unit to a restaurant/cafes (Class E); the installation of mechanical plant (extractors and air conditioning unit) on the rear roof of the building; installation of an air conditioning unit in the rear garden; and a single storey rear extension to the building including installation of rooflights. Retention of existing shopfront alterations with use of the front tables and chairs and external alterations to rear elevation including installation of rooflights without complying with conditions attached to planning permission Ref P2020/1364/FUL, dated 31 March 2021.
 - The condition in dispute is No 6 which states that: The outdoor area to the rear of the site marked as 'Garden Area' on drawing no. NP-18-164/Rev.1.5 shall not be used by customers or staff for the hereby approved or any other use within Class E, other than for maintenance purposes or in the event of an evacuation. The windows and doors on the hereby approved rear extension shall remain shut during its occupation by customers. These measures shall be retained thereafter into perpetuity.
 - The reason given for the condition is: To protect the amenities of surrounding residents.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application form, appeal form and appellant's appeal statement all seek to vary condition 6. The Council's officer report and decision notice describes the application as seeking to vary conditions 6 and 11. The body of the officer report also refers to amending conditions 10 and 12. However, it has not been submitted that the appellant formally agreed to amend the application to include consideration of condition 11, nor have they made any comment with regard to any condition other than No 6. I have therefore not considered conditions 10, 11 and 12 further.

Main Issue

3. The main issue is the effect that varying the use of the garden area and restrictions on opening the windows and doors would have on the living

conditions of surrounding occupiers with particular regard to noise, disturbance and odour.

Reasons

4. The appeal site is the ground floor of a mid-terrace property in Class E use described as a restaurant/café. The rear garden area the subject of the condition is restricted in size and enclosed by the surrounding buildings and their garden/ yard areas. The application sought to vary condition 6 to allow use of the garden area by customers and staff between the hours of 8am and 9pm, with last entry to the garden by customers at 8pm. It also sought to allow for the door and windows in the rear extension to be open during the same hours.
5. The surrounding properties along Upper Street are also in commercial use at ground floor level, and Upper Street had a bustling character at the time of my site visit. However, there are residential properties above, and to the side and rear of the site accessed from Laycock Street. Although there is a public park, a primary school and community uses, the area behind Upper Street has a more restrained domestic character, distinctly different to the busy commercial activity on Upper Street.
6. At my site visit, I attended the appeal site and visited the rear garden of a neighbouring property. I acknowledge this only represents a snapshot in time. Despite the high level of commercial activity on Upper Street, and the additional noise generated by the traffic, both of these spaces were relatively quiet at the time of my site visit, although noise most likely associated with the primary school was audible in the garden of the residential property. I am therefore satisfied that due to the physically close relationship between the appeal site and the surrounding residential properties, the use of the garden area by customers and staff and alterations to the restrictions on the openings of the rear extension would be likely to result in increased levels of noise and disturbance which could have an adverse effect on the living conditions of surrounding occupiers.
7. There is a public house adjacent to the appeal site, on the corner of Upper Street and Laycock Street. This has an external seating area to the rear which sits at a lower level than the garden area of the appeal site. However there is no evidence before me which establishes the current noise environment which would include the air conditioning equipment at the appeal site and the existing external seating area of the public house. Nor do I have any substantive evidence of the likely noise levels that would arise were the garden area to be used by customers and staff and the windows and doors in the rear elevation allowed to be opened. I therefore have no substantive basis to consider that the proposed variation of condition would not significantly exacerbate any existing noise and disturbance that may occur.
8. I note the comments of the Council's acoustic officer. However those comments appear to be based on assumptions that there would be a limited number of people in the garden area who would be seated at tables. No plans have been submitted that demonstrate this is how it is intended to use the space, or suggested measures to ensure this would be the case. I therefore cannot be certain that use of the garden area would be by a small number of people.

9. Measures have been put forward by the appellant that they would be willing to accept as conditions to address the potential effects of the development. I have had regard to the advice in the Planning Practice Guidance (PPG) on the use of conditions and the tests contained within the National Planning Policy Framework (the Framework) when considering these.
10. The appellant has offered to carry out a noise assessment and the Council has indicated that a noise assessment could be secured by condition were I to allow the appeal. However, the outcome of any such assessment is unknown, as is the extent of any mitigation that it may recommend, assuming that mitigation would be possible. I therefore cannot be certain that such a condition would be reasonable or effective. It therefore would not meet the tests set out in paragraph 56 of the Framework.
11. Additional mitigation measures, in the form of closing the windows in the extension at 6pm rather than the 9pm applied for, low music levels inside the premises, use of green walls, and proactive management, have also been put forward. However, there is no evidence before me as to the extent to which the measures concerning the timing of closing of windows, limits on the volume of music within the premises and use of green walls would mitigate noise levels. I therefore cannot be certain that these would be an effective form of noise mitigation. There are no details of what proactive management would entail, and how this would prevent excessive noise from occurring. In addition to it not being clear that this would be effective, I also cannot be certain that this would be enforceable or reasonable in all other respects.
12. I have not been made aware of the hours of opening that are typical throughout the borough. However, each appeal must be determined on its own merits, which will be specific to the relationship of the appeal site and the surrounding uses. It is not in dispute that the adjacent public house has a rear yard area which has longer opening hours than those applied for. However this alone would not justify allowing this appeal in the absence of evidence that I have identified above.
13. There is no substantive evidence before me as to how use of the rear garden area by customers would give rise to particular concerns with regard to odour. Issues relating to odour were addressed at the time planning permission was granted. However, this would not overcome the concerns I have identified above with regard to noise.
14. I therefore conclude that varying the use of the garden area and restrictions on opening the windows and doors would have an unacceptable effect on the living conditions of neighbouring occupiers with particular regard to noise and disturbance. It would therefore be contrary to London Plan adopted March 2021 Policy D14 and Islington's Local Plan: Development Management Policies adopted June 2013 Policy DM2.1Ax which taken together seek to avoid significant adverse noise impacts and for noise to be managed and mitigated in the interests of quality of life and amenity.

Other Matters

15. Notwithstanding that the appellant refers to the 2018 version of the Framework, I acknowledge that national policy continues to recognise the important role of local centres. It also emphasizes the importance of economic development and that significant weight should be attached to this. However

the premises is in active use and benefits from an outdoor seating area to the front of the property where most of the commercial activity takes place. There is no substantive evidence before me as to the additional economic benefit that would be derived were the appeal to be allowed. These considerations would therefore not outweigh the harm I have identified would be caused to the living conditions of surrounding occupiers.

16. The site is within the Upper Street Conservation Area (CA) where s72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 applies. The Upper Street North (CA19) Conservation Area Design Guidelines acknowledge that it is a 'lively commercial area'. The appeal proposal would be consistent with this character and would not affect any of the physical works allowed by the permission. The character and appearance of the CA would therefore be preserved.

Conclusion

17. For the reasons given above, I conclude that the development, with the condition varied as proposed, would not accord with the development plan for the area and there are no material considerations that indicate the decision should be made other than in accordance with the development plan. Therefore, the appeal should be dismissed.

J Downs

INSPECTOR