The Planning Inspectorate

Appeal Decision

Site Visit made on 31 March 2021

by John Dowsett MA, DipURP, DipUD, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 June 2021

Appeal Ref: APP/X5210/W/20/3247743
105 King's Cross Road, LONDON, WC1X 9LR

- 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.
- The appeal is made by Mendoza Ltd. against London Borough of Camden.
- The application Ref: 2019/5945/P, is dated 25 November 2019.
- The development proposed is described as: Temporary change of use of the first and second floors from ancillary drinking establishment floorspace (Use Class A4) to three serviced apartment units (Use Class C1).

Decision

1. The appeal is dismissed, and planning permission is refused.

Preliminary Matters

2. The appeal has been lodged against the failure of the Council to give notice of its decision on the planning application within the relevant prescribed time period. Whilst the Council advised the appellant on 18 February 2020 that it had exercised its power to decline to determine the application, this notification was given outside of the 8 week period for determining the planning application and there was no written agreement between the parties to extend the time period for making the decision. In its appeal submissions the Council has advised that had it made a decision within the statutory time period, it would have refused planning permission for reasons relating the effect of the proposal on the public house as a designated Asset of Community Value, failure of the proposal to secure car free development which would increase parking stress and congestion in the surrounding area, and the effect of noise and disturbance from the existing public house on the occupiers of the proposed development.

3. The new, replacement, London Plan was published and came into effect on 2 March 2021. This now forms part of the development plan for the area. The views of the parties were sought on whether there were any policies in the London Plan 2021 that may affect their respective cases. The Appellant advised that they considered London Plan Policies Policy E10 'Visitor Accommodation' Policy HC7 'Protecting public houses' and Policy SD7 'Town centres: development principles and Development Plan Documents' as being relevant to the appeal. Copies of these policies were submitted as part of the appellant's initial submissions, at which time they were included in the December 2019 "Intend to Publish" version of the London Plan. The wording of these policies has not changed in the published version of the London Plan.

4. The Council did not offer any comment. I have, therefore, determined the appeal based on the Policies in the Camden Local Plan 2017 (the Local Plan) that are cited on the decision notice and Policies E10, HD7 and S7 of the

London Plan 2021 (the London Plan), and the Council's putative reasons for refusal set out in its Statement of Case.

Main Issues

5. The main issues in this appeal are:

- Whether the proposed development would provide suitable living conditions for the future occupiers, with particular regard to noise and disturbance;
- The effect of the proposal on the use and operation of the public house; and
- The effect of the proposed development on highway safety in the vicinity of the appeal site, with particular regard to car parking.

Reasons

Living conditions of the future occupiers

6. The appeal proposal would create three serviced apartments on the upper floors of the building, two on the first floor and one on the second floor. From the evidence, the second floor of the building was historically used as accommodation for a pub manager living on the premises.

7. The intended operating model of the proposed serviced apartments is not set out in the application beyond the intention that the apartments would be available for short term letting. The appellant does set out that they would expect a condition to be attached to any grant of planning permission limiting the occupation to no more than 90 consecutive days which does indicate that the proposed apartments could be occupied by the same person or persons for extended periods in addition to the conventional short break or holiday stay.

8. Policy A1 of the Camden Local Plan 2017 (the Local Plan) seeks, among other matters, to ensure that the amenity of communities, occupiers and neighbours is protected by considering the effect of a number of factors, which include noise and vibration levels. Local Plan Policy A4 sets out that the Council will not grant planning permission for development sensitive to noise in locations which experience high levels of noise unless appropriate attenuation measures can be provided and the proposed development would not harm the continued operation of existing uses.

9. Paragraph 182 of the National Planning Policy Framework (the Framework) sets out that where the operation of an existing business could have a significant effect on new development the applicant should be required to provide suitable mitigation before the development has been completed.

10. As submitted, the planning application proposed to change the use of the existing accommodation on the upper floors of the building, which has previously been converted to three self-contained flats, as serviced apartments. The application did not propose any changes to the building fabric and no further, detailed, information relating to noise, or noise mitigation, has been provided as part of the appeal submissions.

11. Whilst the proposed serviced apartments are not permanent residences, functionally they would be very similar, and the evidence indicates that they could be occupied for extended periods of up to 90 days. Consequently, whilst I accept that visitor accommodation may be less sensitive to noise and

disturbance than self-contained and permanent residential units, I nonetheless share the Council's view that these would be a noise sensitive receptor as they would be rooms for residential purposes.

12. During the site visit I was able to carry out an internal inspection of the public house on the ground floor of the building. I observed that the seating and drinking areas of the public house are located directly below the living areas of both flats on the first floor and that the public house has the facility to play amplified music through a number of loudspeakers mounted just below ceiling level. I also saw that there is a dumb waiter located adjacent to the bar and food preparation area that has an open shaft that extends upwards to at least the ceiling of the ground floor. To the rear of the building there is a small external yard that can be accessed from the rear part of the public area and is available for use by patrons of the public house. Consequently, when it is in use, the public house would be a noise source and there is potential for that noise to be transmitted to the first floor of the building through the fabric of the building and from external activities through window openings.

13. In addition to the public house use on the ground floor of the appeal building, I saw when I visited the site that there are other noise sources in the surrounding area which would potentially affect the proposed serviced apartments. The appeal building is located on Kings Cross Road, which is a principal route through this part of London. Although at the time of my site visit the traffic was very light, the site visit took place during a period when, due to the coronavirus pandemic, some travel restrictions were in place, non-essential shops were closed and many people were working from home. I am, however, aware from previous visits to this part of London that at other times, Kings Cross Road carries a high volume of traffic and that traffic noise is a part of the noise climate around the site. I also saw that to the rear of building, there are two sets of train tracks in an open cutting below street level that carry main line trains and London Underground trains. Noise from passing trains was audible within the upper floors of the building during my internal inspection of that part of the building.

14. Although the Council's principal concern relates to noise from the public house use, in order to meet the requirements of Local Plan Policies A1 and A4 it is necessary to consider the effect of these other noise sources.

15. The appellant suggests that the matter of noise mitigation could be dealt with by way of a planning condition. There is no substantive evidence from either party in respect of the current noise levels generated by the public house use, the existing noise climate around the appeal building, or current noise levels within the upper floors when the public house is in operation. Nor is there any evidence in respect of what would be considered appropriate noise levels within visitor accommodation or what measures would be required to achieve these.

16. The condition that has been suggested by the appellant only addresses noise from the public house and does not take into account noise from the other nearby noise sources.

17. The Framework and the Planning Practice Guidance set out six tests that a planning condition is required to meet. One of these tests is that the condition must be precise. A condition must be worded in such a way that it clear to the applicant and others what must be done in order to comply with the condition. The suggested condition uses technical terms that are not explained in the

condition and is not specific regarding which "Building Regulations value" it refers to. On its face, the suggested condition is far from clear in respect of what is required in order to comply with it. Consequently, I find that it fails the test of precision. Due to the lack of any substantive information in respect of noise, I am not able amend the suggested condition or formulate an alternately worded condition.

18. In the absence of any baseline data in respect of the existing noise climate and noise sources, or the requirements for acceptable noise levels within the proposed accommodation, I cannot be certain that appropriate noise mitigation could be achieved through the use of a planning condition or that suitable living conditions for the future occupiers would be provided.

19. From what I saw during the site visit and from the submissions of the parties, I conclude that the proposed development would not provide suitable living conditions for the future occupiers, with particular regard to noise and disturbance. It would not comply with the relevant requirements of Policies A1 and A4 of the Local Plan.

The effect of the proposal on the public house

20. From the evidence, historically, the appeal building operated as a public house with the main drinking area on the ground floor, a function room and service kitchen on the first floor, and a flat providing managers accommodation on the second floor. More recently the public house operation has been restricted to the ground floor and basement of the building. The upper floors were converted to three self-contained flats at some point between late 2016 and late 2017 without the benefit of planning permission. These flats were subject to an Enforcement Notice served in December 2017 and upheld at appeal in September 2018[1] which required the use to cease. When I visited the site, I was able to inspect the building internally and saw that the upper floors are still laid out as three self-contained flats with kitchen and bathroom fittings in place.

21. I am also advised that a previous planning application which sought to change the use of the first and second floors from public house use to create one, 2 bedroom, and one, 3 bedroom, flat together with the erection of a mansard roof extension to create one further 3 bedroom flat was refused by the Council, and that a subsequent appeal against this refusal was dismissed[2]. This latter appeal was co-joined with the Enforcement Notice appeal and both appeals were heard at the same hearing.

22. In April 2015 the public house was listed as an Asset of Community Value (ACV). Section 87(3) of the Localism Act 2011 sets out that where land is included in a local authority's list of assets of community value, the entry for that land is to be removed from the list with effect from the end of the period of 5 years beginning with the date of that entry. The listing of the building as an ACV therefore ended in April 2020. The Council has confirmed that the listing was not made for a longer period than 5 years and no application was made to renew the listing. Consequently, the building no longer has ACV status.

[1] Appeal ref: APP/X5210/C/18/3193274
[2] Appeal ref: APP/X5210/W/16/3153219

23. Policy C4 of the Local Plan addresses public houses and seeks to protect public houses which are of community, heritage, or townscape value. Policy C4 also sets out that applications involving the loss of pub floorspace, including facilities ancillary to the operation of the public house, will be resisted where this will adversely affect the operation of the public house. This is echoed in Policy HC7 of the London Plan which states that proposals for redevelopment of associated accommodation and facilities that would compromise the operation of viability of the public house should resisted.

24. The application was accompanied by a Viability Assessment that concluded that in its present form, the ground floor public house is trading successfully without the use of the accommodation on the upper floors and provides a place in the community for drinking and socialising. The Council do not dispute the general findings of the Viability Assessment in terms of the current operation but contends that the change of use of the upper floors to visitor accommodation would result in demonstrable harm to the ability of the pub to maximise its community value and adversely affect the operation of the pub.

25. The inspector who determined the earlier appeals relating to the upper floors concluded that the manager's accommodation on the second floor was not necessarily essential or of major importance in terms of the benefits provided by the ACV. He found that the loss of this accommodation would not materially affect its community function or compromise the operation or viability of the use. From the submissions in the current appeal, I can see no reason to reach a different conclusion. The previous inspector further concluded that the loss of the first floor accommodation and its potential to contribute to the ACV would, however, adversely affect the public house. In particular, the kitchen facility was seen as providing considerable value to the community by providing the ability to serve the community in a flexible and varied way. I also note that it was found that the function room had not been used for a considerable time and was not in use at the time of the ACV designation of the building. Consequently, this area was considered less important.

26. Since that decision was made, the appeal building has lost its ACV status. This fact notwithstanding, it is still necessary to consider if the loss of ancillary floor space would adversely affect the operation of the public house. The current public house has been operating since 2017 without the accommodation on the upper floor of the building. There is no evidence before me that would indicate that the public house has not been trading successfully in its current format or is at risk of permanent closure. Nor is there any evidence that the public house is not economically viable. There is also no evidence that the lack of a trade kitchen or the ability to offer substantial meals has prevented the business from operating successfully as a wet led public house.

27. At the time of the previous appeal decisions the first floor accommodation was considered important to ensure that the building can function as an ACV in the future. The buildings status as an ACV carried significant weight in the decisions on those appeals. The status of building has now changed, and the current appeal proposal falls to be determined on whether the loss of floorspace would adversely affect the operation or viability of the public house. There is nothing in the evidence that would suggest that this would be the case.

28. Whilst I accept that the loss of the upper floors of the building to an alternative use would restrict the ability to expand the operation of the public house in the future, it is clear from the evidence that the first floor of the building has been little used for many years, even when it was available to the previous public house operator. There is nothing which would indicate that the current operator of the public house, who holds a lease lasting until December 2031, would require additional accommodation over and above that currently in use in the period until the expiration of the lease.

29. The appeal proposal seeks to use the upper floors of the building as serviced apartments for a period that would coincide with the term of the current lease for the ground floor and basement, after which the upper floors would revert to the current lawful use as part of the public house. Within this context, I do not find that the appeal proposal would compromise the operation or viability of the public house or compromise its long term retention.

30. The appeal site is located in central London and is within the Central Activities Zone defined by the London Plan. Policy E10 of the London Plan seeks to maintain a sufficient supply and range of serviced accommodation and supports the provision of small scale serviced accommodation within the Central Activities Zone except within wholly residential street or predominantly residential neighbourhoods. The appeal building is in an area where there are a mix of uses and there are other hotels in proximity to the appeal site. The Council acknowledge that in principle the provision of visitor accommodation is acceptable.

31. The appellant has also drawn my attention to London Plan Policy SD7 which advocates flexibility for temporary or 'meanwhile' uses of vacant properties. However, this is in the context of identifying opportunities for higher density mixed use residential intensification and, due to its small scale, I do not consider that this policy is directly relevant to the appeal proposal.

32. Based on the evidence before me, I conclude that the proposed development would not cause harm to the use and operation of the public house. It would comply with the relevant requirements of Policy C4 of the Local Plan and Policies HC7 and E10 of the London Plan.

Highway safety

33. Policy T2 of the Local Plan sets out that the Council will limit the availability of parking and require all new developments in the borough to be car free. The supporting text to the policy, which sets out how the policy will be implemented, makes it clear that parking will only be considered for new non-residential developments where it can be demonstrated that parking is essential to the use or operation of the development. It also sets out that redevelopment resulting from a change of use which brings a property into residential use should also be car free.

34. Although the appellant suggests that the requirements for car free development only relate to uses falling within Class C3 as defined by the Town and Country Planning Use Classes Order 1987 (as amended), the wording of Policy T2 is clear that it applies to all new development, which would include a material change of use of part of an existing building. It is not in dispute that the appeal proposal amounts to a material change of use.

35. As originally submitted the appeal scheme did not propose any visitor parking. In its appeal submissions the Council state that this putative reason for refusal could be overcome through a planning obligation that prevents the occupation of any unit within the development by a person who holds a permit to park a vehicle in a business parking bay or is permitted to park a vehicle in a car park owned, controlled, or licensed by the Council. The appeal site is located within an area that is a controlled parking zone (CPZ) where a permit is required to park.

36. Kings Cross Road and parts of the surrounding streets are designated as a Red Route, where stopping is prohibited, and other waiting restrictions are in place on other parts of the surrounding streets. I saw when I visited the site that the existing available on-street parking in the surrounding area was well used. Consequently, I am satisfied that would be necessary for the proposed development to be car free in order not to give rise illegal parking, or parking in a manner that was prejudicial to highway safety, and in order to not increase parking stress in the area.

37. As part of the appeal submissions, a competed Section 106 agreement between the appellant and the Council has been provided. The agreement is additionally made in pursuance of Section 16 of the greater London (General Powers) Act 1974 and Section 111 of the Local Government Act 1972. The obligations set out in this agreement require the owner not to occupy, or permit the occupation of, any of the units that would be formed by anyone who holds a business parking permit or is permitted to park a vehicle in any car park owned, controlled or licenced by the Council, and to advise occupiers that they would not be entitled to be granted a business parking permit or buy a contract to park with in a Council controlled car park.

38. Due to the nature of the occupation of the proposed development, future occupiers would not be eligible to apply for a residents parking permit in the CPZ. The obligations set out in the agreement would, consequently, meet the requirement for the development to be car free.

39. The signed Section 106 agreement contains two minor typographical errors in respect of the reference number of the appeal, in one instance the two digits relating to the year in which the appeal was made are omitted and in the other they are incorrect, however, the remainder of the reference number, which is unique to the appeal, is correct. The agreement also refers to the correct planning application reference number. These errors are very minor and would not prevent the development to which the Section 106 agreement relates from being readily identified and, as a result, are not fatal to its validity or effectiveness.

40. I am satisfied from the submissions that this obligation meets the requirements of Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 and the tests in Paragraph 56 of the Framework.

41. Based on the evidence before me, I conclude that the proposed development would not cause harm to highway safety in the vicinity of the appeal site, with particular regard to car parking. It would comply with the relevant requirements of Policy T2 of the Local Plan.

Other Matters

42. The appeal site is within the Bloomsbury Conservation Area. Section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990 (the Act) requires that, in making decisions on planning applications and appeals within a Conservation Area, special attention is paid to the desirability of preserving or enhancing the character and appearance of the area.

43. The appeal proposal is small in scale and would not significantly alter the external appearance of the appeal building. The appeal proposal would not introduce a new use into the conservation area which currently contains large amounts of other visitor accommodation. On this basis I am satisfied that the appeal proposal would preserve the character and appearance of the conservation area.

Conclusion

44. I have found that the proposed development would not provide suitable living conditions for the future occupiers and as such it would conflict with relevant policies in an up to date development plan. Whilst, visitor accommodation is supported in the area, this does not of itself justify providing accommodation that would be adversely affected by noise. This, to my mind, is an important matter and, consequently, the appeal must fail, notwithstanding that it may comply with other policies in the development plan.

45. For the above reasons, I conclude that the appeal should be dismissed, and that planning permission should be refused.

John Dowsett

INSPECTOR