



Appeal Decision

Hearing held on 18 June 2019

Site Visit made on 18 June 2019

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 August 2019

Appeal Ref: APP/K5030/C/18/3205199 20-21 Widegate Street, London E1 7HP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Widegate Street Bar Ltd against an enforcement notice issued by the City of London Council (the LPA).
- The enforcement notice was issued on 17 May 2018.
- The breach of planning control as alleged in the notice is, without the grant of express planning permission, the change of use of the Premises from restaurant (A3) and retail (A1) uses to use as a Drinking Establishment (Class A4).
- The requirements of the notice are: stop using any part of the Premises as a Drinking Establishment (as defined above in Section 3 of this Enforcement Notice, under Alleged Breach of Planning Control).
- The period for compliance with the requirements is 28 days.
- The appeal is proceeding on the grounds set out in section 174(2)(c), (a) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Preliminary Matters

1. I carried out an unaccompanied site visit the day before the Hearing, observing the appeal premises from Widegate Street. I then carried out a site visit to the appeal property following the close of the Hearing where I was accompanied by representatives of the parties.
2. The enforcement notice is directed at a material change of use. That being the case, it was agreed at the Hearing that the allegation should also state a material change of use, as this is the act of development as defined by statute. This can be corrected as it would not give rise to injustice to the appellant or the local planning authority.

The appeal on ground (c)

3. For the appeal on ground (c) to succeed, the onus is on the appellant to demonstrate, on the balance of probabilities, that the matters stated in the notice which give rise to the alleged breach of planning control did not constitute a breach of planning control.

4. In assessing whether that test is met, it necessary to first determine whether what is alleged in the enforcement notice constitutes development, as defined in section 55 of the 1990 Act. Section 55(1) of the 1990 Act defines development as the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of a material change in the use of any buildings or other land. The notice alleges the material change of use to a use as a drinking establishment. The main issue before me is, therefore, whether the alleged matters amount to a material change of use for the purposes of section 55(1) of the 1990 Act.
5. Reference is made in evidence to Section 55(2)(f) of the 1990 Act which states, in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class is not development. Those use classes are set out in the Town and Country (Use Classes) Order 1987, as amended (the UCO). This means that a change between uses within the same class does not amount to development.
6. There is agreement between the parties that the before and after uses are not within the same use class. Section 55(2)(f) is not therefore engaged. However, the UCO is permissive only; it only seeks to establish that changes between uses with the same class are not development. It is not restrictive, in that it does not state that changes between uses not in the same class will be a material change of use. Instead, establishing whether a material change of use has occurred is a question of fact and degree whether those uses within different classes are materially different from one another.
7. The land to which the notice relates comprises the ground floor of 20-21 Widegate Street, the basement level and the courtyard to the rear. It excludes the entrance portico from Widegate Street to the flats above.
8. Planning permission¹ was granted in March 2011 for the entirety of 20-21 Widegate Street for the change of use from office (Class B1) use to provide six self-contained residential units (3 x 1 bedroom, 3 x 2 bedroom) (Class C3) at first - third floor level and café/restaurant use (Class A3) and retail use (Class A1) at ground floor and basement and associated alterations. This permission subdivided the ground floor to provide one café/restaurant unit in No 20 and one retail unit in No 21. It is common ground between the parties that the permission was implemented. The LPA indicated that the last lawful use for the ground floor of the premises was that for which permission was granted in March 2011 – retail and a café/restaurant use.
9. The appellant commenced occupation of 20-21 Widegate Street in May 2016 from when it began operating in its current format as Simmons Bar – a drinking establishment. Prior to that 20 Widegate Street was in operation as a premises known as Champagne Cult. At the Hearing, it was put to me that part of the premises known as 21 Widegate Street had been vacant for various periods of time.
10. The LPA indicated that No 21 was in a café use towards the end of 2016/early 2017, whilst its 2017 Retail Survey indicated that the unit was in use as Meeks Antiques. However, this does not tally with the appellant's indication that

¹ 10/00939/FULL

occupation as Simmons Bar began some time prior to that and that, given the internal arrangement of Simmons Bar, No 21 would have appeared vacant externally.

11. In any event, whilst the appellant indicated at the Hearing that it had no evidence of No 21 having ever been in retail use, it could not provide any evidence to demonstrate, on the balance of probabilities, that it had not been. Given the onus is on the appellant, I find that the previous use of that part of the premises known as No 21 was, on the balance of probabilities, retail. To that end, I find the LPA's argument that the previous use of the ground floor of the premises was a mixed use of café/restaurant and retail in line with the 2011 permission the more compelling one.
12. The appellant argues that the present use is not materially different from the use of the premises in its former guise as Champagne Cult, which the LPA concluded to be a restaurant in line with the last lawful use of the premises. It is said that Champagne Cult was a drink led operation, with no catering kitchen. The only food products it was said to provide were snacks and anti-pasti. Nevertheless, even if it were the case that the present use as Simmons Bar was not materially different to its previous use as Champagne Cult, it is clear to me, that the present use as Simmons Bar is not a restaurant. The premises primarily serves drinks with around 80% of the business deriving from the sale of drinks. It is, as was described at the hearing, a 'wet-led' operation. In my view, that is materially different in character to a restaurant which is, by definition, a food led operation.
13. Consequently, notwithstanding the LPA's findings that Champagne Cult comprised a restaurant use, I find that use of the entirety of the premises that was taking place at the time the notice was issued is materially different from the last lawful use of the premises as a mixed use of restaurant/café and retail. On that basis, I find, on the balance of probabilities, that a material change of use has occurred. Consequently, what has occurred does amount to a material change of use for the purposes of section 55(1) of the 1990 Act and therefore constitutes development for which planning permission is required under section 57 of the 1990 Act.
14. Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) grants planning permission for various material changes of use between uses in different classes. The material change from a mixed use as a restaurant/café and retail to a drinking establishment does not fall within any of the classes of permitted development under Schedule 2, Part 3 of the GPDO. There is no evidence before me either that the development has been granted planning permission under section 58 of the 1990 Act.
15. Thus, I find that the matters stated in the notice which give rise to the alleged breach of planning control did constitute a breach of planning control.
16. The appeal on ground (c) therefore fails.

The appeal on ground (a) and the deemed application

Main Issue

17. The main issue is the effect of the development on the living conditions of neighbouring residents with particular regard to noise and disturbance.

Reasons

18. The appeal site comprises the ground floor, basement level and rear courtyard area of a mid-terraced building. This part of Widegate Street is characterised by a range of uses including restaurants, public houses, offices and shops. The site lies within the Central Activities Zone as designated in the London Plan² which, amongst other things, is a cultural centre. From my own observations, I agree with the parties that Widegate Street is a busy thoroughfare with high levels of footfall owing to its proximity to major transport hubs. Moreover, given the prevalence of bars and restaurants on Widegate Street and surrounding streets, the area has a vibrant evening economy. As such, the ambient noise levels are relatively high, particularly on an evening as bars and restaurants attract more customers.
19. The closest residential properties to the appeal site are located in the three flats in the upper levels of the appeal premises. In addition, there is a single upper floor flat backing onto the premises at 5 Sandy Row and five flats within 2-3 Sandy Row. There are also several other upper floor flats located along various points of Widegate Street. The LPA's concerns, and those of neighbouring residents, principally derive from two sources of noise - from patrons congregating on Widegate Street and the courtyard to the rear; and from music being played inside the premises.
20. The business operates up until 2330 on Sundays to Wednesdays and 0100 Thursdays to Saturdays. I saw from my site visit that the ground floor of the premises was relatively small. Whilst I recognise that visit was not carried out during a peak period, relatively few customers were present at the time. In addition, it seems to me that, were 150 people to be within the ground floor and basement level at any one time as suggested by the LPA, such numbers would not be capable of being managed in terms of the movement of people for any sustained period of time. The estimated 110 customers at any one time put forward by the appellant seems to me to be a more reasonable figure. Indeed, it was suggested that typically on a busy night, 80 people would be in the premises at any one time with around 200 over the course of an evening. I have no compelling evidence to believe that is not the case.
21. There are several speakers piping music at the ground and lower floor level of the premises. The music system has a limiting system, which prevents music from being louder than 75dBa. At the site visit, myself and the parties heard the music system when it is said it was at its loudest. Externally, I stood outside the property on Widegate Street and music was barely perceptible. Thus, I consider that, subject to a condition requiring the external doors to be kept closed and to be self-closing, internal noise from voices and music will be unlikely to be harmful to those residents at the properties on Sandy Row. Moreover, it was put to me at the Hearing that the premises licence requires music not to be played any later than 2130.
22. Nevertheless, I recognise that music and the sound of voices could transmit upwards to the flats above. The appellant contends that the residential accommodation above was not correctly insulated. However, the LPA indicates that conditions on the 2011 relating to noise transmission to the flats were discharged to their satisfaction. In the absence of evidence to lead me to believe otherwise, I have no reason to disagree. Thus, given they were

² The London Plan: The Spatial Development Strategy for London Consolidated with Alterations since 2011, 2016

designed to mitigate against noise of around 65dBA, noise mitigation measures as part of that 2011 permission will play some role in reducing noise transmission.

23. Furthermore, it seems to me that the use of the premises as a drinking establishment would give rise to a similar level of noise as the prior use as a restaurant. Restaurants can give rise to noise from customers talking, music being played and noise from the kitchen. Indeed, the nature of the previous use as Champagne Cult suggests that noise levels would not be too dissimilar. In addition, the LPA has suggested a condition should be imposed which requires an acoustic report and scheme for noise mitigation to be submitted which ensures that noise transmission from the premises is kept at an acceptable level. I agree such a condition is necessary and will assist in mitigate any noise nuisance from the premises. Thus, I am satisfied that internal noise levels from the operation to the flats above would not be unduly harmful.
24. It was put to me at the Hearing that gatherings of around 50 people can congregate on Widegate Street at any one time. However, as was pointed out at the hearing, it is difficult to say with any degree of certainty that all 50 people congregating are solely customers of the appeal premises. There is a restaurant directly opposite which offers bar facilities, as well as a pub further down on Widegate Street. Moreover, the courtyard to the rear can only accommodate around 10-15 people. I saw from my site visit that it is a rather cramped space with limited opportunity for moving around. Nevertheless, undoubtedly noise from people talking either to the front of the premises or in the courtyard to the rear would be perceptible in the closest residential properties, particularly if windows are left open.
25. However, subject to controls over opening hours, such noise would not continue on into times when residents would have their highest expectations for peace and quiet. Indeed, it is suggested that peak hours for the premises are between 1830 and 2100. At the Hearing, the parties agreed that, whilst it was earlier than the licencing regime allowed for, a closing time of 2300 would be appropriate. Furthermore, residents living in busy, vibrant mixed residential and commercial areas where there are high levels of night time uses will have expectations for higher ambient background noise levels. It seems to me that a closing time of 2300 would allow neighbouring residents peace and quiet at times when they have the highest expectancy for sleep and relaxation. Particularly since the licencing regime requires music to desist by 2130.
26. I accept that drinking establishments can be inherently noisy places and clearly the appeal site here has given rise to levels of noise which have resulted in complaints from local residents. However, given the context of the location of the appeal site, the character of the surrounding area, the nature of the premises and the controls available in the form of conditions, I am satisfied that, on balance, the premises will not give rise to unduly harmful levels of noise and disturbance to the detriment of the living conditions of surrounding residents.
27. I conclude on the main issue, therefore, that the development will not have a harmful effect on the living conditions of neighbouring residents with particular regard to noise and disturbance. Consequently, it accords with policy 7.15 of the London Plan which state that development should avoid significant adverse

noise impacts on health and quality of life. It also accords with Strategic Objective 5 of the City of London Local Plan 2015 (LP) which aims to ensure the provision of inclusive facilities and services that meet the high expectations of the City's business, resident, student and visitor communities. In addition, it would accord with LP policies CS3, DM3.5, CS15, DM15.7 and DM21.3 which: seek to proactively manage night-time entertainment to minimise disturbance to residents and workers; state that proposals for night-time entertainment will only be permitted where there is no unacceptable impact on the amenity of residents; seek to protect the City's quiet areas; seek to minimise potential noise conflicts; and seek to protect the amenity of existing residents particularly with regard to noise-generating uses.

28. The LPA argues that the Draft London Plan Policy D12 states that new noise generating developments such as pubs close to residential development should put in place measures to mitigate and manage noise impacts. Nevertheless, preparation of the Draft London Plan is at a relatively early stage and thus I afford its policies, including those cited on the notice - GG3, D13 and HC6, limited weight.

Other Matters

29. The appeal site lies within the Bishopgate Conservation Area. Given that the drinking establishment use is in keeping with the prevailing vibrant, mixed-use night time economy character of the area, I am satisfied that it will preserve the character and appearance of the Conservation Area. For the same reasons, I consider the development will preserve the setting of the listed buildings at Sandy's Row Synagogue and 24-25 Widegate Street.

Conditions

30. The purpose of conditions 1 and 2 is to require the appellant to comply with a strict timetable for dealing with a scheme for noise attenuation and the installation of self-closing mechanisms on the door which needs to be addressed in order to make the development acceptable. The condition is drafted in this form it is because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matters because the development has already taken place. The conditions therefore provide for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable, then the planning permission falls away.
31. A condition is suggested by the LPA that no live or recorded music should be played that can be heard outside of the building. However, I agree with the appellant that such a condition is vague and imprecise and would be difficult to enforce as whether music can be perceived externally to the premises would be a matter for the person listening.
32. Similarly, the LPA's suggested condition that no promoted events should be carried out is not necessary because I have no reason to believe such events

do not give rise to any different noise or disturbance issues than regular operating of the bar. In addition, the measures in respect of conditions 1 and 2 should mitigate any excess noise arising should such events be held.

33. The premises licence allows for the use to operate until 0100 on Thursday, Friday and Saturday and 2330 on Sunday to Wednesday. Nevertheless, the licencing regime has differing considerations and whilst there should not be duplication, I consider that the premises should not open any later than 2300 as suggested by the LPA to allow residents respite from any noise arising from the premises at times when they would have reasonable expectations for quiet to sleep and relax. I impose a condition relating to opening hours accordingly.

Conclusions

34. For the reasons given above, I conclude that the appeal succeeds on ground (a). I shall grant planning permission for the material change of use of the Premises from restaurant (A3) and retail (A1) uses to use as a Drinking Establishment (Class A4) as described in the notice as corrected.

35. The appeal on ground (g) does not fall to be considered.

Formal Decision

36. It is directed that the enforcement notice is corrected by the insertion of the word "material" between the words "the" and "change in paragraph 3 of the notice.
37. Subject to the correction, the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the material change of use of the Premises from restaurant (A3) and retail (A1) uses to use as a Drinking Establishment (Class A4) at 20-21 Widegate Street, London E1 7HP as shown on the plan attached to the notice and subject to the following conditions:

- 1) The use hereby permitted shall cease within 28 days of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i. Within 28 days of the date of this decision, a scheme in the form of an acoustic report compiled by a qualified specialist shall be submitted for the written approval of the local planning authority specifying the materials and constructional methods to be used to ensure that the noise levels attributable to the drinking establishment use hereby permitted on the ground floor and basement of the premises does not exceed NR30, or a level to be agreed by the local planning authority, in the physically adjoining residential units in the upper floors of the premises.
 - ii. If within 11 months of the date of this decision, the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii. If an appeal is made in pursuance of ii) above, the appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.

- iv. The approved scheme shall have been carried out and completed within 56 days of the scheme having been approved.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be maintained.

If the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

- 2) The use hereby permitted shall cease within 28 days of the date of failure to meet the requirements set out in i) and ii) below:

- i. Within 28 days of the date of this decision, self-closing mechanisms must be fitted on all exterior doors.
- ii. The self-closing mechanisms shall be maintained thereafter.

If the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

- 3) The external doors to the premises shall be kept closed at all times except for in an emergency or for maintenance purposes.
- 4) The drinking establishment use hereby permitted shall not be open to customers between the hours of 2300 on one day and 0700 on the following day on Mondays to Sundays.
- 5) No servicing of the premises shall be carried out between the hours of 2300 on one day and 0700 the following day from Monday to Saturday and between 2300 on a Saturday and 0700 the following Monday and on Bank Holidays. Servicing includes the loading and unloading of goods from vehicles and disposal of waste outside the building.

J Whitfield

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Nick Campbell	Appellant
Jonathan Phillips	Agent
Richard Vivien	Acoustic Consultant

FOR THE LOCAL PLANNING AUTHORITY:

Susan Bacon	Senior Planning Officer, City of London Corporation
Siobhan Crossby	Environmental Health Officer, City of London Corporations
Tony Newman	Senior Planning Officer, City of London Corporation
Rachel Pye	Assistant Director, City of London Corporation
Peter Shadbolt	Assistance Director Planning Policy, City of London Corporation

INTERESTED PERSONS:

Sam Ghosh	Local Resident
Daniel Mendosa	Local Resident
Manreet Randhawa	Local Resident
Joanne Taylor-Smith	Local Resident

DOCUMENTS

- 1 List of those notified of the date, time and arrangements of the Hearing