



Appeal Decision

Inquiry held on 21 April 2009

Site visit made on 21 April 2009

by **Simon Hand MA**

an Inspector appointed by the Secretary of State
for Communities and Local Government

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Decision date:
27 May 2009

Appeal Ref: APP/A5270/A/08/2087279

'The Priory' 16 & 17 The Mall, Ealing, W5 2PJ

- 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 D Devine against the decision of the Council of the London Borough of Ealing.
- The application Ref P/2008/2673-E, dated 30 June 2008, was refused by notice dated 5 September 2008.
- The application sought planning permission for the demolition of existing single storey rear extension and erection of two storey extension with basement at rear to provide extension to club at ground floor, offices on the first floor and storage in the basement without complying with a condition attached to planning permission Ref P/2006/1609-LB, dated 11 January 2007.
- The condition in dispute is No 4 which states that: the basement and first floor offices shall only be used as offices and ancillary accommodation falling within use class B1 of the Town and Country Planning (Use Classes) Order 1987 (as amended). Furthermore, notwithstanding the provision of Section 55 of the Town and Country Planning Act 1990 (as amended) no internal or external access shall be formed between the nightclub and the offices.
- The reason given for the condition is: In order to allow the Local Planning Authority to regulate the uses of the site and consider whether the use of the building for any other purposes would be detrimental to the amenity of the locality in accordance with policies 4.1, 4.7 and 4.8 of the adopted Ealing Unitary Development Plan, 'Plan for the Environment' (2004).

Application for costs

1. At the Hearing an application for a partial award of costs was made by the appellant against the Council. This application is the subject of a separate Decision.

Decision

2. I allow the appeal and grant planning permission for the demolition of existing single storey rear extension and erection of two storey extension with basement at rear to provide extension to club at ground floor, offices on the first floor and storage in the basement at 'The Priory' 16 & 17 The Mall, Ealing, W5 2PJ in accordance with the application Ref P/2008/2673-E dated 30 June 2008, without compliance with condition number 4 previously imposed on planning permission Ref P/2006/1609-LB, dated 11 January 2007 but subject to the other conditions imposed therein, so far as the same are still subsisting and capable of taking effect and subject to the following new conditions:
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- 1) The first floor offices shall only be used as offices and ancillary accommodation falling within use class B1 of the Town and Country Planning (Use Classes) Order 1987 (as amended). Furthermore, notwithstanding the provision of Section 55 of the Town and Country Planning Act 1990 (as amended) no internal or external access shall be formed between the nightclub and the offices.
- 2) The additional basement accommodation created by application Ref P/2006/1609-LB shall only be used in conjunction with the existing night club use and for no other use, including use as a separate night club.
- 3) A scheme for dealing with noise from the additional basement accommodation, which affects the second floor flat, shall be submitted to and approved in writing by the Local Planning Authority, and the approved scheme shall be fully implemented before any connection between the additional basement and the existing nightclub is made. The approved scheme shall refer to the 'assessment procedure' provided in the Statement of Common Ground – Simon Boniface/Andre Varley (for noise issue) (Doc 11), and in doing so "background noise" shall include the operation of the existing night club.

Preliminary Matters

3. The appeal is to remove condition 4 of P/2006/1609-LB, which prevents the basement from being linked to the night club and requires it to be used only as ancillary accommodation for the offices. The basement is described as 'storage' in the original application. The basement is a new construction and would thus appear to have a use as storage/offices. The removal of the condition would not change the use but would allow a physical connection to the night club to be made. Since lodging the application to remove the condition the intention of the appellant has always been to extend the night club into the basement and it is on this basis the Council refused permission.
4. It was agreed at the Inquiry that I should approach the decision on the same basis. If the appeal was upheld, it would be for the appellant to agree with the Council the status of the basement and whether a further application was necessary to regularise the situation. I have thus approached the reasoning below as if the removal of the condition could ultimately lead, either directly or indirectly, to the night club premises being extended into the basement.

Main Issues

5. Firstly, whether extending the night club premises would lead to a material increase in the noise and disturbance suffered by local residents and generally in the town centre, from people leaving late night dancing and drinking establishments. Secondly, whether the use of the rear basement as a night club would have an unacceptable impact on the second floor flat because of excessive noise.

Reasons

1st Issue – the town centre and the management of the club

6. Ealing town centre has a busy night time economy and there are a number of clubs and pubs that stay open to the early hours. It was made clear to me that

one of the effects of this is for groups of people to congregate in the town centre, waiting for buses or taxis or buying food and that on occasions this leads to trouble, including a riot in 2008. Similarly groups of people wending their way home late at night can be intimidating for any locals who find themselves out at this time. The local police are sufficiently concerned that they oppose any development that would lead to an increase in the numbers of late night revellers. The Council have identified a special policy area for licensing purposes which covers central Ealing (and the appeal premises) within which they will oppose any attempt to potentially increase the numbers of late night revellers due the cumulative impact from existing premises and the scale of the problems already experienced. This is essentially a public order issue, and they have the full support of the police in this.

7. The appellant presented evidence that 'The Priory' was a well run establishment whose door staff were proactive in peacefully dispersing patrons as they left the club and patrolled a reasonable distance beyond the doors of the club itself. None of the recent incidents for which the Council had evidence related to the club, and the one significant problem at Christmas 2007 was a one-off, since when security measures, especially the process at entry to the club, have been improved. An investigation on behalf of the appellant by Mr Messham, for the Friday and Saturday nights of the 6 and 7 March 2009, showed late night patrons dispersing quietly, mostly towards the town centre, and no untoward incidents of any description, near to the club or in the surrounding residential streets.
8. I accept the evidence that The Priory is a well run club and that there is unlikely to be significant trouble in its immediate vicinity. However the Council's concern is the increase in numbers of revellers as a whole. The club has no control over its patrons once they head off to the town centre or to local residential streets. The appellant did not try to argue there was no general problem in Ealing, but that the club did as much, if not more than could reasonably be expected, to ensure there was no trouble in its immediate locality. While this is valuable, it has little relevance to the overall problem facing Ealing town centre.
9. The police did not oppose this application and appeal, but that was because no increase in numbers was proposed, a matter I shall come onto in a moment. I was given no evidence to convince me the police and Council were mistaken in their general policy to resist any developments that might lead to more people out on the streets late at night with the potential to cause more trouble. It is thus clear to me that if that is what was proposed in this appeal then it would fall on that point alone.

1st issue – the provision of extra space in the club

10. The club currently occupies the ground floor and basement. This basement or 'front basement' is relatively narrow and provides a bar and dance area. The ground floor provides lavatories, cloakroom, offices, bar and dance area. The object of the appeal is to extend the club into the new 'rear basement' area, creating a much bigger dance area. The statement of common ground showed the gross floor area would increase from 492 sqm to 748 sqm, an increase of 256 sqm or just over 50%.

11. The owners' plans to utilise this space have changed over time. A plan (2025/28) that accompanied an application to vary the licence in March 2008 showed the use of most of rear and front basements as dance floor, as well as the ground floor. The intention then was to increase the capacity of the club. The plan with the appeal before me showed the existing front basement to be used for toilets and cloakroom and therefore the rear basement would provide a dance area only some 50 sq m larger than exists now. I was told at the inquiry that the toilets and cloakroom upstairs are to remain, the intention being to create a more upmarket ambience with better seating and tables to attract and retain customers. This was a response to the recession, which had seen the club struggle to fill its current limit of 220, never mind increase the numbers.
12. Nevertheless, the potential to accommodate significantly more patrons than at present would remain. The internal layout is largely a matter for the owners and their plans could change at any time especially given a change in the market conditions. The key issue is thus how to control the number of customers.

1st issue – control of numbers

13. The Council calculated that at 748 sqm, and allowing 0.5 sqm per person as indicated by building regulations, the extended club could accommodate 1496 people. At its existing size it can accommodate 984. These figures are exaggerated as they deal with gross floor area, and the club has to provide toilets, cloakroom storage and offices of some sort, but I have no reason not to assume the proportional increase in capacity would be the same. In any event the theoretical capacity, however measured, is significantly larger than the current 220 limit.
14. The current limit is derived from a condition of the premises licence. This licence is granted by the Council's licensing committee and such restrictions on numbers are not unusual for licensed premises. An application to alter it can be made by the owners at any time. The application of March 2008 was an attempt to increase numbers and then the proposal was to remove the limit altogether. A previous application to increase the limit to 400, heard in October 2006 was not allowed. The March 2008 application is in abeyance pending the resolution of the planning situation, but given the lapse of time it is possible a fresh application will have to be made if this appeal is successful.
15. Despite the attempts of the Council to argue otherwise, it is clear that the licensing committee will hear evidence from many sources when considering an application to allow greater numbers into a club. In particular the police and the Council's planning department. There is also the 'special policy' for licensing which begins with a presumption against any increase in numbers. I do not accept that the Council planners will not be able to oppose any increase in numbers just because the club can physically accommodate a greater number of people. At present the club can accommodate more than 220 and this has not stopped successful opposition to an increase in numbers in the past. Mr Bleakley accepted that this decision letter for example could be brought to the committee's attention.

16. There was no evidence that the club was not abiding by the numbers restriction. Mr Messham noted considerably less than the maximum when he made his inspection in March of this year. Undercover police who visited the club as part of their routine covert licensing activities in January 2009 did not find any problems, and Council officers who visited for unknown reasons also in January found 180 people in the premises. It thus seems that the licence is both conformed to and enforced.
17. The powers of the Councils enforcement officers are quite different to those of the police, or other departments of the Council dealing with noise nuisance or licensing breaches. Given the way the club is currently run it would appear to be straight forward to obtain accurate numbers of those in the club by simply asking on the door. As every patron passes through a metal detector and has their ID scanned exact figures are easily available. However, this need not remain the case, especially if the club were to change hands in the future. I agree with the Council that a planning condition seeking to control numbers would potentially be difficult to enforce. It would also duplicate the existing control provided by the licence.

1st issue - conclusion

18. Thus the evidence suggests to me that while the club is well managed the Council are correct to oppose an increase in numbers of patrons to the club because of public order issues not necessarily related to the club itself but which are a consequence of increasing the numbers of people on the streets late at night. The use of the new rear basement would potentially allow a significant extra number of patrons to be accommodated. A planning condition would be difficult to enforce and the only way to control numbers is through the licence. The licence has been effectively enforced so far and there is no suggestion it would not be in the future. Success in this appeal would not undermine the numbers restrictions nor prevent the same arguments being used to oppose any future application for an increase in the numbers limit as have been used successfully so far. Consequently I conclude that there would be no material increase in the noise and disturbance suffered by local residents and generally in the town centre from people leaving late night dancing and drinking establishments if this appeal were to be allowed. The proposal is thus not contrary to policies 4.1, 4.11 and 7.6 of the London Borough of Ealing Unitary Development Plan (2004).

2nd Issue - the agreed position

19. The Council are guided by their Supplementary Planning Guidance note 10 which deals with noise and vibration. After much discussion the appellant and the Council's noise experts reached agreement on the impact of noise from the new rear basement on the flats above. It was agreed that although the Council were concerned about both flats above the club and one at 19A The Mall, the most direct impact was on the 2nd floor flat and if this could be dealt with, the impact on the others would be acceptable too. This flat is separated from the ground floor night club by first floor offices. I shall refer only to the 2nd floor flat in the reasoning below.
20. Mr Boniface, the Council's noise expert, explained that for various technical reasons the figures in the appellant's noise reports were not to be relied on. In

particular because the background noise outside the windows of the flat had not been measured properly; because the noise source used to replicate the operation of the club in the new rear basement significantly under-represented base frequency noise, which would be of greatest concern to residents living above a night club; because the basement itself had not been finished and the ground floor above was still incomplete; and because the worst case scenario as envisaged in SPG10 had not been used. These conclusions were not opposed by the appellant.

21. The noise from the existing club in the flat is already loud and could, in Mr Boniface's opinion, amount to a statutory nuisance. The appellant's data suggested the noise from the new rear basement would be louder in the flat than the noise from the existing night club. This is somewhat counter-intuitive as the new rear basement is further from the flat than the existing club, which is directly beneath it. However, it was not contested that the noise from the rear basement would be likely to be louder than from the existing club.
22. The club's music amplification equipment is already fitted with a device to automatically limit the volume once a certain preset level is reached. This level is supposed to be set by the Council's own noise experts, but Mr Boniface had not been involved with it. It seems that the level was set some time in the past by someone else from the Environmental Health section. Given that the existing noise could already amount to a statutory nuisance it did not seem that the limiter was set properly. Because of the way a limiter operates, it cannot filter out the particularly offending bass frequencies but would have to reduce the overall volume levels, but given this, it was agreed there was no reason in principle why a limiter should not work. Once set, staff in the club do not have access to the controls so the limiter cannot be overridden.

2nd issue – would a condition be too onerous

23. There is no reason in principle therefore why a condition cannot be used to control the noise from the rear basement. Mr Boniface's reservations stemmed from his view that to bring noise down to acceptable levels the music in the rear basement would have to be played so quietly it would not function as dance music in a night club scenario and so effectively the objective of the application would be negated by the condition.
24. In my view there are two reasons why the situation may not be as serious as Mr Boniface suggests. Firstly, I am not convinced that noise from the rear basement will be louder in the flat than from the much closer existing club. The appellant's figures have already been shown to be open to question, and they may well be wrong in this case too. Also once the basement is fitted out, the speakers properly mounted and the ground floor building completed the acoustic environment could well change, and it would seem to me only for the better in terms of less noise being transmitted to the flat.
25. Secondly, I am only concerned with the effects of the proposals that are part of this appeal. Thus it would be wrong to require the noise from the rear basement to be quieter than that from the existing club. Mr Boniface's view was based on a strict application of the criterion in SPG10 that effectively requires new noise sources to be no greater than background noise when measured in the rooms of the flat and by 'background noise' he did not include

the existing club. If the existing club noise is taken into account, any required reduction of the noise from the new rear basement would not be as drastic as feared.

26. I note that the appellant was content for the condition to be applied even if it meant the music in the rear basement had to be very quiet. They could re-organise the interior space to accommodate the low volume and it could fit in with their plans to change the way the club was marketed. However, this may not always hold true and future operators may find it unreasonably onerous. I also note that the appellant has applied to change the use of the flats to offices, and although one application was refused, a second has been lodged recently. However I cannot give that any great weight as I have no evidence as to what the outcome of such an application or future appeal might be.
27. Nevertheless, I am satisfied that once fully constructed and operational, and when measured against the background noise of the existing club a condition that seeks to control noise from the rear basement need not be too onerous and could therefore be applied. Consequently, the proposal is not contrary to policy 4.11 of the Unitary Development Plan.
28. A detailed assessment procedure for determining an accurate noise measurement was agreed between the parties, except for the issue of what 'background noise' should mean, as part of the noise statement of common ground (Doc 11). In my view, a condition that requires the appellant and the Council to agree and implement a noise reduction scheme referring to the assessment procedure agreed in the noise statement of common ground and which makes it clear the definition of background noise includes the operation of the existing club will suffice.

Conclusions

29. I shall allow the appeal and remove condition 4. I shall attach new conditions to ensure the office use is still controlled and to ensure noise is controlled. I shall also attach a condition to ensure the new basement is only used in conjunction with the existing night club and not as a separate club, as the latter could lead to further issues of noise and disturbance.

Simon Hand

Inspector

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

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| Celina Colquhoun of Counsel | 2/3 Gray's Inn Square, London |
| She called | |
| Mr McHardy (21 st only) | Licensing Manager, Ealing BC |
| Mr Neil Bleakley | Team Leader Planning Department, Ealing BC |
| Mr Boniface | Noise and Nuisance Officer, Ealing BC |

FOR THE APPELLANT:

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| S Whale of Counsel | 4-5 Gray's Inn Square, Gray's Inn, London, WC1R 5AH |
| He called | |
| Ms J Flynn (21 st only) | Manager, The Priory nightclub |
| Mr R Messham | Licence Protection Service, 3 Cedar Road, Bromley, Kent, BR1 3BY |
| Mr T Edens | Planning Consultant, 29 Canford Close, Enfield, Middlesex, EN2 8QN |

INTERESTED PERSONS:

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| Miss Val Clover | Basement Flat, 29A Oxford Road, Ealing, W5 3SP |
| Mr McLaughlin | 3 Florence Road, London, W5 3TU |

DOCUMENTS

- 1 Council's E-Mail 17th April concerning late receipt of appellant's noise report and enclosing original letters of notification
- 2 Appellant's E-mail (17th April) responding to Council comment on noise report
- 3 Statement of Common Ground
- 4 Appellant's opening statement
- 5 Copy of 'Ealing & Acton Gazette' for 20 March 2009, handed in by Miss Clover, describing 2008 riot.
- 6 Letter of 17th April from Mr Edens to Ealing BC covering copy of noise report by Mr Varley dated April 2009
- 7 Documents provided by Mr McHardy
 - 7a) Map of special protection area
 - 7b) Application for a variation of licence, received 14th March 2008
 - 7c) Plan of existing and proposed club attached to 7b)
 - 7d) LFEPA representations relating to 7b)
- 8 Revised page of Mr Bleakley's proof relating to agreed floorspace figures in SCG
- 9 Extract from guidance on the Licensing Act 2003
- 10 Ealing BC Statement of Licensing Policy
- 11 Statement of Common Ground – Simon Boniface/Andrew Varley (for noise issue)
- 12 Suggested noise condition agreed between the parties