
Appeal Decision

Inquiry Held on 6, 7 & 8 November 2018

Site visit made on 8 November 2018

by David Murray BA (Hons) DMS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 December 2018

Appeal Ref: APP/X1925/W/17/3188914
The Cabinet, High Street, Reed, SG8 8AH.

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr R Newman against the decision of North Hertfordshire District Council.
 - The application Ref. 16/02113/1, dated 22 August 2016, was refused by notice dated 21 July 2017.
 - The development proposed is the change of use of the premises from public house (Use Class A4) to a single dwelling (Use class C3).
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Decision

1. The appeal is dismissed

Main Issues

2. Although the formal reason for refusal is reflected in the first main issue below, it is clear from the evidence submitted by the main parties and the 'Save the Cabinet Action Group (SCAG)', which has the status of a Rule 6 party, that there should be a further main issue concerning the effect of the proposed change of use on the significance of The Cabinet as a Listed Building and the effect on the significance of the Reed Conservation Area.
3. The main issues are therefore:
 - Whether the proposed change of use of the public house (The Cabinet) as a local community facility would meet the requirements of Policy ETC7 of the (emerging) North Hertfordshire Local Plan having regard to the criteria set out within the policy including the 'exception' provisions.
 - The effect of the proposed change of use on the significance of The Cabinet as a Listed Building, and on the significance of the Reed Conservation Area, and if harm is found to these heritage assets, the public benefits that have to be weighed against the level of harm.

Reasons

Background

4. The appeal concerns the change of use of a public house, The Cabinet, which is situated in the village of Reed. Although its address is the High Street in

practice this is a narrow rural lane with grass verges on the eastern edge of the village. The site is located within an area comprising a few scattered residential properties, including two thatched houses, a farmstead and a short residential terrace. The Cabinet is a part two storey / part single storey timber clad building, with elevations painted a light colour, on the west side of the High Street and it is a Grade II Listed Building. It is also located in the Reed Conservation Area. The village of Reed has a population of about 300 people.

5. It is evident that The Cabinet had been a public house since at least 1806 but it ceased trading as such in 2011 and was vacant until the appellant bought it at an auction in October 2015 from the previous owners 'Albanwise'. The appellant's planning agent Ms Fitzgerald acknowledges that after carrying out essential repairs to the fabric of the building it was converted to a dwelling and has been occupied as a home since. The application is therefore retrospective.
6. Applications for Listed Building Consent for internal alterations to facilitate the proposed change of use were submitted to the Council under ref. 16/02129/1LB and 17/01542/1LB about the same time as the planning application. These applications remain with the Council for determination and are not the subject of this appeal.
7. The premises were registered as an Asset of Community Value (ACV) in April 2014 following a request from Reed Parish Council.

Policy Context

8. The development plan includes saved policies in the North Hertfordshire District Local Plan No2 with Alterations 1996 (now referred to as the 1996 LP). There are no relevant saved policies concerned with the appeal proposal. The Council is also preparing a new Local Plan 2011-2031 and a proposed Submission Version was published in October 2016 (the new LP). The new LP has now reached the examination stage and the Council advises that following receipt of the Examining Inspector's Interim Findings, the Council is expecting to publish a schedule of Main Modifications later in November 2018. These will be subject to consultation in a period between December and February 2019.
9. Individual policies in the emerging plan may be given weight now depending on the degree of unresolved objection being considered at examination and compliance with the terms of the National Planning Policy Framework (NPPF). The NPPF was re-issued in July 2018, under the transitional arrangements the examination will consider the plan's provisions under the original 2012 version. However, this s78 appeal has to have regard to the updated version of the NPPF and so all references made will be to the 2018 document unless otherwise stated.
10. New LP Policy ETC7 is concerned with scattered shops and community facilities in towns and villages. I am satisfied that it broadly accords with the provisions of the NPPF especially paragraphs 83(d) and 92(c) the latter of which says that in order to provide the social, recreational and cultural facilities and services that the community needs, planning decisions should guard against the unnecessary loss of valued facilities and services,

particularly where this would reduce the community's ability to meet its day to day needs.

11. From the updated evidence submitted by the Council it appears that the outstanding objections to the policy do not concern the application of it to the circumstances of The Cabinet as a public house in Reed. Further, the alterations proposed as a Main Modification do not amend the substance of the policy and therefore I propose to deal with Policy ETC7 as per the Submission Version. Having regard to all of these policy aspects I agree with the conclusions of the main parties at the Inquiry that Policy ETC7 should be given significant weight at this stage as a material consideration.
12. Other policies in the emerging plan relevant to this case are Policy SP13 concerning the historic environment and HE1 concerning designated heritage assets.

Accord with Policy ETC7

13. Before discussing the accord with this policy itself, it is fair to say that there is some ambiguity within it, particularly the final exception paragraph, which was discussed at the inquiry. The policy has to be considered on a simple reading of the words involved, using their ordinary meaning, and having regard to the overall purpose of the policy. In this context my reading of the exception test in the final paragraph is as follows: that the vacancy in the (lawful) use of the premises; documentary evidence on viability; and attempts to sell the premises; should all cover the same period of at least one year and that period should just (reasonably) precede the time when the proposal to change the use is made. In this case, the evidence required would primarily need to cover at least the one year period before the application was submitted i.e. before August 2016, although it is also reasonable for me to consider relevant circumstances in the period up to the Council's decision and the intervening periods leading up to the Inquiry.
14. The second paragraph onwards of Policy ETC7 is relevant to the case and indicates that the loss of facilities outside of the defined retail hierarchy will be granted where specific criteria are met. I will consider these in turn.

(a) Other similar facilities available

15. It is common ground that there are no other public houses in the village of Reed itself nor within a convenient walking distance for customers, therefore, clause (a) of the policy is not met. I note that there are some 13 public houses within a radius of 3 miles of the appeal site, however, it was not argued that these were a convenient alternative to previous customers of The Cabinet.

(b) Whether the replacement use would complement the function and character of the area.

16. The evidence given by Mr Roberts for the Council and Ms Ingram for SCAG was that this criteria is not met as the replacement use would result in the loss of the public house which would harm the function and character of the area. However, my reading of this part of the policy is that it refers to the general nature of the use that is proposed as a replacement rather than the one that would be lost. I saw at the site visit that the area around the appeal site is mainly residential in character, albeit that existing houses are

dispersed on the edge of a rural village. I am satisfied that the residential use proposed would complement the function and character of the area, notwithstanding the issue over the loss of the lawful use as a public house. I find that the proposal meets this criterion.

17. The final paragraph of the policy puts forward criteria as an exception to (a) above and I will consider the components of the exception having regard to the interpretation I have set out in paragraph 13 above.

Period and nature of vacancy

18. The Cabinet has been vacant since 2011 but it has been occupied by the appellant as a dwelling since being repaired following his purchase at auction in October 2015. To my mind this unauthorised different use for at least 6 months before the application was submitted is a material incursion into the specified vacancy period in which the public house had to be tested on viability and attempts to sell. On this basis alone I consider that the proposal fails the exception test set out in the policy. However, in case I have misinterpreted that I need to consider the other factors.

Marketing

19. The exception criterion refers to reasonable attempts to sell or let the premises and this can be described as 'marketing'. All of the evidence presented on marketing relates to that carried out on behalf of the previous owners of the Cabinet - Albanwise, and which culminated in the sale at auction. The marketing that was carried out prior to the auction is summarised in the letter of 4 March 2016 from the joint selling agents Mullocks Wells (MW) (Core Document (CD) 1.2)
20. As background I understand that Albanwise paid £645,000 for The Cabinet in 2007. When it was put up for sale in 2012 there were no offers when initially offered for sale at £495,000. Some 27 enquires were made during the period of MW marketing until 2014. However, the initial interest failed to materialise into a purchase. The Cabinet was put to auction in 2015 and a brochure for the auction indicated a guide price of £350,000+. Mr Newman's bid of £375,000 was the only bid at the auction and was successful.
21. Although Mr Roberts for the Council considers that the comprehensiveness and robustness of the marketing process are inadequate I do not take issue with these aspects, which were undertaken by professional companies, or the fact that the premises were marketed for a different owner. However, I am concerned that the marketing period is substantially out of step with the period concerning the other factors required in the testing of the premises in the context of the my reading of the policy as I outlined in paragraph 13 above.
22. Moreover, I am concerned that the marketing of the public house at the auction raised an expectation of 'hope value' above its true value based on the lawful use. After mentioning that some renovation/modernisation is required the brochure indicated "This is a great opportunity to refurbish or convert the existing property and offers excellent potential to develop (STPP)" Presumed to mean 'subject to planning permission'. This may well be standard practice by auctioneers as suggested by Mr Spelman for the appellant, and at that stage I recognise that the premises were not being

tested to accord with the process laid out in the policy, but only to try and recoup some of Albanwise's investment. However, to my mind this casts serious doubt over the appropriateness of the marketing that took place.

23. On the marketing issue I find that the evidence presented does not demonstrate that the timing and nature of the marketing meets the requirement of the exception test in Policy ETC7.

Evidence on viability

24. The issue of viability is a broad subject made more difficult by the fact that The Cabinet ceased trading as a pubic house in 2011 and so there is no up-to-date documentary evidence on trading accounts or on consumer expenditure to help assess viability. There are many assessments of viability before me which I will consider in a moment but it is fair to say that each involves a professional assessment of the viability of the premises, based on many economic variables as considered appropriate, and it is not my role to substitute my own opinion. I will therefore concentrate on the range of assessments and where the differences lie.
25. At the time of the Council's consideration of the application, there was a viability assessment in the Culverhouse report (22 November 2016) prepared as part of the appellant's case in support of the planning application. This was independently assessed by Trinity Solutions (12 December 2016) on behalf of the Council. Both assessments concluded that The Cabinet would not be viable again as a public house and it is apparent that this factor was critical in the planning officer's recommendation of approval. The planning committee also had to consider the representations from SCAG and others that a pub could be viable including when run as a social or community funded social enterprise.
26. Since the refusal of planning permission and the lodging of the appeal, further reports on viability or assessments of the reports have been prepared by Mr Spelman (20 October 2017) for the appellant; Mr Nichols for SCAG and Mr Roberts for the Council. Further, the additional spreadsheet prepared by Nichols gives a useful comparison of the assessments, transposing the data assumptions, although I appreciate the concerns about such comparisons being 'parachuted in'.
27. As a comparison of the potential public house business in the premises in terms of a 'net profit before repayments' the Culverhouse valuation indicates that there would be an annual loss of just over £8,000 whereas the other valuations show a potential small profit ranging from almost £24,000 to £75,000. Further, the respective deficit or profit is increased when repayment of loans and interest on capital is taken into consideration, with the worst case being a £67,000 annual deficit.
28. However it appears to me that Mr Spelman's approach of fixing the market value of The Cabinet at £350,000 unduly influences the rest of the valuation assessment. Whilst this is about the figure that was paid at auction, for the reasons I gave in paragraph 22 above, I consider that it does not reflect the true market value based on the lawful use of the property. A similar stance on examining the true market value is reflected in the appeal decisions put to

me¹. Further, there is clear evidence to show that at a significantly lower purchase price it is likely that a public house use could be viable. It also appears to me that the costs of repairs used by Mr Spelman are relatively high and exceed the costs based on the repair and refurbishment of the public house and should not include the costs associated with the removal of the use as a dwelling house. On the technical evidence put to me I conclude that I have to place more weight on the evidence of Mr Roberts and Mr Nicholls than on Mr Spelman's.

29. In addition to the technical assessments of viability two other factors regarding viability are relevant. First Mr Martin gave evidence as the previous tenant/chef of The Cabinet from 2008 until it closed in 2011. He said that at that time the business was doing steady trade and was viable. The only reason why the pub closed was because of the unlawful actions of a member of staff which he could not rectify. Nevertheless, he was sure that a pub business could be viable and successful in the premises.
30. Secondly, Mr Langley, Chair of Reed Parish Council, gave evidence that the parish council has secured approval to borrow £400,000 from the Public Works Loan Board (£250,000 specified in the letter of 17 May 2018 from MHCLG²) to be used on the purchase and reinstatement of The Cabinet as a public house. The parish council's application was supported by a business plan which demonstrated that the pub would be viable and how the loan would be repaid. Mr Langley said that the fact that the MHCLG granted the application was an indication that their assessment of the future viability of a pub was sound and that the Council had credibility as a borrower. There was also the possibility of a 'white knight' becoming involved in the purchase and running of a pub for community use, as suggested by Mr Goddard who had made an offer to buy the pub before the auction, but such altruism has to be treated with caution. Ms Fitzgerald's evidence for the appellant mentioned the case of the White Lion public house in St Leonards³ where a third party interest to revive the pub failed to materialise after the appeal was dismissed.
31. Bringing the evidence on viability together, there is clear difficulty in assessing this aspect as The Cabinet has not been trading as a public house for some seven years and as a consequence assessments of the future viability of a pub use now are hypothetical. Further, there is a diverse range of professional opinions about whether such a use could ever be viable. However, also taking account of the evidence of the last tenant/chef and the parish council in securing a means of funding for the potential purchase of The Cabinet as a public house for the community, it appears to me that there is sufficient evidence to conclude that there are reasonable circumstances in which the use as a public house could be viable. **I conclude that on balance it has not been demonstrated that the reinstatement of the lawful use could not be viable.**
32. Overall on this issue I conclude that in respect of Policy ETC7 the presumption in favour of the loss of a local facility is not justified because there is no similar alternative facility available within reasonable walking distance under part (a) of the policy, and while part (b) is met, the proposed

¹ APP/P0240/A/13/2198005; APP/X1925/W/16/3154355; APP/D3125/A/10/2134643

² Ministry of Housing, Communities and Local Government, Local Authority Capital Finance and Reserves)

³ APP/X0415/C/15/3130705

change of use of The Cabinet to a house would fail the exception test. Within this, it has not been demonstrated that there have been reasonable attempts to sell or let the premises for a similar use within the stated period; neither has The Cabinet been vacant as a public house within the whole test period; nor has a lack of future viability been demonstrated.

Effect on the significance of the Listed Building and the Reed Conservation Area

33. The evidence of Mr Copp for the appellant and Ms Ingram for SCAG describes in great detail the historic and architectural qualities and overall significance of The Cabinet as a listed building and on its significance in the Reed Conservation Area. It is common ground with these parties that the change of use of the Cabinet results in 'less than substantial harm' to the Reed Conservation Area.
34. Concentrating on the effect on the significance of the listed building, SCAG says that the change of use proposed would result in the complete loss of the communal value of The Cabinet and therefore should be regarded as the total loss of this heritage asset leading to 'substantial harm' as addressed in paragraph 195 of the NPPF. However, national guidance in the Planning Practice Guidance⁴ (PPG) recognises that 'substantial harm' is a high test so it may not arise in many cases. Further it is important to consider whether the adverse impact seriously affects a key element of its special architectural or historic interest. I recognise that the 'community value' of the public house use is an essential part of its significance, however, this needs to be considered in the round and not as a special aspect of greater significance than the other historic and architectural aspects. It is generally agreed that the change of use will not affect the architecture and setting of The Cabinet bearing in mind that the applications for the alternations to the internal fabric of the building are not before me.
35. In applying the general duty on me set out in section 66 and 72 of the 1990 Act⁵ I think that it is more appropriate to consider the effect in the holistic way that the appellant's team suggests. I find that the change of use would harm the significance of The Cabinet as a listed building but this harm amounts to 'less than substantial harm'. The test set out in paragraph 196 of the NPPF therefore applies so that the harm is weighed against the public benefits in respect of both the heritage asset of the Listed Building and the Reed Conservation Area.
36. I recognise that the conversion of The Cabinet to a house has resulted in the repair of the building which is a public benefit given that the evidence shows that the fabric of the building deteriorated when closed. However, I have concluded in part under the first issue that the Cabinet could be viable as a public house. This represents the optimum viable use. Therefore, the reinstatement of this would secure its significance as a local heritage asset.
37. Overall I find on this issue that the less than substantial harm to the Listed Building and significance of the Conservation Area that the proposal would cause is not outweighed by the public benefits put forward. As the proposal would not secure the conservation and preservation of the heritage asset in

⁴ Paragraph 016 (Reference ID 18a-016-20140306)

⁵ Planning (Listed Buildings and Conservation Areas) Act 1990

the long term the proposal would conflict with Policy HE1(a) of the emerging new LP.

Other considerations

38. SCAG submits that the unauthorised change of use of The Cabinet to a dwelling house constitutes 'intentional unauthorised development' (IUD) as set out in the Written Ministerial Statement (WMS) dated 17 December 2015 (as referred to in the Chief Planner's letter of 31 August 2015) and which was confirmed by the Minister⁶ on the 29 October 2018 as a potential material consideration in a planning case.
39. In this case, the appellant Mr Newman did not give evidence himself at the inquiry and consequently I do not know his true intentions when he bought The Cabinet at auction and then started to repair the building before the premises were converted to a dwelling house. I understand from the evidence of others and from written representations that the appellant is a developer/builder but is also a licensee and has an interest in a public house elsewhere. On the evidence available I cannot be sure that the appellant only had an intention to carry out unauthorised development and so I cannot place much weight on this aspect in the planning balance.

Planning balance

40. The proposal needs to be considered in the context that the existing development plan is silent on the main issues that are involved in this case. However, Policy ETC7 in the emerging LP is a material consideration that carries significant weight. I have found that the proposal to change the use of The Cabinet conflicts with this policy as there is no similar alternative facility within reasonable walking distance under part (a) and for a number of reasons the change of use does not meet the stated requirements of the exception test that follows within the policy. The proposal therefore constitutes the loss of a community facility without overriding justification. This loss also conflicts with the guidance set out in paragraphs 83(d) and 92 (c) of the NPPF.
41. In respect of the second issue I have found that the proposed change of use would result in less than substantial harm to the significance of The Cabinet as a Listed Building and to the significance of the Reed Conservation Area as heritage assets and great weight should be given to the conservation of these assets. However, this harm is not outweighed by public benefits including securing the optimum viable use for the premises. There is conflict with emerging policy HE1 to which substantial weight should be given as it is in conformity with national policy.
42. These adverse factors have to be balanced with the positive aspects of the development but these are limited in that they only arise from the private use of a single dwelling house for the appellant and the repair of the fabric of the building itself.
43. I find that the conflict with emerging LP policies, and the policy of the NPPF that I have mentioned, clearly outweigh the benefits and this indicates that planning permission should not be granted for the change of use, as set out in paragraph 11(d)(i) of the NPPF.

⁶ Kit Malthouse MP, Minister of State, MHCLG.

44. I recognise that such a decision may result in the appellant being faced with the loss of his home. This would be an interference with his human rights. However, such rights are qualified rights and have to be balanced with other considerations. I am satisfied that a refusal of permission on the planning merits of the proposal is reasonable and necessary in the public interest and it is therefore not a disproportionate interference.

Conclusions

45. For the reasons given above I conclude that the appeal should be dismissed.

David Murray

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Ms A Foster, of Counsel	Instructed by the Solicitor to the Council.
She called	
Mr P Roberts, RICS	Partner; Dalton Warner David LLP, acting on behalf of North Hertfordshire District Council.

FOR THE APPELLANT:

Mr S Hopkins, Solicitor	Homes and Hills LLP
He called	
Ms Fitzgerald, BA (Hons) Dip TP, MRTPI	Director, Barker Parry Town Planning Ltd.
Mr T Copp BA (Hons) MA Assoc IHBC	Senior Associate Director, CgMs.
Mr Spelman BSc, FRICS	Director, Peter Spelman Consultancy Ltd.

FOR THE SAVE CABINET ACTION GROUP (SCAG) - Rule 6 Party:

Mr M Henderson, of Counsel	Instructed by SCAG
He called	
Ms D Ingram MSc CHE	Director, Planning for Pubs Ltd.
Mr Nichols BSc(Hons) MRICS	Managing Director, Everard Cole Ltd.
Mr Chapman	Campaign for Real Ale (CAMRA)
Mr Martin	Previous tenant of The Cabinet
Mr Titmuss	Prospective tenant for The Cabinet about 2011

INTERESTED PERSONS:

Cllr Mrs Hill	County Councillor
Cllr Mr Morris	District Councillor
Mr P Goddard	Local resident
Mr Smith	Local resident
Dr Blenkinsop	Local resident

DOCUMENTS HANDED IN AT THE INQUIRY

- 1 Copy of the Ms Foster's Opening Submissions for the Council.
- 2 Copy of Mr Henderson's Opening Statement on behalf of SCAG.
- 3 Update from the Council on the emerging LP and proposed modifications to Policy ETC7.
- 4 Schedule of comparative valuations from Mr Nichols on behalf of SCAG.
- 5 Copy of RICS Practice Standards re The capital and rental Valuation of public houses, bars, restaurants and night clubs (2010).
- 6 Closing for the Council
- 7 Closing for SCAG
- 8 Closing for the Appellant