

Town and Country Planning Act 1990

S78 Appeal

Council's Statement of Case

LPA ref: 16/02113/1

PINS ref: APP/X1925/W/17/3188914

**Change of use from A4 (Public House) to C3 (Single Dwellinghouse) at The Cabinet, High Street,
Reed, SG8 8AH**

Background

1. This Statement of Case (SoC) sets out the Council's case in defence of this appeal.
2. The Appellant purchased and occupied The Cabinet Public House from 2015 and started internal renovation and conversation works from his occupation. Local residents informed the Council of these works, and the Appellant was advised to submit a planning application for the change of use of the public house to a single dwelling house. A retrospective planning application for the change of use was submitted on 01/09/16. The application was presented to the Planning Control Committee for determination on 20/07/18 and the application was refused for the following reason:

"In the opinion of the Local Planning Authority, the change of use of these premises to residential use would lead to the loss of a valuable community facility, the last public house in the village of Reed. The change of use therefore conflicts with the requirements of paragraphs 28 and 70 of the National Planning Policy Framework and Policy ETC7 of the North Hertfordshire Submission Local Plan 2011 – 2031".

3. There is an extensive planning history for the public house, given that it is also a Grade II Listed Building. Of relevance are listed building consent applications number 16/02129/1LB and 17/01542/1LB which are the associated listed building applications for the works associated with the change of use of the building from public house to residential use. The decision has been taken that until the change of use appeal has been determined, the listed building applications will be held in abeyance.

Appeal Site and Surroundings

4. The Cabinet is a two storey, timber clad building located on the east side of the High Street, adjacent to the village pond. The building is wide, although relatively shallow in depth, and sits fairly close to the lane frontage, with a car park to one side and rear gardens. There is a change in levels at the front, with steps up and a patio area in front of the building.
5. The area has a rural feel with nearby / surrounding development comprising residential properties and open space. The nearby Brickyard Lane farmyard is under residential re-development.

Proposed Development

6. The planning application sought retrospective planning permission for the change of use of the Public House (A4) to a single dwelling house (C3).

Relevant Planning Policy

7. North Hertfordshire District Local Plan no.2 with Alterations 1996

Policy 6 – Rural areas beyond the Green Belt;

Policy 16 – Areas of Archaeological Significant and other Archaeological Areas;

Policy 25 – Re-use of Rural Buildings;

Policy 26 – Housing Proposals;

Policy 55 – Car Parking Standards;

Policy 57 – Residential Guidelines and Standards.

8. National Planning Policy Framework

Paragraphs 7 & 14 – Achieving Sustainable Development;

Section 3 – Supporting a prosperous rural economy;

Section 6 – Delivering a wide choice of high quality homes;

Section 8 – Promoting healthy communities;

Section 12 – Conserving and enhancing the historic environment.

9. Local Plan 2011 – 2031 – Proposed Submission Draft October 2016

Policy SP10 – Healthy Communities;

Policy ETC7 – Scattered local shops and services in towns and villages;

CGB1 – Rural areas beyond the Green Belt;

CGB4 – Existing rural buildings.

The Local Planning Authority's Case

10. The Decision Notice dated 21 July 2017 states:

“In the opinion of the Local Planning Authority the change of use of these premises to residential use would lead to the loss of a valuable community facility, the last public house in the village of Reed. The change of use therefore conflicts with the requirements of paragraphs 28 and 70 of the National Planning Policy Framework and Policy ETC7 of the North Hertfordshire Submission Local Plan (2011 -2031).”

11. No further reasons for refusal are stated.

12. The Local Planning Authority understands that it is not disputed that emerging Policy ETC7¹ is consistent with paragraphs 28 and 70 of the NPPF and that given the advanced stage of the emerging Local Plan, Policy ETC7 is a material consideration which should be afforded significant weight. Accordingly, the main issue is whether the proposal is in compliance with Policy ETC7.

13. Policy ETC7 states:

“...Planning permission for the loss or change of use of any shops, services or facilities outside the defined retail hierarchy will be granted where:

a. There (sic) is another shop, service or facility of a similar use available for customers within a convenient walking distance; and

b. The proposed replacement use would complement the function and character of the area.

An exception to criterion (a) will only be permitted if it can be demonstrated that the unit has remained vacant for a year or more, and documentary and viability evidence has been provided that all reasonable attempts to sell or let the premises for similar uses in that period have failed.”

¹ Paragraph 5.32 Local Plan 2011-2031 Proposed Submission October 2016.

14. There is no other similar facility within a convenient walking distance and therefore the policy requires it to be demonstrated that:
“...the unit has remained vacant for a year or more, and documentary and viability evidence has been provided that all reasonable attempts to sell or let the premises for similar uses in that period have failed.”
15. The Local Planning Authority considers that the evidential burden in this regard rests with the applicant in accordance with the principles set out by Mr Justice Holgate at paragraph 48 of the Parkhurst Road Judgement².
16. It is the Local Planning Authority’s contention that the appellant has not provided any evidence of the kind prescribed by the exception to criterion (a) of Policy ETC7. The appellant’s appeal is therefore without merit and should be dismissed.
17. The appellant purchased The Cabinet in November 2015, converting and occupying the premises for residential purposes prior to the submission of the planning application and continuing to occupy for residential purposes subsequently. It is therefore apparent that the premises have not, since November 2015, “remained vacant for a year or more” and have in fact been continuously occupied since.
18. The appellant has therefore failed to comply with the first requirement of the exception to criterion (a) of Policy ETC7 and, contrary to paragraph 5.12 of the appellant’s Statement of Case, it is not agreed by the Local Planning Authority that “...the exception clause to Policy ETC7 is therefore applicable.”
19. No evidence has been provided by the appellant that they have openly marketed the premises nor that the premises have been genuinely available since the date of the auction on 22 October 2015. In the absence of any such evidence the appellant has failed to demonstrate that “all reasonable attempts to sell or let the premises for similar uses in that period have failed”.
20. The appellant has therefore not provided any cogent evidence demonstrating that they have complied with and satisfied either, let alone both, of the key requirements of the exception to criterion (a) of Policy ETC7.
21. The appeal may therefore be dismissed without any need to consider additional matters.
22. Notwithstanding the Local Planning Authority’s contention in this regard, the appellant has provided certain historic information in respect of the marketing of the premises by the previous owner of the premises that concluded with his purchase of the premises in November 2015.
23. The Local Planning Authority contends that numerous Appeal Decisions³ have established that the appellant is required, in these circumstances, to provide detailed information as set out below:
 - Full details of the proposed terms;
 - Full details of all parties to whom marketing particulars have been provided;
 - Full details of all viewing and inquiries including names to enable identification;

² Parkhurst Road Limited and Secretary of State for CLG and The London Borough of Islington Case No: CO/3528/2017.

³ For example – see the Appeal Decisions attached to the Planning 4 Pubs Report dated 31 May 2017 submitted on behalf of SCRC.

- Full details of offers made by prospective purchasers/lessees including the terms of those offers;
 - Full details of negotiations with prospective purchasers/lessees.
24. In addition, the Local Planning Authority has had regard to the judgement of Mr Justice Cranston in the Fossway Limited case⁴ wherein, at paragraphs 40 to 41, consideration was given to the adequacy of the marketing exercise undertaken by Fossway Limited and the following additional key points identified:
- In testing the market for the current use the price may be zero;
 - The property must not be marketed at an inflated price so as to deter prospective current use occupiers and/or purchasers;
 - Deliberate neglect must be disregarded;
 - The vendor must be able to demonstrate that it was a “willing seller”.
25. With regard to the final bullet point, paragraph 33 of the Parkhurst Road judgement summarises the concept of a “willing seller” and a “willing purchaser” from which it is clear that the parties must be willing to agree the best price reasonably obtainable having regard to reality. As such, in the event that a vendor adopts an unrealistic price expectation and thereby deters bids for a policy compliant use and/or frustrates attempts to secure the premises, the vendor will not be considered to comprise a willing seller and it will be apparent that the marketing exercise was defective in the context of justifying a change of use in accordance with Policy ETC7.
26. It is understood by the Local Planning Authority that The Cabinet was purchased by Albanwise Limited for a consideration of £645,000⁵ on 16 October 2007. It traded as an A4 use until 2011 whereupon it is understood that the freehold interest was marketed from 3 August 2011 by Davis Coffey Lyons and Mullocks Wells on behalf of Albanwise Limited at an asking price of £495,000⁶.
27. The appellant has provided evidence that the asking price was reduced to £450,000 in November 2012 but it is noted that the particulars⁷ advised that:
- “There is an overage clause on the grounds and the building. If there is an enhancement in value as a result of residential development in the grounds, or the pub increasing in value through a change of use to a freehold dwelling, for a period of 20 years, the current owners will benefit from 35% of the increase in value.”*
28. The premises were then entered into auction on 22 October 2015 at a guide price of £350,000+. The respective brochures⁸ advised prospective purchasers that:
- “This is a great opportunity to refurbish or convert the existing property and offers excellent potential to develop (STPP)” and “The property could benefit from some modernisation downstairs, with the upstairs living accommodation in need of renovation. This is a great opportunity to refurbish or convert the existing property and offers excellent potential to develop (STPP).”*

⁴ R (on the application of Gibson) and Waverley Borough Council and Fossway Limited Case No: CO/12748/2010.

⁵ Land Registry Title HD354219 dated 27 November 2011

⁶ Peter Spelman Consultancy Ltd Report Dated 20 October 2017 Appendix B (appendices 3 and 4)

⁷ Peter Spelman Consultancy Ltd Report dated 20 October 2017 Appendix B (appendix 5)

⁸ Peter Spelman Consultancy Limited Report - Appendix B (appendices 1 and 2)

29. It is therefore clear that prospective purchasers were made aware that:
- The premises required modernisation, renovation and refurbishment; and
 - The premises were suitable for conversion and development subject to the grant of planning permission.
30. In this context the appellant has stated at paragraph 5.35 of their Statement of Case that:
- “The property was not marketed as a dwelling house but as a public house”.*
31. It is apparent from the marketing particulars provided by Mr Spelman on behalf of the appellant that this statement is not correct as the particulars are clear that prospective purchasers were invited to take into account the potential not only for conversion of the premises but also wider development.
32. The appellant completed the purchase of the premises on 19 November 2015 for a total price, inclusive of VAT, of £442,500⁹.
33. The appellant has not provided any evidence as to the assumptions upon which, despite there apparently being no other bidders to compete with on price, he proposed and agreed these terms.
34. In this context the appellant has been quoted by Mr Culverhouse as stating that:
- “I am a personal licence holder with experience in the operation of licensed premises and I originally planned on re-opening the building as a pub.”¹⁰*
35. However, the Design and Access Statement dated 22 August 2016 (predating the Culverhouse reports) submitted in support of the planning application states:
- “The property was purchased by the applicant on the assumption that the only sustainable use for the premises was as a dwelling.”*
36. The absence of any breakdown of the agreed price or explanation from the appellant as to the actual assumptions underpinning their successful bid means that no weight can be placed upon the price paid as evidence of the market value of the premises in the context of the exception to criterion (a) of Policy ETC7.
37. In this context it is an established principle that an appellant should not be permitted to recover the excess paid in acquiring premises by benefitting from a consent for change of use to a more valuable use merely because no current use operator can match that price in the market. As such the test is not whether an A4 user can match the actual price paid by the appellant nor even whether an A4 user could afford to offer a value acceptable to the appellant but whether there is market evidence of demand for an A4 user even at a price that may be nominal.
38. With regard to historic market activity, the appellant has provided a copy of a Mullocks Wells letter dated 4 March 2016¹¹ relating to the period prior to acquisition by the appellant. This is described as a Marketing Report, but it lacks significant detail and does not meet the standards of a Marketing Report as understood in the context of the exception to criterion (a) of Policy ETC7.

⁹ Land Registry Title HD354219 dated 8 May 2017.

¹⁰ Page 7 Culverhouse Viability Report 22 November 2016 and Para. 4.5 Culverhouse Change of Use Appraisal 18 April 2017.

¹¹ Peter Spelman Consultancy Ltd Report – Appendix C.

39. Notwithstanding its inadequacies it is noted that reference is made within this letter to interest being expressed by Titmus, Everard Cole and Galvin/Scott although just cursory commentary is provided.
40. However, the Local Planning Authority is aware of evidence¹² provided by and on behalf of the Save the Cabinet in Reed Campaign wherein further information is provided in respect of these offers from which it is apparent that, had the vendor genuinely comprised a willing seller, an A4 use may have been secured.
41. The marketing evidence, such as it is, as provided by the appellant does not therefore demonstrate that *"...all reasonable attempts to sell or let the premises for similar uses in that period have failed"* and, in fact, suggests that an A4 use would have been secured had the vendor been willing to lower their price expectations.
42. The Local Planning Authority therefore considers the Mullocks Wells letter to be irrelevant as it is deficient in content. As such it does not accept paragraph 5.62 of the appellant's Statement of Case where it is stated that:
- "The level and nature of marketing of the property has not been disputed, albeit a number of potential lessees/purchasers have not opted to proceed for whatever reason."*
43. Rather than addressing these deficiencies the appellant has sought to rely upon Viability Assessments prepared by Mr Culverhouse and Peter Spelman Consultancy Limited which purport to test the extent to which an A4 use could be sustained at the premises in various hypothetical scenarios. The apparent intention of these reports is to demonstrate that there are no circumstances under which such a use could be envisaged.
44. The Local Planning Authority notes that the appellant says at paragraph 5.61 of its Statement of Case:
- "It is worth highlighting that policy ETC7 does not require the Appellant to provide viability evidence in the form provided, but to demonstrate through evidence that the property has been marketed for a sufficient period of time for the sale or lease of the property for its lawful use or for something similar and that the marketing of the property for sale has failed."*
45. The reports are fundamentally flawed as can be illustrated by the latest report provided by Peter Spelman Consultancy Ltd where, at paragraph 11.4, he assumes a capital spend of £175,000 based on an April 2012 survey prepared by an actual prospective pub operator without any detailed explanation or breakdown as to how this cost has been arrived at.
46. In making this deduction he has:
- Disregarded that the state of repair was clearly identified in the auction particulars so would have been reflected in the purchase price such that there is an element of double counting;
 - Disregarded the evidence of the actual cost of the actual works undertaken by the appellant;
 - Overlooked that works arising from deliberate neglect are to be disregarded; and
 - Ignored the fact that, as at the date of his report and the submission of the planning application, the premises had been extensively repaired such that the clear majority, if not all, of the matters identified at paragraph 6.4 of his report were likely to have been addressed.

¹² Planning 4 Pubs Report dated 31 May 2017, A Miller Report dated 2 June 2017 and A Miller Further Representations dated 26 June 2017.

47. In addition, he states at paragraphs 5.9 and 5.10 that he has adopted a purchase price of £350,000 on the basis, inter alia, that *“the property has hope value for residential use subject to planning”* albeit under options 2 and 3 he then adopts a price of £375,000.
48. In effect he is advancing an argument that it is not viable for the appellant to run the premises as an A4 use if the operator must pay a market value that has regard to the potential for residential use and bear £175,000 abnormal costs.
49. Notwithstanding the accuracy, or otherwise, of his conclusions on viability his entire analysis is predicted off entirely the wrong starting point. As such, Mr Spelman’s report is fundamentally flawed and of no relevance to the consideration of the exception to criterion (a) of Policy ETC7.
50. It is accepted that the Local Planning Authority commissioned advice by Trinity Solutions Consultancy Limited¹³ (TSC) to review the Culverhouse November 2016 report provided by the appellant and that this advice was presented to Committee. It is also accepted that TSC followed the Culverhouse approach and assessed viability on the hypothetical assumptions, inter alia, that a pub operator would be required to pay £375,000 or £240,000 to acquire the premises.
51. However, Mr Culverhouse and TSC together with Mr Spelman have all failed to realise that it is illogical to assume that a willing purchaser of the premises for an A4 use acting knowledgeably, prudently and without compulsion having made proper enquiries¹⁴ would offer a price in the open market that would impose such a burden that the business, for which the premises are required, would be rendered unviable.
52. It is therefore irrational for the appellant to state, at paragraph 5.35 of their Statement of Case, that:

“The value of the property estimated for the purposes of viability of £350K is considered to be fair and reasonable.”
53. Overall these reports do no more than test hypothetical scenarios and offer opinions that an A4 business could not pay the acquisition prices as tested within each report on the authors’ trading assumptions. They do not demonstrate an actual lack of demand in the open market for A4 use and are of no relevance nor assistance in considering the exception to criterion (a) of Policy ETC7.
54. It is therefore the Local Planning Authority’s contention that the appellant has, in effect, ignored the requirements of the exception to criterion (a) of Policy ETC7 and such evidence that has been provided is fatally flawed and irrelevant.
55. The proposed change of use from A4 (Public House) to C3 (single residential dwelling) is therefore not justified and the appeal should be dismissed.

¹³ Review of the SG Culverhouse Public House Viability Report dated 12 December 2016.

¹⁴ Definition of Market Value – page 70 RICS Valuation Global Standards 2017 and paragraph 33 of Parkhurst Judgement.