
Appeal Decision

Site visit made on 11 May 2016

by Nick Fagan BSc (Hons) DipTP MRTPI

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

Decision date: 14 June 2016

Appeal Ref: APP/D1780/W/16/3142409

Diegos Restaurant, 10-11 Bedford Place, Southampton SO15 2DB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
 - The appeal is made by Mr Luis Luis (Diegos Restaurant) against the decision of Southampton City Council.
 - The application Ref 15/01470/FUL, dated 13 July 2015, was approved on 30 October 2015 and planning permission was granted subject to conditions.
 - The development permitted is change of use from restaurant/café (Class A3) to mixed use restaurant/café, drinking establishment, hot food takeaway, non-residential institutions, assembly and leisure (Class A3/A4/A5/D1/D2) with new folding doors and retractable awning at first floor level.
 - The condition in dispute is No 4 which states: *Unless otherwise agreed in writing by the Local Planning Authority, the A4 (drinking establishments), A5 (hot food takeaway), D1 (non-residential institutions) and D2 (assembly and leisure) uses hereby permitted shall not operate outside the following hours: Monday to Sunday: 08:00 to 00:00.*
 - The reason given for the condition is: *In the interests of residential amenity.*
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is the likely effect that deleting the condition would have on the living conditions of residents in the local area.

Reasons

3. 'Saved' Policy REI7 of the City of Southampton Local Plan Review (LPR) states that proposals for A3, A4 and A5 uses will be permitted in city and other centres providing, amongst other things, that appropriate conditions are imposed where necessary to prevent the generation of any undue noise or other forms of nuisance directly arising from the proposed use. I am aware that the A3 use of these premises is long standing and unrestricted, which is why the Council has only applied the restrictions in the condition to the additional uses allowed under the permission. I address this issue in more detail below.
 4. Policy CS1 of the Southampton City Council Core Strategy (CS) states that a City Centre Action Plan (CCAP) will be prepared to identify sites and policies to promote and co-ordinate high quality development in the city centre. The CCAP was subsequently adopted in March 2015, following being found sound by the Examining Inspector.
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5. CCAP Policy AP8 (The Night Time Economy) states that proposals for new development and extended opening hours will be subject to restricted opening times for Class A3, A4 and A5 uses dependent on location as set out in Table 5 on CCAP pages 40 and 41. Paragraphs 4.69-4.81 set out the Council's approach to balancing the tension between developing the night time economy and the need to reduce noise and disruption to people living in and close to the city centre.
6. This approach designates two areas of the city centre as late night hubs (LNH) and several other areas as evening zones (EZ). LNHs (such as the Western Docks) are located away from residential areas and are appropriate for late night uses with opening hours up to 3am including nightclubs, casinos and other entertainment (D2) as well as A3-A5 uses. EZs contain a concentration of existing pubs, bars and nightclubs but are generally either within or close to residential areas. Proposals for new uses which require planning permission, and are otherwise acceptable, will be subject to restricted opening times of midnight or 1am in accordance with the specific times set out in Table 5. The Council's City Centre Masterplan also notes that the balance of residential and evening economy and business uses is sensitive and can sometimes be an issue.
7. Bedford Place/London Road is an EZ with a terminal hour of midnight. It also lies within the Cumulative Impact Policy Area for Licensing Applications as this area was identified by the Council as already suffering from noise, disturbance and anti-social behaviour adversely impacting on the living conditions of residents at night. As a result applications for new premises or substantial variations to existing licences such as longer opening hours are unlikely to be permitted unless the applicant can demonstrate that the changes will not have an adverse impact on the area.
8. The Council state that there is an existing and ongoing issue associated with noise and disturbance in EZs (late night zones) arising from the concentration of night time uses in close proximity to residential dwellings.¹ It also states that it has been consistent over a long period of time, as demonstrated in the cited appeal cases it refers to in its appeal statement, in applying the terminal hour of midnight in this area. I have no evidence from the appellant to contradict this statement.
9. As a matter of statute and national policy applications for planning permission should be determined in accordance with the development plan unless material considerations indicate otherwise.²
10. The appeal site is a double fronted two storey mid-terrace commercial premises, which backs onto Lower Banister Street opposite the Bedford Place public multi-storey car park from where its rear elevation can be clearly viewed. The area is a mixed commercial and residential area. This side of Bedford Place consists of mainly two storey nineteenth century commercial units, most of which are a mixture of A3, A4 and A5 units but with some residential uses on upper floors. Further north is a modern 4-storey block of residential flats (Roebuck House) with a Sainsbury's Local occupying the

¹ Council's appeal statement paragraph 6.10

² S38(6) Planning & Compulsory Purchase Act 2004 and S70(2) of the Town & Country Planning Act 1990; and paragraph 11 of the National Planning Policy Framework (NPPF)

ground floor retail unit. To the west are residential streets including further west the area known as the Polygon.

11. Hence there are residential properties, both houses and flats, very close to the appeal site. At least some of the customers from the appeal premises, in common with other similar late night premises on Bedford Place, will inevitably disburse through these residential streets, which could and apparently does give rise at times to noise, disturbance and anti-social behaviour detrimental to residents' living conditions.
12. The appellant argues that the imposition of a midnight terminal hour when the original A3 use was always unrestricted is unreasonable. I acknowledge that Condition 3 of the permission states that the A3 use shall remain as the principal use and that the other uses shall remain secondary and that there was previously an ancillary element of A4 and A5 uses.
13. But the permission expanded this, formalising the A4 and A5 uses and adding D1 and D2 uses to enable dance classes and live music/dance performances to be held at Diego's. These uses, or new 'mixed use' as the appellant prefers to term it, were clearly new uses at the time the permission was granted. If this was not the case there would have been no need to have applied for the permission. The permission clearly allows an expanded mixture of uses which is likely to attract a greater number of patrons than a sole A3 use. The removal of the terminal hour condition would obviously allow such uses to operate until whatever time in the morning the appellant is able to secure a license until.
14. There is no evidence that Diego's is not a well run establishment and no specific indication that its customers have given rise to any particular problems of noise, disturbance or anti-social behaviour late at night to date. I have no doubt that it contributes to the cultural life of the city attracting as it does many Portuguese and Spanish speakers including family groups.
15. However, removing the terminal hours condition would increase the likelihood of the problems set out above because people would be leaving the appeal site later, possibly much later, when the impact of any noise and disturbance on nearby residents would be more severe. This is because residents would be more likely to be asleep and it is reasonable that their sleep should not be disturbed by noisy or rowdy behaviour often associated with people who have been drinking until the early hours of the morning. The removal of the condition would allow patrons of the appeal premises to drink until the early hours of the morning. The Council's policy framework is designed to prevent any worsening of current problems in this respect.
16. The permission is also in respect of the appeal property and not personal to the appellant so it could be taken over by an establishment or operator that was not as responsible as the appellant over the behaviour of its patrons. I acknowledge that the appellant employs door security to ensure that people who are drunk or aggressive are not admitted to the premises, but no establishment has any control over its customers once they have left the premises.
17. The appellant considers that the licensing regime and other legislation should be used by the Council and Police to prevent such problems from occurring. Whilst these other legislative regimes can and do also control noise,

disturbance and anti-social behaviour it is clear that the Council wishes to tackle such problems in a holistic way, which is practical and reasonable. The fact that the licensing or other legislative regimes can be used does not exclude the appellant from the need to comply with planning policy in the development plan unless there is a good reason why he should be an exception to it.

18. The extra floor space at first floor level granted under permission 03/00905/FUL did not impose a terminal hours condition because the premises already had an unrestricted A3 use and the application was for additional A3 floor space, and for the Council to have done so may have been unreasonable. That permission was not for the same totality of uses as this permission gives and so is not comparable.
19. The appellant states that several lawful development certificates (LDC) have recently been granted for early morning hours of trading. However, LDCs do not have to comply with extant planning policy and so are irrelevant to this appeal. The Council's planning policies can only obviously apply to proposals where planning permission is required, as in this case.
20. I appreciate that the deletion of the condition would give the appellant much more flexibility to run his business in the way that he chooses, including catering for more parties with music and dance later into the evening, and that this would be likely to make his business more profitable. But I have seen no evidence to demonstrate that the business is currently unviable.
21. The condition's removal would also clearly enhance the night time economy of the Bedford Place EZ. But freeing up the enterprise from the controls imposed by the condition must be balanced against the needs of nearby residents. The effects of more people leaving Bedford Place and walking or driving home through the surrounding residential streets early in the morning would, I conclude, be likely to adversely affect the living conditions of such residents for the reasons I set out above. No satisfactory reason has been given to except this establishment and these premises from the Council's recently adopted policy framework.
22. The condition is necessary and reasonable and meets the other tests for conditions set out in paragraph 206 of the NPPF and in Planning Practice Guidance. It seems to me that allowing Diego's, along with similar business uses, to stay open until midnight strikes a reasonable balance between the needs of such enterprises that mainly rely upon evening trade for their success and the needs of residents in the local area to obtain a good night's sleep free of disturbance.
23. The deletion of the condition would therefore be contrary to CCAP Policy AP8, 'saved' LPR Policy REI7 and also to Policy SDP1(i), which states that permission will only be granted for development which does not unacceptably affect the health, safety and amenity of the city and its citizens. It would also be contrary to paragraph 17 bullet point 4 of the NPPF.
24. For the reasons given above I conclude that the appeal should be dismissed.

Nick Fagan

INSPECTOR