



Appeal Decision

Site visit made on 7 November 2016

by Caroline Mulloy BSc (Hons) DipTP MRTPI

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

Decision date: 14th November 2016

Appeal Ref: APP/X1355/W/16/3155884

97 Claypath, Durham DH1 1RG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Ms Lajan Omer Hama against the decision of Durham County Council.
 - The application Ref DM/16/01017/VOC, dated 29 March 2016, was refused by notice dated 16 June 2016.
 - The application sought planning permission for conversion of an A2 vacant driving school office to an A3 café or restaurant including the erection of an external flue on the rear elevation without complying with a condition attached to planning permission Ref 4/11/00713/FPA, dated 7 November 2011.
 - The condition in dispute is No 5 which states that: The hours of operation of the A5 hot food takeaway shall be between 9am and 11pm only and at no other time.
 - The reason given for the condition is: In the interests of residential amenity as there are residential properties adjacent to the planning application site in accordance with Policy S2b and S10 of the City of Durham Local Plan 2004.
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is the effect of any noise and disturbance during the proposed extended opening hours on the living conditions of neighbouring occupiers.

Procedural Matters

3. The hot food takeaway is currently operating beyond the 11pm closure time specified on the planning permission¹. The application is, therefore, retrospective and I shall deal with the appeal on this basis.

Reasons

4. The appeal property is situated at the end of a row of three-storey terraced commercial properties and is currently operating as a hot food takeaway. The upper floors of the appeal premises are occupied as separate residential flats. The site lies within the secondary shopping area of Durham and within Durham Conservation Area.

¹ Planning application reference: 4/11/00713/FPA

5. Immediately adjacent to the appeal premises is an estate agents and there are other commercial uses including shops, hot food takeaways, public houses at ground floor level with residential above along the north side of Claypath. The south side has more residential accommodation at ground floor level. Across the road from the appeal premises is Millenium Square and the entrance to the Walkergate Leisure Complex alongside the Gala Cinema. I would, therefore, describe the locality as characterised by mixed commercial and residential uses. As such residents in this and adjacent buildings will already be affected by a degree of noise and disturbance.
6. The Council's delegated report sets out information on the operating hours of similar used on Claypath. The takeaway at no 92 has permitted opening hours of 1100 to 0100; no 57 Claypath has permission to operate no later than 1830; no 85 Claypath has no hours condition attached but does appear to have been granted permission subject to a section 106 obligation, although no details of the obligation are before me; No 86 Claypath has permission to operate as a hot food takeaway from 1100 to 2300 Monday to Thursdays and 1100 to 0300 Fridays to Saturdays; the United Reform Church has planning permission to operate a restaurant with hours restricted to 2300 Sundays-Thursdays, 0000 Fridays-Saturdays; and no 94 Claypath sought to extend its opening hours for a hot food takeaway from 2300 to 0300, however, the application was refused and a subsequent appeal dismissed.
7. Whatever may happen in practice the ability through planning permission to remain open until 0300 hours seems restricted to no 86 which is limited to 2 nights and no 85 Claypath. I note that both of these decisions precede the National Planning Policy Framework (the Framework) and no 85 Claypath precedes the current development plan. This limits the weight which I can attach to them in my Decision.
8. Hot food takeaways have the potential to adversely affect the living conditions of nearby residents by virtue of noise and odour caused by cooking inside the premises and noise and general disturbance caused by customers and delivery vehicles coming and going outside the premises. Customers would have to wait whilst their food is being prepared resulting in customers congregating in the waiting area or even outside. Such effects can be particularly intrusive when they take place late into the evening when other background noises generally diminish.
9. The application subject of the appeal and three other applications were submitted following complaints received from the Alcohol Harm Reduction Unit of the Police making representations to the Council's enforcement section regarding the problems that the late night opening of the hot food takeaways was having on residential amenity.
10. A number of objections were received in response to the planning application and to the appeal. I acknowledge that some of those representations are from occupiers of residential properties further away from the appeal property and are, therefore, unlikely to be directly affected by the proposal.
11. However, I am particularly concerned regarding the affect of the proposal on the residential flats above the appeal premises and those immediately adjacent to the west. Any noise generated in the property is likely to be particularly experienced by the flats immediately above. I notice that the flats above have a separate entrance and operate independently to the appeal premises. Whilst there may have been no complaints from the existing tenants consideration also needs to be

given to the living conditions of future occupiers. I also note the student accommodation currently under construction on the other side of the road.

12. There is no evidence to suggest that any such noise would be attenuated and given the close proximity of residential properties it would not be reasonable to leave the acceptability of any such noise measures to be approved by way of planning condition.
13. The appellant contends that the opening hours should be aligned with that of the operating licence which extends to 3am, its current operation and that of other premises in the area. It may be that licenses have been granted for hours that vary from those allowed by the planning permission. Such licences cannot, however, fetter a decision on a planning application, which is to be made on the planning merits of the particular proposal.
14. The appellant contends that the proposal would align the opening hours with those of the bars and clubs of the Walkergate Leisure Complex (the Complex) which are licensed until 2000 with closure for 0230. However, the proposed opening hours would extend beyond those of the Complex and the appeal premises is separated from the bars and restaurants by Millennium Square and the library.
15. The appellant also contends that residents, many of them students would be aware of the lively nature of the area before signing a lease and are more likely to tolerate higher levels of noise and disturbance. However, whilst occupiers of those flats must have to tolerate higher levels of noise and disturbance than they would in a normal residential area that does not deny them the expectation of reasonable quiet during the late evening and early hours of the morning.
16. Attention is drawn to the effect of the restricted hours of opening on the viability of the business and also a letter from the appellant's accountant stating that the business will have to close. However, no detailed evidence is before me to support this assertion. The economic benefits of the proposal must be weighed against the harm arising from the proposal to the living conditions of existing and future occupiers. I consider that the harm which I have identified outweighs the benefits.
17. I note that the appellant employs a security firm and that there have been no incidents in the premises. I also note the appellant's comments regarding the police strategy to clear the area of Claypath as quickly as possible at the end of a night. However, I am not clear how extending the opening hours of the appeal premises beyond the hours of the majority of similar uses in the area would achieve this objective.
18. For the reason stated above I conclude that the proposal would be contrary to saved Policy S2b of the City of Durham Local Plan (Local Plan) (2004) which states that development at ground floor level of Class A2 (Financial and Professional) and Class A3 (Food and Drink) within the secondary area, as defined on the proposals map will be permitted provided that they do not undermine the retail character of the street. Conflict also arises with saved Policy S10 of the Local Plan which states that development for Class A3 (Food and Drink) use will be permitted provided that, amongst other things, there are no adverse effects on the amenities of nearby occupants. Furthermore, there is also conflict with saved Policy 13 of the Local Plan which states that planning permission will not be granted for new development or changes of use which have a significant adverse effect on the amenities of residents within them.

19. Moreover, conflict arises with paragraph 17 of the Framework which seeks to secure a good standard of amenity for all existing and future occupiers and paragraph 69 of the Framework which seeks to promote safe and accessible environments where crime and disorder, and the fear of crime, do not undermine quality of life or community cohesion.

Other matters

20. There are no physical alterations proposed to the appeal premises and I am, therefore, satisfied that the proposal would preserve the character and appearance of the Durham Conservation Area.

Conclusion

21. For the reasons stated above and taking all other considerations into account, the appeal should be dismissed.

Caroline Mulloy

Inspector