
Appeal Decision

Site visit made on 22 November 2016

by Andrew Owen BA(Hons) MA MRTPI

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

Decision date: 12 December 2016

Appeal Ref: APP/C4615/W/16/3156935

The Crown, Simms Lane, Netherton, Dudley DY2 0PQ

- 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 NewRiver Retail Property Unit Trust, No.4 against the decision of Dudley Metropolitan Borough Council.
 - The application Ref P16/0343, dated 9 March 2016, was approved on 20 May 2016 and planning permission was granted subject to conditions.
 - The development permitted is described on the Council's decision as "The variation of condition 4 of planning permission P15/0503 to be varied to 'the premises shall not be open to the public before the hours of 07.00 nor after 23.00 Monday to Sunday (including Public Holidays) for a temporary 12 month period from the date of the first operation of the retail premises. Once the 12 month temporary period has ceased the hours of operation shall revert back to those as originally set out by condition 4 of planning permission P15/0503 which for clarity states that 'the premises shall not be open to the public before the hours of 07.00 nor after 23.00 Monday to Saturday, or before the hours of 08.00 nor after 23.00 on Sundays and Public Holidays.'"
 - The condition in dispute is No 4 which states that: "*The premises shall not be open to the public before the hours of 07.00 nor after 23.00 Monday to Sunday (including Public Holidays) for a temporary 12 month period from the date of the first operation of the retail premises. Once the 12 month temporary period has ceased the hours of operation shall revert back to those as originally set out by condition 4 of planning permission P15/0503 which for clarity states that 'the premises shall not be open to the public before the hours of 07.00 nor after 23.00 Monday to Saturday, or before the hours of 08.00 nor after 23.00 on Sundays and Public Holidays.'*"
 - The reason given for the condition is: "*To enable the Local Planning Authority to assess fully the impact of the change in the hours of operation for a trial period and to comply with Saved UDP policies EP7 and DD4.*"
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Decision

1. The appeal is allowed and the planning permission Ref P16/0343 for variation of condition 4 of planning permission P15/0503 to be varied to 'the premises shall not be open to the public before the hours of 07.00 nor after 23.00 Monday to Sunday (including Public Holidays) for a temporary 12 month period from the date of the first operation of the retail premises. Once the 12 month temporary period has ceased the hours of operation shall revert back to those as originally set out by condition 4 of planning permission P15/0503 which for clarity states that 'the premises shall not be open to the public before the hours of 07.00 nor after 23.00 Monday to Saturday, or before the hours of 08.00 nor after 23.00 on Sundays and Public Holidays', at The Crown, Simms Lane, Netherton, Dudley DY2 0PQ granted on 20 May 2016 by Dudley Metropolitan Borough Council, is varied by:
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- i) deleting condition 4 and substituting for it the following condition:
The premises shall not be open to the public before the hours of 07.00 nor after 23.00 Monday to Sunday (including Public Holidays).
- ii) amending the description of the development to 'Erection of new A1 store including ATM with dedicated external servicing, refuse and plant area, access arrangements, associated car parking and landscaping without compliance with condition 4 previously imposed on planning permission Ref P15/0503, dated 22 September 2015'.

Procedural matter

2. The Council's decision appears to have been a determination made under s73 of the Act. This section provides for a new planning permission to be created, separate from the pre-existing planning permission. However, the description of the development on the decision notice does not properly describe a form of development. From the information before me it appears that permission was sought for the erection of new A1 store including ATM with dedicated external servicing, refuse and plant area, access arrangements, associated car parking and landscaping without compliance with condition 4 previously imposed on planning permission Ref P15/0503, dated 22 September 2015. I will therefore vary the planning permission accordingly. There can be no injustice to either party in making this change since the ability to carry out the development granted by planning permission P15/0503 without compliance with condition 4 as originally drafted on that permission is the essence of what is sought and is not affected by my amendment.

Application for costs

3. An application for costs was made by NewRiver Retail Property Unit Trust, No.4 against Dudley Metropolitan Borough Council. This application is the subject of a separate Decision.

Main Issue

4. The main issue is whether the condition is reasonable and necessary in the interests of the living conditions of the occupiers of neighbouring properties with respect to noise and disturbance.

Reasons

5. The appeal proposal seeks to allow the store to open from 0700 hours on Sundays and Public Holidays, instead of from 0800 hours as currently permitted. Conditions 3 and 5 on the extant planning permissions control noise from plant and machinery, and the hours within which deliveries and dispatches can be made, respectively. Therefore the proposal relates solely to the effect of customers visiting the store between 0700 and 0800 hours on Sundays and Public Holidays.
6. The site comprises the car park to The Crown Public House. The proposal would be likely to involve noise being generated from the site at a time of day when, currently, The Crown is closed.
7. There are dwellings nearby on Simms Lane, Halton Street and Bournebrook Close. The properties on Simms Lane would be largely shielded from the proposed store and car park by The Crown which would be retained. Also there

is a tall brick wall in the south east corner of the site which would be retained and would generally stand between the parking spaces identified to serve The Crown and the houses on Bournebrook Close. The properties on Halton Street face away from the site and are separated from the development by tall boundary fencing on their rear boundaries. Nonetheless they are the closest houses to the parking spaces for the proposed A1 store, being around 20 metres from the nearest of those spaces, and so would be those most affected by the proposed alteration to the condition.

8. The noise assessment submitted with the application estimates that the ambient noise level between 0700 and 0800 hours on Sunday would be 47dB $L_{Aeq\ 1hr}$. The reason it is estimated is because the monitoring equipment was tampered with. Nonetheless, the given figure is not disputed by the Council, and an independent peer review concluded that this figure was not an unreasonable assumption. Subsequently, during the appeal, a second background noise survey was undertaken and measured the actual ambient noise level on a Sunday between 0700 and 0800 hours as being 52 dB $L_{Aeq\ 1hr}$.
9. The assessment accounts for the noise from cars driving in and out of the car park, manoeuvring, starting and stopping. It measured this noise as having a Single Event Level (SEL) of 67-70 dB at a distance of 3 metres from the source. A maximum of 26 car trips would take place between 0700 and 0800 hours on a Sunday or Public Holiday.
10. The assessment estimates that there would, at most, be an increase of around 1dB $L_{Aeq\ 1hr}$ at the nearest noise sensitive receptor based on the original estimated ambient noise levels and the nearest receptor being 11 metres from the noise source. When the noise of car doors shutting were added, the SEL was measured at 69-72 dB, which would result in a greater increase in noise in at the receptors than previously considered. However the nearest neighbouring properties on Halton Street are much further than 11 metres away, and ambient noise levels have been measured as being louder than those used in the original assessment. National guidance within the Design Manual for Roads and Bridges advises that an increase of less than 3dB is likely to be noticeable but have no intrusive impact. I consider it very unlikely that the proposal would result in an increase of more than 3dB at the nearest receptors.
11. A supplementary assessment was undertaken to calculate the L_{AFmax} noise levels, which would be more appropriate for fast occurring noises such as a car door shutting. This calculated that such noise, when measured from within a building with an open window, would be between 38 and 45dB L_{AFmax} at a distance of 20 metres. The World Health Organisation guidelines¹ state that when measured inside bedrooms with windows partly open, noise should not exceed approximately 45 dB L_{AFmax} more than 10 - 15 times a night. Even if the anticipated 26 car trips within the hour were to be exceeded, the noise generated would not be likely to exceed 45dB L_{AFmax} .
12. The figures in the $L_{Aeq\ 1hr}$ and L_{AFmax} assessments are not disputed by the Council. I acknowledge that the lack of any harmful impact, as anticipated by the calculations in the various assessments, does not necessarily mean the neighbours would not be able to hear noise from the site and may complain if they consider they are being disturbed. Nonetheless, from the evidence before

¹ World Health Organisation, 1999, Guidelines for community noise.

me, I consider any noise experienced by the nearby occupiers would not be likely to be disturbing.

13. Also I accept that noise from customers, and the number of customers to the site within the hour in question, is beyond the control of the applicant and would be variable. However any assessment of a proposed development is based on anticipated effects based on a number of assumptions and professional experience. The assumptions that have been made in the noise assessment and the supplementary technical notes are reasonable and the methodologies used are appropriate. As such the conclusions within them are robust and can be given weight.
14. Using both a $L_{Aeq\ 1hr}$ and a L_{AFmax} assessment, the proposed extension to the opening hours would most likely not result in any material disturbance being caused to the occupiers of neighbouring properties. As such whilst I note the Council's reasons for imposing a temporary condition on the development, I consider the information provided by the appellant in respect of the nature of the use, the likely number of customers and noise likely to be generated, was sufficient to enable the Council to make a definitive determination of the application and to not require a 12 month trial period. As such I do not consider the temporary condition is necessary or reasonable in the interests of ensuring satisfactory living conditions for the occupiers of neighbouring properties with respect to noise and disturbance.
15. The alternative condition proposed by the appellant would meet all the tests as required by paragraph 206 of the National Planning Policy Framework and the advice in the Planning Practice Guidance and would ensure the living conditions of the occupiers of neighbouring dwellings are protected. With this amended condition in place the proposal would accord with saved Policies EP7 and DD4 of the Unitary Development Plan which both effectively aim to protect residential amenity.

Conclusion

16. For the reasons given above, and taking account of all other considerations, I conclude that the appeal should be allowed.

Andrew Owen

INSPECTOR