
Appeal Decision

Site visit made on 8 November 2016

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

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

Decision date: 28 December 2016

Appeal Ref: APP/D4635/W/16/3156917

The Ashmore, Griffiths Drive, Wolverhampton WV11 2LJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by NewRiver Retail against the decision of Wolverhampton City Council.
 - The application Ref 16/00577/RC, dated 1 June 2016, was refused by notice dated 13 July 2016.
 - The application sought planning permission for the erection of two retail units, including an ATM, refuse and plant area without complying with a condition attached to planning permission Ref 14/01283/FUL, dated 20 August 2015.
 - The condition in dispute is No 4 which states that: Goods deliveries, despatch and collections of refuse shall be restricted to [0800 to 1800] hrs Mondays to Saturdays and 0900 to 1800 Sundays and Bank and Public Holidays.
 - The reason given for the condition is: in the interests of amenity of the area.
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Decision

1. The appeal is allowed and planning permission is granted for the erection of two retail units, including an ATM, refuse and plant area at The Ashmore, Griffiths Drive, Wolverhampton WV11 2LJ in accordance with the application Ref 16/00577/RC dated 1 June 2016, without compliance with condition No 4 previously imposed on planning permission Ref 14/01283/FUL dated 20 August 2015 but subject to the conditions in the attached schedule.

Preliminary Matters

2. The appellant has submitted a revised Noise Impact Assessment, September 2016 (NIA), a Service and Delivery Management Plan (SDMP), amended details of the position of the acoustic fencing and details of the acoustic fencing. These details have also been submitted to the Council in relation to the discharge of conditions on the original planning permission. All parties have had the opportunity to comment on these and as such they would not be prejudiced by my consideration of them. I have dealt with the appeal on this basis.
 3. Section S73 applications are commonly said to be seeking to vary or remove conditions to which an existing permission is subject. However, that is not strictly the case. If such applications (or appeals against their refusal or non-determination) succeed, a completely new permission is created that stands alongside the original and the applicant or appellant is able to choose which is
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implemented. The 2016 permission¹ is described as a variation of condition 9 (to extend hours of opening from 0800-2300 Sundays and Bank Holidays to 0700-2300). However, as the original permission² was for the erection of two retail units, including an ATM, refuse and plant area I have used this description in the formal decision and banner heading.

4. The Council's reason for refusal cites Policy B5 of the Wolverhampton Unitary Development Plan (UDP). However, as this relates to design standards for Class B employment and sui generis commercial uses and not retail uses I do not consider that it is relevant in this case.

Application for costs

5. An application for costs was made by NewRiver Retail against Wolverhampton Council. This application is the subject of a separate decision.

Background and Main Issue

6. Planning permission has been granted for two new retail units, including an ATM, refuse and plant area and the retail units appeared to be substantially complete at the time of my site visit. The main issue is the effect that varying condition No 4 would have on the living conditions of the occupants of neighbouring properties, with particular regard to noise and disturbance.

Reasons

7. The appeal site is located on Griffiths Drive adjacent to The Ashmore, a public house, a car sales business and St. Albans Church. The area to the north of the site is characterised by a mix of uses, whereas, the area to the south is predominantly residential in character. The yard area for deliveries would be in close proximity to the southern boundary of the site and all deliveries would enter the site through The Ashmore's car park off Peacock Avenue. The dwellings on Townson Road are at a slightly lower level than the appeal site.
8. The proposal would extend the delivery hours from between 08.00 and 18.00 to between 07.00 and 20.00 on Mondays to Saturdays. There is no proposed alteration to the hours on Sundays and Bank and Public Holidays. The main reasons for extended servicing hours are based on the proposed operator's need for flexibility as to the timing of service vehicle visits to the store. The key issues of concern are the coordination of smaller delivery vehicles and the ability for the store to be able to receive fresh produce within the extended hours.
9. I acknowledge that the National Planning Policy Framework (the Framework) supports sustainable economic development and as such I give this significant weight. However, it also seeks, amongst other things, to secure a good standard of amenity for all existing and future occupants of buildings.
10. As set out in the appellant's NIA the main sources of noise are likely to be the unloading and loading of trolleys out of and into the vehicle, the wheeling of trolleys between the vehicle and the service entrance to the store, the operation of the vehicle's tail lift, the reversing alarms on the vehicles and the opening and closing of the vehicle's rear door. There would also be some

¹ 16/00085/RC

² 14/01283/FUL

engine noise from vehicles as they arrive and leave the store and travel through the car park.

11. There would also be noise from the plant and machinery associated with the retail units. However, condition 3 of the original permission controls the noise emitted from any fixed mechanical plant on the site and it states that it shall not exceed the background noise level (LA90,T) by more than 0dB(A) at any time.
12. I acknowledge that the operation of the retail units would increase the frequency of delivery vehicles using the site from the previous use as solely for a public house. This does have the potential to increase the noise and disturbance experienced by neighbouring occupiers in Townson Road and Peacock Avenue and this is recognised in the NIA. Consequently, mitigation measures including an acoustic fence were proposed as part of the original application. The details of the acoustic fence, including the amended siting have been submitted to the Council and taken into account in the NIA.
13. The NIA has been revised to take into account the concerns raised by the Council during the determination of the 2016 application³. The NIA finds that with the mitigation measures in place there would be an indication of the increase in deliveries and refuse collections having a less than adverse impact, depending on the context, for the neighbouring occupiers in Peacock Road. In relation to the occupiers of the Towson Road properties it finds that the impact would be indicated to be low depending on the context.⁴ The appellant has also produced a SDMP to include the further mitigation measures suggested in the NIA and that the store operator employs as standard operations. I acknowledge that some of the measures included in the SDMP are reliant on the effective management of the site and that smaller deliveries could take place at the front of the appeal site. However, the NIA illustrates that even on a worst case scenario the likely impact of the extended hours would be less than adverse on the neighbouring occupiers.
14. I note that the NIA is a technical document but it provides evidence on the acoustic environment and the likely effect of the proposal. The extended hours would be at a time when the majority of neighbouring occupiers would be at home and they may be asleep at these times. However, the NIA has assessed the nearest noise sensitive receptors as the first floor rooms of the dwellings in Townson Road and Peacock Avenue. In such circumstances and with little technical evidence to the contrary, whilst there would be some increase in noise and disturbance for nearby neighbours, this would not be to a level that would be significantly adverse.
15. Consequently, based on the evidence before me and taking all the above into account, I find that varying condition No 4 would not cause unacceptable levels of noise and disturbance and would not result in material harm to the living conditions of occupiers of neighbouring properties. As such the development would comply with UDP Policy EP1 which, amongst other things, seeks development that would not have a material adverse impact on the immediate, medium or long term amenity of users of the surrounding areas through noise pollution. It would also comply with paragraph 123 of the Framework in that planning decisions should aim to avoid noise from giving rise to significant

³ 16/00085/RC

⁴ Tables 6.4 and 6.5

adverse impacts and mitigate and reduce to a minimum other adverse impacts on health and quality of life arising from noise from new development.

Other Matter

16. The appellant has cited an appeal decision⁵ for the erection of a convenience store. However, I do not have the full details of the case before me and as such I cannot be certain that it is comparable to this case and as such I give it little weight. In any case, I am required to determine the appeal on its merits.

Conditions

17. The Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. As I have no information before me about the status of the other conditions imposed on the original planning permission, I shall impose all those that I consider remain relevant. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties.
18. I have imposed a condition specifying the relevant drawings as this provides certainty. I have not cited drawing No RFI-0301-D as this has been superseded in part by drawing No RF58-0311-02. The conditions in relation to noise from plant, delivery hours, the construction management plan, construction period operating hours, development operation hours and the acoustic fence are required in the interests of the living conditions of neighbouring residents. The conditions in relation to materials, landscaping and the shopfronts are required in the interests of the character and appearance of the area. In the interests of highway safety I have imposed conditions in relation to the Peacock Avenue access and the parking areas. I have imposed the condition on cycle/motorcycle facilities to promote sustainable modes of transport. The condition in relation to the damp proof membrane is required to prevent any ingress of landfill gas into the building.
19. In the case of the pre-occupation/use conditions, I consider that resolution of the matters specified to be of sufficient significance to the achievement of an acceptable development and in safeguarding the subsequent form of development such that it would be inappropriate to proceed further without the prior clarification and certainty that would arise from their approval.
20. I have not imposed a condition in relation to the submission of a NIA as the submitted revised NIA meets these requirements.

Conclusion

21. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed.

D. Boffin

INSPECTOR

- Schedule Attached -

⁵ APP/D0650/W/15/3134654

SCHEDULE OF CONDITIONS

1. The development hereby permitted shall be carried out in accordance with the following approved plans: -

Plan Type	Reference	Version
Proposed elevations	RF1-0306	F
Proposed floor plan	RF1-0303	E
South Elevation view from Townson Road	RF1-0308	
Site Location Plan	RFI-0300	A
Service Area Layout	RFI-0307	
Acoustic Fence Details	RF58-0311	02

2. The rating level (L_{Ar},T_r) of the noise emitted from [fixed mechanical plant] at the development, shall not exceed the background noise level (L_{A90},T) by more than [0]dB(A) at any time. Noise levels shall be determined at any residential (or other noise sensitive) premises, in accordance with BS 4142:2014. Where a background noise measurement cannot be determined at the assessment position, a representative notional level shall be obtained in accordance with BS 4142:2014.

For the purpose of this condition, Time T is determined as follows:
Background noise levels (L_{A90}, T): Time T shall be sufficient to obtain a representative value of the background noise and be not less than 15 minutes in duration. Rating noise level (L_{Ar}, T_r): Time T (the reference time interval) is 1 hour between the hours of 07.00 to 23.00 hrs. Rating noise level (L_{Ar}, T_r): Time, T (the reference time interval) is 15 minutes between the hours of 23.00 hrs to 07.00hrs on the following day.

3. Goods deliveries, despatch and collections of refuse from the site shall occur only between the hours of 07.00 to 20.00 Mondays to Saturdays and 09.00 to 18.00 Sundays and Bank and Public Holidays.
4. The construction phase of the development hereby permitted shall be carried out in full accordance with the Construction Management Plan received on the 17 November 2015. Any deviations from the plan for operational reasons shall be notified to the Local Planning Authority in writing beforehand, or as soon as practicable afterwards in the event of any breach.
5. The existing access to the site from Peacock Avenue shall remain open and available for customers use at all times that the development hereby approved is open to customers.
6. During the construction period operational hours and commercial vehicle movements to or from the site shall be restricted to 08.00 to 18.00 hrs Mondays to Fridays and 0800 to 1300 hrs Saturdays, and at no time on Sundays or Bank and Public Holidays.

7. The premises shall only be open for customers between 07.00 and 23.00 on any day.
8. The cycle and motorcycle facilities shall be provided in accordance with the details submitted to the Local Planning Authority on 17 November 2015 on Plan Ref RFI-2402 dated 13 January 2015. The approved cycle and motorcycle parking facilities shall be provided prior to the use or occupation of any part of the development hereby permitted.
9. The materials used in the construction of the development hereby permitted shall be in accordance with the details submitted to the Local Planning Authority on 17 November 2015 on Plan Ref RFI- 2401. Any changes to the materials schedule shall be submitted to the Local Planning Authority for approval before being used in the construction of the development hereby permitted.
10. The acoustic fence as detailed within the submitted acoustic fence specification and Plan ref RF58-0311 rev 02 shall be constructed on site prior to the first use of the retail units hereby permitted. The fence shall be maintained and where necessary replaced by a fence of the same or higher specification for the lifetime of the development.
11. The landscaping scheme shall be fully implemented before the first use of the development hereby permitted and shall be maintained thereafter in perpetuity. This maintenance shall include the replacement of any tree or shrub which is removed, destroyed or dies by a tree or shrub of the same size and species as that which it replaces, unless otherwise agreed in writing by the local planning authority. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), areas of soft landscaping shall not be replaced by the provision of a hard surface nor shall they be used for parking or storage.
12. Prior to the use or occupation of the development hereby permitted, the parking areas shown on the approved plans shall be provided and shall thereafter be kept available for the parking of vehicles in connection with the use hereby approved, at all times.
13. The shopfronts hereby approved shall be glazed in clear glass that shall not be obscured, blocked, or blanked off, by any means, internally, or externally, including by means of shutters, curtains, posters or shelving. Clear views must be maintained into the interior of the units, showing displays of merchandise and activity by people/customers.
14. The proposed development site lies within influencing distance of a former landfill site located at Ashmore Park open space, therefore a 2000 gauge Damp Proof Membrane shall be installed in the foundation of the new building.