
Appeal Decision

Site visit made on 13 December 2016

by Richard S Jones BA (Hons) BTP MRTPI

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

Decision date: 10 January 2017

Appeal Ref: APP/C4615/W/16/3157418

The Hasbury Inn, 218 Hagley Road, Halesowen, Dudley B63 4QQ

- 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 against the decision of Dudley Metropolitan Borough Council.
 - The application Ref P16/0158, dated 3 February 2016, was approved on 23 March 2016 and planning permission was granted subject to conditions.
 - The development permitted is the variation of conditions 2, 4 and 14 of approved planning application P15/0502 to alter approved plans, delivery times and provision of an electric vehicle charging point and associated electrical infrastructure.
 - The condition in dispute is No 4 which states that:
 - 1) *No deliveries or despatches shall be made to or from the site and no delivery or despatch vehicles shall enter or leave the site (whether laden or unladen), before the hours of 07:00 nor after 20:00 Monday to Saturday for a temporary 12 month period from the date of the first operation of the retail premises. Once the 12 month temporary period for deliveries / dispatches has ceased the hours of deliveries / dispatches shall revert back to those as originally set out by condition 4 attached to planning permission P15/0502 and governing deliveries / dispatches between Mondays and Saturdays.*
 - The reason given for the condition is:
 - 1) *To protect the amenities of nearby residents and comply with Saved Policies EP7 (Noise Pollution) and DD4 (Development in Residential Areas) of the Dudley Unitary Development Plan.*
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Decision

1. The appeal is allowed and the planning permission Ref 16/0158, for the variation of conditions 2, 4 and 14 of approved planning application P15/0502 to alter approved plans, delivery times and provision of an electric vehicle charging point and associated electrical infrastructure, granted on 23 March 2016 by Dudley Metropolitan Borough Council, is varied, by deleting Condition No 4 and substituting it with the following condition:
 - 4) No deliveries or despatches shall be made to or from the site and no delivery or despatch vehicles shall enter or leave the site (whether laden or unladen), before the hours of 0700 hours nor after 2000 hours Monday to Saturday. Prior to beneficial use of the Class A1 store commencing, a Delivery Management Plan shall be submitted to and approved in writing by the local planning authority. All deliveries shall be carried out in accordance with the approved Delivery Management Plan.
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Application for costs

2. An application for costs was made by NewRiver Retail Property Unit Trust against Dudley Metropolitan Borough Council. This application is the subject of a separate Decision.

Background and main Issue

3. The application was made to vary Conditions 2, 4 and 14 of approved planning application P15/0502, which granted permission for changes to the existing elevations of the public house to facilitate a change of use to A1 store with ATM and associated servicing, refuse, plant and parking spaces. This was approved on 23 March 2016 under reference P/16/0158, subject to 17 conditions, including varied Conditions 2, 4 and 14. The appellant has confirmed that Conditions 2 and 14 have been satisfactorily varied. This appeal therefore relates solely to Condition 4, which, in respect of the original planning permission, states that:

"No deliveries or despatches shall be made to or from the site and no delivery or despatch vehicles shall enter or leave the site (whether laden or unladen), before the hours of 08:00 nor after 18:00 Monday to Saturday, or before the hours of 10:00 nor after 15:00 on Sundays and Public Holidays."

4. The reason for the condition is to protect the amenities of nearby residents and comply with Saved Policies EP7 (noise pollution) and DD4 (development in residential areas) of the Dudley Unitary Development Plan (UDP).

5. The application sought to vary Condition 4 as follows:

"No deliveries or despatches shall be made to or from the site and no delivery or despatch vehicles shall enter or leave the site (whether laden or unladen), before the hours of 07:00 nor after 20:00 Monday to Saturday, or before the hours of 10:00 nor after 16:00 on Sundays and Public Holidays."

6. It has been agreed between the parties that it is acceptable to extend the delivery time restrictions by one hour to between 1000 hours and 1600 hours on Sundays and Public Holidays and this restriction is the subject of a separate condition (No 1).

7. For Monday to Saturday, Condition 4 as varied states:

"No deliveries or despatches shall be made to or from the site and no delivery or despatch vehicles shall enter or leave the site (whether laden or unladen), before the hours of 07:00 nor after 20:00 Monday to Saturday for a temporary 12 month period from the date of the first operation of the retail premises. Once the 12 month temporary period for deliveries / despatches has ceased the hours of deliveries / despatches shall revert back to those as originally set out by condition 4 attached to planning permission P15/0502 and governing deliveries / despatches between Mondays and Saturdays."

8. The reason for the condition is the same as that set out for the original condition above.

9. The appeal therefore effectively seeks to remove the temporary nature of the condition to allow the business to permanently operate within the amended time restrictions from Mondays through to and including Saturdays.

10. Consequently, the main issue is whether Condition 4 is reasonable and necessary having regard to the living conditions of nearby residents with particular reference to noise and disturbance.

Reasons

11. The appeal relates to an existing public house with surface car park across its site frontage to Hagley Road and along its eastern boundary. The site also includes a delivery area, beer garden, children's play area and outbuilding.
12. It is flanked on its eastern side by a restaurant and takeaway and part of the rear garden of No 4 Red Leasowes Road. A shop and a small car sales business are located beyond. The western side is immediately flanked by a two storey property with a hairdressers' business on the ground floor. Beyond this property is an access to four dwellings which face towards the rear part of the site. The rear of the site is bounded by residential properties fronting onto Red Leasowes Road whilst a three storey retirement apartment scheme is situated on the opposite side of Hagley Road. The surrounding area is therefore mixed use residential and commercial, located approximately 400 metres south-west of Halesowen town centre.
13. The application was supported by a Noise Impact Assessment, which includes a sound survey to establish the current environmental sound climate for the site. Because the use is not operational, a database of noise measurements has been used from delivery vehicle noise and loading activities at other supermarket and convenience store developments to determine the likely noise impact of an extended period of deliveries at the nearest noise sensitive receptor, which is identified as No 7b Red Leasowes Road, situated to the rear of the proposed delivery yard.
14. It is explained that the likelihood of complaint is indicated by the difference between the noise from the new development and the existing background noise. Based on the measured noise levels, the background sound level for the purposes of the assessment has been taken to be 44 dBA during the weekday (including Saturdays) delivery period of between 0700 and 2000 hours. The assessment indicates that during this period the difference between the background sound level and the rating level of the delivery operations is likely to be +1 dB. For the weekend daytime assessment period (10:00 to 16:00 hours) the assessment states the difference is likely to be +4 dB.
15. A number of mitigation measures are identified in order to reduce the noise impact, including engines and radios being turned off, minimised use of reversing beepers where possible, drop heights being reduced to the lowest practicable levels, the use of a low noise, rubber floors in both delivery vehicles and around the delivery area, the use of rubber wheels on trolleys and all staff (including delivery drivers) being made aware of the necessity to keep noise to a minimum. With the use of appropriate mitigation measures the assessment concludes that deliveries to the store during the assessment period are likely to be acceptable thereby supporting the application to vary the restrictions detailed in Condition 4.
16. Following concerns expressed by the Council's Environmental Safety and Health Team, a further two supporting technical notes have been provided. The most recent note (TN002) clarifies that the number of deliveries that could take place during any one hour period is one, rather than the two considered in

original assessment. This is because of the time taken to process the stock following unloading, with an average dwell time of circa 40 minutes. On this basis it is stated that the numerical impacts considered in the assessment (+1 dB weekdays) should be reduced by 3dB and that the level of impact (unmitigated) is likely to be -2 dB during the proposed weekday operational times, which is considered by BS4142:2014¹ as being an indication of low impact.

17. I have also noted and given significant weight to the subjective assessment of the Council's Environmental Safety and Health Team and acknowledge the concerns raised regarding certain aspects of the assessment. However, in absence of any evidence to demonstrate a contrary position, I am satisfied that the assessment provides a satisfactory level of certainty to reasonably predict the effects of the development. The appellant has also confirmed the acceptability of imposing of a condition requiring a site specific delivery management plan, which would further mitigate any harm arising and would therefore be both necessary and reasonable. This would also benefit local residents within the delivery times already permitted.
18. Moreover, as the original planning permission has not been implemented, it is possible that the existing use as a public house could continue. In this regard, I have not been provided with evidence of any existing restriction on deliveries for that use, although I accept that these would likely be less than that of a shop. Nevertheless, the noise and disturbance associated with the continued use as public house represents a material fall-back position, to which I have attached moderate weight.
19. Moreover, the change of use from Class A4 (drinking establishments) to Class A1 (shops) is permitted development by virtue of Class of Schedule 2, Part 3, Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015. The public house could therefore in principle, change its use to a shop without planning permission and without any restriction on the times of delivery. This is also a material fall-back position to which I have given significant weight.
20. I also note that additional noise controls are provided by Condition 6 (relating to sound emitted from any fixed plant or machinery) and Condition 7 relating to the provision of an acoustic barrier to the boundaries shared with residential properties.
21. Therefore, having regard to the identified fall back options, the likely number of deliveries, the findings of the assessment, the secured provision of an acoustic barrier and the conditional control provided by securing a delivery management plan, I find that the extension of the delivery hours would not cause undue harm to the living conditions of nearby residents with particular reference to noise and disturbance. Accordingly, the temporary aspect of Condition 4 is not necessary or reasonable and the removal of the same would not result in conflict with Saved UDP Policies, DD2, DD4 or EP7, which require such proposals to include measures that would minimise noise emissions and allow development in residential areas where there would be no adverse effect upon residential amenity.

¹ Methods for rating and assessing industrial and commercial sound

Conclusion

22. For the reasons given above I conclude that the appeal should succeed. I will therefore replace Condition 4 with that set out in the formal decision.

Richard S Jones

Inspector