

Appeal Decision

Hearing held on 24 January 2017

Site visit made on 24 January 2017

by Amanda Blicq BSc (Hons) MA CMLI

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

Decision date: 14 February 2017

Appeal Ref: APP/Z5630/W/16/3156415

92 High Street, New Malden, Kingston upon Thames KT3 4EU

- 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 Cashino Gaming Ltd against the decision of the Council of the Royal Borough of Kingston-upon-Thames.
 - The application Ref 15/15396/FUL, dated 22 December 2015, was refused by notice dated 16 February 2016
 - The application sought planning permission for change of use from A2 (Financial and Professional services) to amusement centre (sui generis) and installation of new period style shop front without complying with a condition attached to appeal Ref APP/Z5630/A/04/1141359, dated 22 July 2004.
 - The condition in dispute is No 1 which states that: The use hereby permitted shall not be open to customers outside the following times: 0900 – 2000.
 - The reason given for the condition is: to prevent unacceptable noise and disturbance to the occupiers of nearby dwellings.
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Decision

1. The appeal is allowed and temporary planning permission is granted for (for change of use from A2 (Financial and Professional Services) to amusement centre (sui generis) and installation of new period style shop front) at 92 High Street, New Malden, Kingston upon Thames KT3 4EU in accordance with the terms of the application, Ref 15/15396/FUL , dated 22 December 2015 , without compliance with condition 1 previously imposed on planning permission Ref APP/Z5630/A/04/1141359, dated 22 July 2004 and subject to the following conditions:
 - 1) The use with the extended hours set out in condition 2 hereby permitted shall be for a limited period being the period of 2 years and 6 months from the date of this decision.
 - 2) The use hereby permitted shall only take place between the following hours:
0900 – 0100 hrs, Mondays – Sundays
 - 3) Prior to implementation of the extended opening hours set out in condition 2, the applicant shall carry out works to ensure that the rating level of the noise from external plant located at the premises shall be at
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least 5dBA lower than the existing background noise level at any given time of operation. The noise levels shall be measured or predicted 1m externally to any window at the nearest residential façade. Measurements and assessment shall be made according to BS 4142:2014 and contained within an acoustic report that shall be submitted to and approved in writing by the local planning authority. The external plant shall be retained in accordance with those details thereafter.

- 4) Prior to implementation of the extended opening hours set out in condition 2, the applicant shall install sound reduction measures between the separating floor/ceiling construction of the premises and the flat above. Details shall be submitted to and approved in writing by the local planning authority before installation and development shall comply with those details and shall be retained thereafter. The scheme shall be designed to be 5dB better than that given in Approved Document E (2003 Edition incorporating 2004 and 2010 amendments) of the Building Regulations (Table 0.1a, page 12).
- 5) The amusement machines installed in the premises shall be restricted to amusement with prize machines only.
- 6) No games of a sessional nature shall be played on the premises.
- 7) A window display shall be provided at all time in the windows fronting High Street.

Procedural Matters

2. The planning permission for the current opening hours of 0900 – 2200 hrs relates to a previous application for the variation of Condition 7 of the original application which was allowed at appeal¹. As such, although the application form for this appeal refers to the original planning application, I have referred to the appeal decision in the heading above as this is the current permission.
3. I visited the site after the hearing in the company of both main parties, and inspected the interior, the alley and proximity to dwellings on Firman Close, as well as noting evidence of residential accommodation above other businesses on High Street.

Background and Main Issue

4. This application was made to remove a condition from the original permission to enable 24 hour opening, following complaints that Cashino was operating on a 24 hour basis and in breach of planning permission.
5. The evidence before me indicates that the determinative factors in this appeal are whether the increased opening hours would generate noise and disturbance from comings and goings late at night, and whether this would be disruptive for the occupiers of on High Street and dwellings to the rear in Firman Close.
6. Accordingly, the main issue is whether the condition is reasonable and necessary, with reference to the living conditions of occupiers of nearby dwellings in respect of noise and disturbance.

¹ APP/Z5630/A/04/1141359

Reasons

Policy Background

7. The main parties disagree as to the relevance of the policies quoted in the reasons for refusal. With regard to Policy 7.15 of the London Plan² (TLP), I see no reason why TLP Policy 7.15B sections (a), (b) and (c), which address noise management measures, should not apply. I appreciate the appellant's argument that section (b), which requires development to mitigate and minimise the potential adverse impacts of noise is of the most relevance but this does not mean that section (a) which requires the avoidance of significant adverse noise impacts on health and quality of life, should not apply. Similarly, any development that generates noise will have an effect on the acoustic environment in broad terms and consequently I consider section (c), which refers to the acoustic environment, is also of relevance.
8. Policy DM10 (k) of the Local Plan³ (LP) states that new development should aim to have regard to the amenities of occupants and neighbours, including the avoidance of noise and disturbance. Notwithstanding that this policy is titled Design Requirements for New Developments, I see no reason to give section (k) any lesser weight than sections of the policy that deal with scale or layout etc. as argued by the appellant. The appellant also suggested that this appeal would not be new development. However, the proposed changes to opening hours that result in a planning permission would constitute new development, as the nature of the approved development would be altered.
9. LP Policy DM22 states that the Council will resist the concentration of specific entertainment venues with the propensity to generate late night noise and disturbance. Whilst I appreciate that the Council is aiming to restrict the cumulative effect of rowdy behaviour associated with certain types of venue, I give some weight to the appellant's argument that the appeal before me would be an isolated instance of an all-night venue. It could not therefore be considered as contributing to a concentration of venues with noise and disturbance issues. As such, I give this policy limited weight in my reasoning.
10. It was also argued by the appellant during the hearing that the appeal is concerned with the effects of noise, rather than the health of occupiers of nearby dwellings. However, I concur with the Council that the adverse effects of noise can have impacts on personal health as outlined in Planning Policy Guidance⁴ (PPG).

Noise and disturbance

11. The appeal site (Cashino) is a ground floor commercial premises on High Street, which is a town centre thoroughfare and bus route. I noted a mix of national chain stores in the area as well as independent cafes and restaurants. The footways appear to have been widened and the street scene is tidy and attractive with designated parking bays. Most of the ground floor businesses appear to have residential accommodation on one or two floors above the premises. To one side of Cashino there is a vehicular access (alley) serving a rear parking area with a pedestrian gate leading to the residential cul de sac of

² The London Plan, March 2015

³ Royal Borough of Kingston upon Thames, Local Development Framework, adopted April 2012

⁴ Ref ID 30-004-20140306

Firman Close. On my visit there were a few cars parked in the service area and the area appeared reasonably clean and tidy.

12. The evidence indicates there has been anti-social behaviour in the alley, which appears to have diminished following the cessation of 24 hour opening although no evidence has been submitted that conclusively links this behaviour to staff or patrons of Cashino. The appellant accepts that in the past staff have exited the building at the rear to have smoking breaks which caused disruption to the occupiers of the flat above Cashino. However, it was argued during the appeal that the rear fire door is not now required for evacuation and is kept locked; that was the case when I visited the site.
13. The PPG requires decision making to take account of the acoustic environment as outlined in the Noise Policy Statement for England (NPSE). This identifies levels of perception and the outcomes of those perceived noise levels on health, behaviour and quality of life for the receptors. The levels of effect range from no observed effect (NOEL) to significant observed adverse effect (SOAEL). The NPSE states that it is not possible to have one single objective noise-based measure to define these effect levels as they are likely to be different for different noise sources, for different receptors and at different times. The PPG also outlines a noise exposure hierarchy linked to the observed effect levels, which identifies specific examples of behaviour and attitude amongst receptors along a continuum of increasing noise⁵.
14. There are also quantitative guidelines in both the British Standard ⁶ (BS) and from the World Health Organisation⁷ (WHO) which link actual noise levels to behavioural responses and health effects on receptors.
15. The appellant has provided an acoustic report which gives survey data and compares this to the WHO guidelines⁸. The guidelines conclude that noise levels above 45 dB LAeq outside bedroom windows are considered to cause sleep disturbance and adverse health effects when windows are open.
16. The survey data ⁹ taken from a position directly outside Cashino indicates that both the averaged and minimum night-time background noise levels for the period 2300 – 0700 hrs are in excess of 45 dB LAeq. Consequently, I conclude that existing background noise is very close to levels that are likely to cause sleep disturbance when windows are open¹⁰. Using the NPSE guidance, this is likely to cause at least an observed adverse effect (OAEL). I note however that the source data for this conclusion demonstrates that there is a significant dip in averaged background noise between 0100hrs and 0500 hrs¹¹, although the loudness of the noise spikes that do occur, are not significantly different from those experienced throughout the day.
17. Survey data for within the alley¹² also indicates that for the night-time period surveyed, background noise levels are only just below 45 dB LAeq.

⁵ Council Statement of Case, page 9

⁶ BS 8233:2014

⁷ Guidelines for Community Noise

⁸ Table T5

⁹ Tables T2 and T4

¹⁰ Table T5

¹¹ Graph G2

¹² Table T4

18. The acoustic report provides predicted noise levels for a hypothetical conversation between three patrons standing outside Cashino. This attributes a noise level and its impact on the overall background noise. I concur with the appellant that the actual increase in loudness, at 2.9 dBA, would not be significant in absolute terms. Whilst I agree with the Council that human receptors are likely to be more sensitive to unpredictable noise during night-time hours, I am also aware that there are regular night buses along High Street and as well as many restaurants. Consequently there are likely to be instances of pedestrians talking as they walk along the road as well as buses stopping and starting, against which the additional noise of patrons conversing outside Cashino is likely to be insignificant.
19. The Council is also concerned that future patrons would leave taxis idling outside the premises and that this would contribute to the increased noise levels. However, it seems unlikely that customers would leave vehicles with the engines idling whilst they were Cashino, and although I appreciate that customers might park illegally on double yellow lines outside the premises, I am not satisfied that this would be a significant source of additional noise and disturbance, given the regular night bus service. The Council also stated during the hearing that the current opening hours were already unacceptable. However as I have noted elsewhere there is very little evidence to support this assertion. I also note that there is no recorded history of police attendance at the premises.
20. The distribution of residential accommodation near Cashino is thought to comprise first and second floor accommodation on High Street and dwellings on Firman Close¹³. Whilst I concur with the Council that the lack of objections from occupiers of the flatted accommodation cannot be presumed to indicate a lack of concern, the High Street has a mixed character and as such the tolerance of noise and disturbance during the night for flat dwellers is likely to be greater than that of occupiers of Firman Close, which has a pronounced residential character.
21. In the light of the above, I am not satisfied that the normal comings and goings of well-behaved patrons during increased opening hours would lead to a diminished quality of life, or cause behavioural changes substantial enough to raise the existing Oael to SOael, for occupiers of nearby dwellings.
22. However, notwithstanding that conclusion, I have concerns related to behaviour not modelled in the acoustic report as sudden and unpredictable noise, against a background of lower night-time noise levels, would be disruptive for occupiers of dwellings in the vicinity. The appellant has argued that if the appeal was to be allowed, a noise management plan (NMP) could address the management of patrons smoking outside, and CCTV could monitor use of the alley, amongst other issues. I appreciate that the NMP outlines good practice but it would be at least partly dependent upon the management practices of the shop owner and the behaviour of individual staff members. I also concur with the Council that an NMP would be difficult to enforce. It could not control the behaviour of patrons arriving or leaving, or necessarily moderate talking and shouting at levels above those used in the modelling. Furthermore, in addition to the inherent limitations of the NMP, its adoption

¹³ Statement of Common Ground

could not be imposed upon future owners of the premises. As such, I give the appellant's argument that the NMP would control behaviour, little weight.

23. I also share the Council's concern that the customer base would increase if opening hours were extended. It seems unlikely that a shop with 26 machines, albeit with varied software, is satisfied with an average head count of 5 customers, especially as there are two members of staff on duty at all times.
24. I am also concerned that there might be an increase of anti-social behaviour or disturbance in the alley. The Council argued that when Cashino was previously open all night, it was the only premises open at that time of night and inferred that there must have been a link between anti-social behaviour and Cashino. However, there are many restaurants on High Street and staff will be leaving those premises to go home after the official closing hours. Furthermore, I am not satisfied that patrons would prefer to urinate in the alley, as alleged, when there are clean and warm facilities inside Cashino.
25. Nonetheless, there is a representation from a local resident who appears to have experienced disturbance from the alley and notwithstanding that there is no conclusive evidence linking Cashino to such disturbance, the alley's proximity to Cashino's entrance raises the possibility that there could be a link. Consequently, whilst I am not entirely satisfied that the disturbance in the alley is related to Cashino's opening hours, neither can I discount the possibility.
26. Consequently whilst I see no reason to disagree with the conclusions of the modelling in the acoustic report, this was based on the predictable behaviour and number of well-behaved patrons. There is a strong likelihood that an increased volume of patrons, possibly with different work and social patterns facilitated by increased opening hours, could cause occasional disruption outside that would not be managed by the NMP, and that would cause a SOAEL for the occupiers or nearby dwellings.
27. In the light of the above, although I have concluded that the predictable behaviour of patrons would not be contrary to the provisions of LP Policy DM9 and TLP Policy 7.15as outlined above, I have also concluded that there is a small likelihood that significant unpredictable instances of noise and disturbance could still occur, which would be to the detriment of living conditions of occupiers of nearby dwellings and which would be contrary to those policies. I have noted above that I do not consider LP Policy DM 22 to be of particular relevance to this appeal.
28. For these reasons, some restrictions of hours should continue.

Temporary permission

29. The appellant has suggested that a temporary permission be granted so that extended opening hours can have a trial period. I appreciate that the Council considers that the use of the shop as an amusement centre has already had a trial period when the shop had 24 hour opening, albeit illegally, and it would be unfair on residents of nearby dwellings to experience additional noise and disturbance again. However, there is little evidence before me to definitively link that period of extended opening to increased noise and disturbance arising from the premises. Whilst I appreciate that the Council cannot reveal details of previous complaints, it nonetheless means I have limited evidence in support of their case and am unable to give it particular weight in this regard.

Consequently, I consider a trial period would identify whether there is a direct link between opening hours and noise and disturbance, whilst also giving the Council an opportunity to monitor and review the situation.

30. Although the appellant argued that residents have protection under Paragraph 122 of the National Planning Policy Framework, this states in relation to pollution that councils should focus on whether the development and its impact is an appropriate use of the land, rather than the control of the emissions. In this case I have concluded that the development would be an appropriate use of land as long as the impact of the development, that is noise and disturbance, can be controlled. However, there is sufficient doubt in my mind as to whether the impact of the development can be effectively controlled, to lead me to conclude that a temporary permission would be appropriate.
31. The appellant has noted that the former period of 24 hour opening occurred when the premises was under different management. However, insofar as the premises may be under different management in the future, and permissions and conditions run with the land, not ownership, I give this argument little weight.
32. The appellant has also submitted a condition suggesting an extension of opening hours to 0130 hrs if this was considered more acceptable than 24 hour opening. This time appears to align with a reduction in background noise, as evidenced by Graph G1 in the acoustic report. However, the more detailed data given in Graph G2 appears to show the reduction in background noise occurs around 0100 hrs. Furthermore some time would elapse between the premises closure and the exit of staff. As such I have used this slightly earlier time in the conditions as I consider it reflects more accurately the start of a diminution of background noise levels.

Other matters

33. A number of objections have been submitted by interested parties. However, having reviewed the list of residents notified of the hearing I concur with the appellant that the majority do not live in the immediate vicinity. Although I appreciate concerns that disturbance may affect the character of High Street for these residents, the evidence before me also states that there is little footfall after 2300 hrs. Moreover, distance from the appeal site would ensure the living conditions of most of these interested parties would not be affected by increased noise and disturbance.
34. In addition, a large proportion of submissions are concerned that extending opening hours would encourage gambling habits and also refer to the premises as a casino. Whilst I also appreciate this concern, the merits of gambling are outside the scope of this appeal. Furthermore the use of the machines that I observed indicated that their use is a solo activity, and the premises is not a casino as I understand the term.

Conditions

35. I have considered the conditions put forward by the Council against the requirements of the national Planning Practice Guidance and the Framework, as well as the conditions on the original permission. Additional conditions were suggested verbally by the appellant at the hearing and the Council was given an opportunity to comment on them.

36. The appellant suggested that elements such as soundproofing, CCTV and the continued locking of the rear door could be imposed as individual conditions if I considered the NMP to be unenforceable. As the evidence before me indicates that there have been issues associated with internal noise generation and the flat above the premises, I have imposed a condition requiring sound-proofing.
37. I have not imposed conditions requiring the use of CCTV and locking of the fire door as although their deployment would represent good management, I do not consider either to be necessary in planning terms or be enforceable.
38. I have also imposed a condition requiring evidence that noise emissions from external plant at the premises are controlled. This is to safeguard the living conditions of occupiers of nearby dwellings.
39. Conditions 5, 6 and 7 are taken from the current planning permission and are unaffected by issues relating to this appeal as they relate to the type of activity that can be undertaken on the premises, and the provision and retention of a shop front window. These are necessary to safeguard the amenities of the area, and to maintain the interest and continuity of the shopping frontage.
40. In order to ensure there is sufficient time to install soundproofing and to control noise emissions before the use with extended hours commences, I have imposed a temporary condition for 2 years and 6 months. Where necessary and in the interests of clarity and precision, I have altered the conditions to better reflect the relevant guidance.

Conclusion

41. For the reasons I have outlined I have concluded that the disputed condition should be varied as given above and that this is both necessary and reasonable in the context of local and national policies.

Amanda Blicq

INSPECTOR

APPEARANCES

FOR THE APPELLANT

Torben Andersen	RBA Acoustics
Helen Cuthbert	Planning Potential
Tom Davies	Planning Potential
Juan Lopez	Barrister
Jeni McLaren	Praesepe plc
Samantha Poynter	Praesepe plc

FOR THE LOCAL PLANNING AUTHORITY

Martin Holley	Royal Borough of Kingston upon Thames
Richard Odell	Royal Borough of Kingston upon Thames

ANNEX 1

Documents submitted at the Hearing (by agreement)

1. Outline Submissions on behalf of the appellant.
2. Extract from LDF Core Strategy (giving supporting text).
3. Base data noise survey 25 November 2015.