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## Appeal Decision

Site visit made on 13 February 2017

**by Zoe Raygen Dip URP MRTPI**

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

**Decision date: 24<sup>th</sup> February 2017**

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**Appeal Ref: APP/V2004/W/16/3164176**  
**Aldi Stores Ltd, Sutton Road, Hull HU7 0AH**

- For the reasons set out below, and with the agreement of the main parties, I have dealt with the appeal as being made under section 78 of the Town and Country Planning Act 1990
  - The appeal is made by Planning Potential Ltd against the decision of Kingston-upon-Hull City Council.
  - The application Ref PP-05079247 (16/00596/S73), dated 26 April 2016, was refused by notice dated 12 October 2016.
  - As set out on the planning application form, planning permission is sought for a store without complying with conditions attached to planning permission Ref 14/01430/FULL, dated 7 April 2015 together with the erection of a 4metre high acoustic fence to rear landscape area (to rear of Tynedale) - Revised proposal to incorporate acoustic fence.
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### Decision

1. The appeal is allowed and planning permission is granted for a store without complying with conditions attached to planning permission Ref 14/01430/FULL, dated 7 April 2015 together with the erection of a 4metre high acoustic fence to rear landscape area (to rear of Tynedale) - Revised proposal to incorporate acoustic fence at Aldi Stores Ltd, Sutton Road, Hull HU7 0AH in accordance with the terms of the application, Ref PP-05079247 (16/00596/S73), dated 26 April 2016 subject to the conditions set out in the schedule to this decision notice.

### Application for costs

2. An application for costs was made by Aldi Stores Ltd against Kingston-upon-Hull City Council. This application will be the subject of a separate decision.

### Procedural matters

3. Planning permission was granted in 2013 for the erection of a single storey (A1) retail unit with associated pedestrian and vehicular accesses (following the demolition of a public house) on the appeal site (application ref 13/00294/FULL). That permission was subject to a number of conditions which restricted opening hours to not after 2200 hours or before 0800 hours Monday to Saturday, and not after 1800 hours and before 1000 hours Sundays and Bank Holidays and another restricted deliveries to 0700 to 2300 Monday to Saturday and 1000 to 1800 Sundays and Bank Holidays.
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4. In 2014 in response to a new pattern of working planning permission was granted under the provisions of S73 of the Act to 'vary' those conditions. The new planning permission contained the following two conditions:
  13. *No customer shall be permitted to be on the premises after 2200 hours and before 0800 hours, Mondays - Saturdays, and after 1800 hours and before 1000 hours Sundays, until 07/07/2016 only, and thereafter not after 2200 hours or before 0800 hours Monday to Saturday, and not after 1800 hours and before 1000 hours Sundays and Bank Holidays, unless otherwise agreed in writing by the Local Planning Authority.*
  14. *No deliveries shall be received or dispatched except between the hours of 0700 and 2300 Monday to Saturday, 0900 to 1800 Sundays, and 0900 to 2300 Bank Holidays until 07.07.2016 only, and thereafter 0700 to 2300 Monday to Saturday and 1000 to 1800 Sundays and Bank Holidays, unless otherwise agreed in writing by the Local Planning Authority*The reasons given for the conditions are:
  13. *in the interests of residential amenity and to comply with policies S1 and S12 of the Local Plan and*
  14. *in the interests of residential amenity and to comply with policies E1 and S1 of the Local Plan.*
5. Instead of reverting to the original hours of opening and delivery on 7 July 2016, the appellant submitted the application that is the subject of this appeal to continue operating the store on the basis of the opening and delivery hours as approved for the temporary period under 14/01430/FULL. Essentially this would mean extending the delivery hours in the morning from 1000 to 0900 on a Sunday and a Bank Holiday and from 1800 to 2300 in the evening on a Bank Holiday. Opening hours would be extended from 1800 to 2200 on a Bank Holiday. Following the assessment of the application by the Council the appellant amended the scheme to include the erection of a 4 metre acoustic fence as part of the proposals to mitigate any potential for noise and disturbance to neighbouring residential properties as a consequence of the extended hours.
6. However, that fencing would, of itself, require planning permission. I am not persuaded that the provisions of S73 of the Act allow for consideration of matters outwith any of the conditions on the original planning permission. In deciding how best to deal with the development proposed, I note that prior to determination of the application, the Council consulted with local residents regarding both the proposed alterations to the conditions and the provision of the acoustic fence. I am satisfied, in this regard, that those with a potential interest in the outcome of the decision would have had the opportunity to make their comments known about the entirety of the development proposed both at the application stage and now at appeal. There was no ambiguity regarding the intended proposals in that consultation. After careful consideration, and with the agreement of the main parties, I am satisfied that no-one's interest would be unfairly prejudiced were I to consider the appeal as being made under S78 of the Act, particularly since the 2014 permission has been implemented and the store is trading. I shall proceed on that basis.
7. Prior to the consideration of the application at the Council's Planning Committee the appellant sought to amend the proposals to achieve a favourable decision by deleting reference to the extended delivery hours on a Sunday and Bank Holiday. It is clear though from the Council's decision notice and appeal statement that the application was determined in accordance with

the original proposals regarding delivery hours and it is on that basis that I will determine the appeal.

## **Main Issues**

8. Development pursuant to permission No 14/01430/FULL has been implemented. That is a material consideration in this case. On that basis, I consider the main issues to be firstly the effect the proposed hours of opening and for deliveries would have on the living conditions of the occupiers of nearby residential properties in terms of noise and disturbance, and secondly the effect of the proposed acoustic fence on the character and appearance of the area.

## **Reasons**

### *Living conditions*

9. The appeal site is located adjacent to a housing estate. The appellant states that the distance from the delivery bay and the nearest residential properties is about 34 metres and this has not been disputed by the Council. Between the building and the houses is an area of planting containing a mix of mature deciduous trees and shrubs and a high close boarded fence on the rear boundary of the houses. Car parking is located adjacent to the area of landscaping.
10. The proposed alteration to opening hours of the store would mean that the store would open until 2200 instead of 1800 on a Bank Holiday. Although this element of the proposal has been included within the Council's reason for refusal its statement relates specifically to noise and disturbance in relation to delivery hours. I also note that objections from interested parties relate to the delivery hours rather than the proposed extension of opening hours on the Bank Holiday. As the store is already open until 2200 on a Monday to a Saturday and I have seen no evidence of harm caused to neighbouring residents in this respect then I consider that the proposed alteration to opening hours would be acceptable.
11. The Council consider that the proposal to extend the delivery hours to 0900 from 1000 on a Sunday and Bank Holiday and from 1800 to 2300 on a Bank Holiday would cause harm to the living conditions of neighbouring residents through noise and disturbance. They point to complaints received from local residents particularly in relation to the earlier delivery hours where noise from lorries manoeuvring, reverse beepers and lorries waiting to deliver have disturbed neighbours sleep.
12. The appellant's acoustic report prepared by Acoustic Design Technology 2016 states that there would be adverse noise impact within the proposed extra hours of operation at the point of the adjacent houses due to the manoeuvring of the lorries. However it also states that this needs to be assessed within the context of the site where delivery noise and the character of the noise would be consistent with the prevailing traffic noise controlled environment. Furthermore, mitigation measures of ensuring reverse beepers were turned off, that the manoeuvre into the loading bay is made in one go and scheduling deliveries to ensure that only one delivery is made at once would further reduce the proposed noise impact.
13. At the time of my site visit the area was busy and noisy with the comings and goings of traffic both within the car park of Aldi and the adjacent main A1033

road. I appreciate that this is a snap shot in time and may not be the case earlier in the day particularly on a Sunday or Bank Holiday. At such quieter times I can appreciate that noises associated with lorries manoeuvring could be disturbing without appropriate mitigation.

14. The Council has demonstrated that there is a history of deliveries occurring before the times restricted by condition and despite assurances made by the company the evidence from neighbours indicates that reverse beepers are used and more than one lorry attends the site at once. I understand the frustration of the neighbours but if these matters were the subject of specific conditions then I see no reason why they could not be enforceable. It would be for the Council to ensure that the appellant was operating strictly in accordance with the conditions. The appellant has referred me to two appeal decisions where such conditions have been applied by my colleagues (APP/D1590/W/14/3001589 and APP/K0235/W/16/3146074). The Council suggest that the sites are not comparable to the appeal site. However, both were in relation to the effect of manoeuvring associated with deliveries on the living conditions of adjacent residents and show that conditions can reasonably be used to control methods of delivery. Therefore, whilst such measures are reliant on human co-operation, they are not unusual and are capable of monitoring and enforcement.
15. The appellant also proposes the erection of a 4 metre high timber acoustic fence within the site. The Council's Environmental Health Officer considers that this would adequately mitigate against any potential for noise and disturbance to both ground and first floor windows of the neighbouring residential properties. I have seen no evidence to suggest that this would not be the case.
16. *Planning Practice Guidance* (PPG) advises that noise should not be considered in isolation, separately from the economic, social and other environmental dimensions of the proposed development. I consider that there is some prospect that occupiers of the very nearby houses would notice noise from deliveries during the disputed early morning hours. However, having regard to PPG, one of the key considerations in determining whether it would amount to undue harm is whether any observed adverse effect would be significant. In practical terms, that includes whether it would be particularly noticeable against background noise and whether the noise would arise at a time when residents should be able to reasonably expect not to be disturbed.
17. I am mindful that the principle of retail use of this site has been established and that the site was previously used as a public house. The appellant refers to World Health Organisation guidance which defines 'normal sleep hours' as between 2300 and 0700. Whilst some people could be more sensitive than others to noise outside those hours, the period in contention, between 0900 and 1000 on Sundays and Bank Holidays and 1800 and 2300 on a Bank Holiday is not particularly unsocial. Therefore, with suitable mitigation, any noise and disturbance arising during the additional delivery hours would be unlikely to be so severe as to have significant adverse effects on residents' health and quality of life.
18. Given the permitted hours of trading, the appellant contends that deliveries before 1000 would enable fresh produce to be provided for customers enabling shelves to be stocked before customers arrive, thereby providing a better

service. Furthermore it would allow delivery to more than one Aldi store by the same lorry reducing the overall number of journeys. I give modest positive weight to those social, economic and environmental considerations.

19. For the reasons above I conclude that the proposed alterations to both the opening and delivery times would not be harmful to the living conditions of neighbouring residents. The proposal would therefore be in accordance with Policy S1 of the Hull City Plan 2000 (the HCP), paragraph 123 of the National Planning Policy Framework (the Framework) and emerging Policy 49 of the Hull Local Plan 2016-2032 Public Consultation Document 2016. These require that shopping development is only allowed providing the impact on local amenity is acceptable and which seeks to avoid adverse impacts of noise and encourages the use of conditions to mitigate any impacts.

#### *Character and appearance*

20. The acoustic fence would be constructed of timber and located three metres within the site boundary in order to protect the trees within the landscaped area. Adjacent to the site is a well-used cycle/pedestrian way providing access to the site from the surrounding residential area.
21. The high fence would therefore be particularly open to public view as well as to the residents of Tynedale to the rear. Nevertheless, timber fences are part of the established character of the area and it would be some distance from the houses and gardens on Tynedale. Furthermore it would be viewed, both from the footpath and the houses on Tynedale, within the context of the adjacent large mass of the commercial building and the existing established landscaping. As a result even with the difference in land level between the appeal site and the adjacent residential properties it would not be overly prominent or dominant.
22. It would be sited within the appeal site 3 metres from the boundary fence with neighbouring houses. However this would enable the retention of the existing landscaping and reduce the impact on neighbouring residents.
23. For the reasons above the proposed acoustic fence would not be harmful to the character and appearance of the area. The proposal would therefore be in accordance with Policy S1 of the HCP and the Framework. These require amongst other things that shopping development has an acceptable impact on the built and natural environment and responds to local character.

#### **Other matters**

24. Representations were made to the effect that the rights of the adjoining occupier, under the Human Rights Act 1998, Article 1 of the First Protocol, would be violated if the appeal were allowed. I do not consider this argument to be well-founded, because I have found that the proposed development would not cause unacceptable harm to the living conditions of the adjoining occupiers. The degree of interference that would be caused by the proposal would be insufficient to give rise to a violation of rights under Article 1 of the First Protocol. Issues raised relating to air conditioning units, lighting and delivery hours on a weekday are not within the remit of this appeal.

### **Conditions**

25. I have no information before me about the status of the other conditions imposed on the original planning permission (14/01430/FULL). Therefore, 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.
26. I have given some consideration to the issue of conditions regarding the management of deliveries. The Council suggest that a condition securing a delivery management strategy would suffice. I acknowledge that such a condition was used on the original permission. However, given the difficulties that have been experienced on site in relation to alleged breach of conditions I consider the conditions need to be precise to enable any future enforcement action required.
27. Therefore, I have imposed three conditions to protect the living conditions of neighbouring residents. I consider conditions to ensure that lorries are reversed into the loading bay first time and to secure measures to limit deliveries early or late in the day would be unenforceable. The condition imposed requiring vehicles to turn off their engines on site would ensure that if more than one HGV was on site, the one not actively delivering goods would not cause noise and disturbance.

### **Conclusion**

28. For the reasons set out above, and having regard to all other matters raised, I conclude that the appeal should be allowed.

*Zoe Raygen*

INSPECTOR

### **Schedule of Conditions**

- 1) The acoustic fence hereby permitted shall be implemented on site in accordance with the details in plan ref 0677-091, 0677-090 rev B within 1 month of the date of this permission. The fence shall be retained at all times.
- 2) Notwithstanding the provisions of the Town and Country Planning (Use Classes) Order 1987 (as amended) (or any subsequent re-enactment thereof), the development hereby approved shall be used for A1 retail purposes only, and shall not at any time operate any of the following services.
  - Staffed fresh fish counter.
  - Staffed fresh meat counter.
  - Staffed delicatessen counter.
  - Hot food sales.
  - Banking facilities.
  - Dispensing pharmacy facilities.
  - Dry cleaning services.
  - Post office services
  - Lottery and scratch card sales.
  - Photographic services.
  - Cafe/restaurant.
  - Cigarettes and/or tobacco sales.
  - Newspaper, magazine, and greetings card sales, (other than those specified in Table 1 and Table 2 of the supporting statement dated 21.11.2014. ref 14/2172)
- 3) Notwithstanding the provisions of the Town and Country Planning (Use Classes) Order 1987 (as amended) (or any subsequent re-enactment thereof), the development hereby approved shall be used for A1 retail purposes only, and no more than 20% of the net retail floorspace hereby approved shall be used for the sale of comparison goods unless otherwise agreed in writing by the Local Planning Authority.
- 4) Notwithstanding the provisions of the Town and Country Planning (Use Classes) Order 1987 (as amended) (or any subsequent re-enactment thereof), the development hereby approved shall be for A1 retail purposes only, and no more than 1500 product lines shall be sold from the site at any one time unless otherwise agreed in writing by the Local Planning Authority.
- 5) Any trees or plants which die, are removed or become seriously damaged or diseased within a period of 5 years from the implementation of the landscaping scheme, shall be replaced in the next planting season with others of similar size and species

- 6) No customer shall be permitted to be on the premises after 2200 hours and before 0800 hours, Mondays - Saturdays, and after 1800 hours and before 1000 hours Sundays
- 7) No deliveries shall be received or dispatched except between the hours of 0700 and 2300 Monday to Saturday, 0900 to 1800 Sundays, and 0900 to 2300 Bank Holidays
- 8) A litter bin shall be provided and retained on the forecourt of the premises throughout opening times
- 9) Prior to the commencement of the use, provision shall be made for the secure storage of refuse, in accordance with a scheme to be submitted to and approved by the Local Planning Authority. The provision shall be retained in accordance with the scheme
- 10) Prior to the commencement of development, a light impact survey shall be carried out with details to be first submitted to and approved by the Local Planning Authority, and shall include details of any mitigation measures required to protect prospective occupiers of the dwellings from disturbance by light pollution. The report shall be prepared in accordance with the guidance notes for the reduction of obtrusive light 2005, produced by the Institution of Lighting Engineers. The development shall thereafter proceed in accordance with the approved mitigation measures
- 11) Prior to being discharged into any watercourse, surface water sewer or soakaway system, all surface water drainage from parking areas and hardstandings shall be passed through trapped gullies and an oil interceptor designed and constructed to have a capacity compatible with the site being drained. Roof water shall not pass through the interceptor unless previously agreed in writing by the Local Planning Authority
- 12) Before the development begins details of the Crime Prevention Measures shall be submitted to and approved in writing by the Local Planning Authority in consultation with Humberside Police. The details shall include:
  - Lighting of footpaths
  - CCTV coverage
  - Anti-graffiti Measures
  - Garage Door specification
  - Parking

Access to rear gardens

Communal areas

Front boundaries

Side and rear boundaries

Windows, doors, Roof Lights, Alarms,

Whether a room is to be a Home Office(working from home) if so, the standards of doors/windows

Access control.

The development shall be carried out and thereafter retained as approved

- 13) The building shall not be occupied until a means of access for pedestrians, cyclists, and the disabled has been constructed in accordance with the approved plans. The access shall thereafter be retained to ensure suitable and equitable access is available
- 14) Vehicular access shall be taken from the retained northern access on West Carr Lane only, with egress only onto the A1033 Sutton Road shown plan no. 3238-P01 rev F, with guard railing retained and repositioned
- 15) The building(s) hereby approved shall not be occupied until a secure vehicle parking area has been provided in accordance with the approved plans. The vehicle parking area shall be retained in its entirety for such use
- 16) The building(s) hereby approved shall not be occupied until secure cycle parking facilities have been provided in accordance with the approved plans. The cycle parking shall subsequently be retained in its entirety for such use
- 17) The building(s) hereby approved shall not be occupied until parking facilities for motor cycles, mopeds and scooters have been provided in accordance with the approved plans. The parking facilities shall subsequently be retained in their entirety for such use
- 18) In accordance with the approved plans provision shall be made and retained within the site at all times for the parking, loading and unloading of vehicles and for vehicles to turn so that they may enter and leave the site in forward gear
- 19) All the recommendations of the submitted Travel Plan hereby approved shall be implemented in accordance with the timetable agreed therein. The Approved Travel Plan or any variation of the Travel Plan agreed in writing by the Local Planning Authority shall continue to be implemented as long as any part of the development is occupied.
- 20) The refrigeration units of all delivery/collection vehicles shall be switched off prior to arrival at the store and between the hours of 0700 and 2300 Monday to Saturday, 0900 to 1800 Sundays, and 0900 to 2300 Bank Holidays
- 21) The reversing alarms and all other beepers/alarms of all delivery/collection vehicles shall be switched off whilst at the store between the hours of 0700 and 2300 Monday to Saturday, 0900 to 1800 Sundays, and 0900 to 2300 Bank Holidays.
- 22) The engines of all delivery/collection vehicles shall be switched off when not manoeuvring and no horns sounded or radios used (except in an emergency) between the hours of 0700 and 2300 Monday to Saturday, 0900 to 1800 Sundays, and 0900 to 2300 Bank Holidays.

-----END OF CONDITIONS-----