
Appeal Decision

Site visit made on 23 January 2017

by Jonathan Tudor BA (Hons), Solicitor (non-practising)

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

Decision date: 15 March 2017

Appeal Ref: APP/T5150/W/16/3161897
44 High Road, London NW10 2QA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Cengiz Erpolat against the decision of the Council of the London Borough of Brent.
 - The application Ref 16/2767, dated 22 April 2016, was refused by notice dated 22 August 2016.
 - The application sought planning permission for erection of single storey rear extension and change of use to take-away and restaurant without complying with a condition attached to planning permission Ref 87/1195, dated 12 January 1988.
 - The condition in dispute is No 5 which states that: The premises shall only be used for the preparation or sale of hot food and for ancillary purposes between the hours of:
0800 to 2300 Sunday to Thursday
0800 to midnight Friday to Saturday.
 - The reason given for the condition is: To ensure that the proposed development does not prejudice the enjoyment by neighbouring occupiers of their properties.
-

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by the Council of the London Borough of Brent against Mr Cengiz Erpolat. That application is the subject of a separate Decision.

Procedural Matters

3. Since the determination of the original application the Council has adopted a Development Management Policies (DMP)¹ document which replaces the saved Unitary Development Plan policies referred to in the Council's decision notice. Both main parties have had the opportunity to comment on the relevant policies of the DMP during the course of the appeal and have done so.

Background

4. A restaurant and takeaway known as the 'Woody Grill' trades at the appeal site. The appellant wishes to extend the opening hours from those originally imposed to 0800 to 0500 Monday to Sunday.

¹ Adopted 21 November 2016

5. The Council advise that there have been a number of previous applications to extend the opening hours which have been refused. A similar application and an appeal against an Enforcement Notice relating to opening hours at the same site were dismissed in an Appeal Decision issued on 17 February 2015.² The appellant has also indicated that the 'Woody Grill' has operated outside the hours permitted by the planning condition but permitted by a refreshment licence for a number of years.

Main Issues

6. The main issue is the effect that varying the opening hours would have on the living conditions of nearby residents, with particular regard to noise and disturbance.

Reasons

7. The appeal site is located on a busy road in Willesden, north west London lined on both sides by three-storey buildings with commercial premises on the ground floors. The upper floors of many of the properties appear to be residential flats. The site is also immediately adjacent to Metropolitan Court (formerly the Spotted Dog public house), a sizeable mixed use development which contains 37 flats, some at the front facing onto High Road and others to the rear adjacent to the back yard of the restaurant and takeaway.
8. The appellant's case is that the extension of operating hours would have significant economic benefits for an established local business and employer. It is further suggested that other hot food outlets in the area are open through the night and that the appellant needs to be able to compete with them on an equal footing. However, no specific examples of premises with longer opening hours have been provided by the appellant.
9. The Council refers to a bar at 50 High Road, just two doors from the Woody Grill, which has consent to open from midday to 2300 Mon–Thurs, midday to midnight Fri–Sat and midday to 2330 on Sundays and Bank Holidays. The restaurants and takeaways that I saw in the area, which displayed their opening hours, had various closing times of 2300, 2330, 2400 with the latest being 0200, but in that case only during Fri–Sat. Therefore, it was not apparent to me that other similar premises were legitimately opening through the night, as suggested by the appellant.
10. Both parties have referred extensively to the previous appeal decisions referred to above. In dismissing the appeals, the Inspector referred to activities such as the slamming of car doors, as an example of the type of additional late night noise that would disturb nearby residents. The appellant questions that stating that there are double yellow lines outside the appeal premises and along that side of the road. However, there are a number of parking spaces almost immediately opposite on the other side of the road, which extend for most of that block. There is also parking available on Linacre Road, a residential street that joins the High Road, a short distance from the Woody Grill. Therefore, I consider that extended opening hours would lead to that type of noise later at night.
11. The appellant says that on-street parking would not increase but it seems to me likely that opening later into the night would attract customers during those

² APP/TI5150/C/14/2216558 & APP/T5150/A/14/2213742 (Linked appeals)

night-time hours, with many arriving by car. It is also reasonable to think, as suggested by the Council, that some customers of a late night opening town centre restaurant and take-away would more likely than not be talking loudly, shouting, singing or possibly causing other general disturbance. Therefore, there would be noise and disturbance caused by customers arriving and leaving later into the night if the appeal were allowed.

12. Existing general background noise in a busy urban area, including a night bus stop opposite, is cited by the appellant, but that does not justify adding to it, especially when the type of noise involved is likely to be the shutting of car doors, loud conversation, shouting or singing in the street. Such sudden and intermittent spikes in noise can be especially disturbing to residential occupiers trying to sleep. The situation would be exacerbated during warmer periods when people are more likely to have their windows open or indeed during other times when they may wish to open windows for ventilation. The negative effects on general health of exposure to such noise are well-established.
13. The appellant questions the basis on which the Council consider that the noise likely to be caused by the proposal would be significant. However, the appellant has presented no independent reports or expert evidence to support the assertion that there would be no significant increase in noise beyond existing background levels. Therefore, I am more persuaded by the professional judgement and assessment of the Council's Officers.
14. The amount of residential development in the urban space is increasing, with Willesden Green Library, albeit a 100 metres or so from the appeal site, also undergoing re-development to provide residential units. Greater residential occupation in the area makes reasonable control of opening hours even more important. The appellant suggests that there are already late night revellers producing noise in the area but other similar establishments do not, according to the Council, have consent to stay open through the night to the extent proposed by the appellant.
15. The appellant refers to a refreshment licence which allows the premises to operate until 0500 and suggests that there is a lack of consistency between different departments in the Council. However, whilst there may be some overlap, licensing is a quite separate and different statutory regime. The fact that a licence has been granted, albeit with its own conditions, does not mean that planning permission should be granted. That aspect was also considered in the previous appeal decision where the Inspector reached the same conclusion.
16. Furthermore, the proposal would conflict with policy DMP1 of the recently adopted DMP, which advises that development will be acceptable provided it is, amongst other things, not unacceptably increasing exposure to noise and general disturbance. Point 2.11 of the policy's accompanying text, referring to takeaways in shopping parades with residential properties above, states that limits on opening hours might be required to regulate general disturbance from patrons at night. That is similar to the reason given for the imposition of the condition attached to the original 1987 planning permission.
17. The objectives of policy DMP1 are similar to Unitary Development Plan (UDP) policies SH10 and SH11, quoted in the Councils decision notice but now superseded. They also refer to consideration of the effects on the amenity of residential occupiers, the proximity of residential accommodation and whether

the proposed hours of operation would result in disturbance. Policy SH11 suggests that appropriate conditions may be imposed relating to hours of opening. Similarly, policy EP2 of the superseded UDP states that noise generating development would not be permitted where it would harm existing or proposed noise sensitive development in the areas, such as housing.

18. The appellant questions whether the Council acted appropriately in determining the application on the basis of saved UDP policies which dated from 2004 and says that greater weight should have been given to the London Plan, the emerging DMP and the National Planning Policy Framework (the Framework). However, those saved UDP policies still formed part of the development plan at the time of the decision and planning law requires that applications must be determined in accord with the development plan unless material considerations indicate otherwise.³
19. As paragraphs 211 and 215 of the Framework indicate, the policies of a local plan should not be considered out-of-date simply because they were adopted prior to the publication of the Framework. Rather due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework. In any event, I am obliged to determine the matter on the basis of the current development plan, including the recently adopted DMP, which would have been subject to a public examination process to check its consistency with the Framework.
20. It is submitted by the appellant the Council has contributed to a situation where occupiers may be affected by noise by granting permission for the development at Metropolitan Court. My attention has been drawn to paragraph 123 of the Framework and associated National Planning Policy Practice Guidance (PPG),⁴ which state that decision-makers should recognise that development will often create some noise and that unreasonable restrictions should not be placed on businesses seeking to expand because of subsequent changes in nearby land uses. However, as the existing conditioned opening hours are not dissimilar to other similar businesses in the area, I do not consider that the condition amounts to an unreasonable restriction.
21. The relevant PPG also suggests that the potential effect of new residential development proximate to an existing business should be considered. However, I am not determining the planning application for Metropolitan Court, which according the appellant was granted permission in October 2008. That was also prior to the publication of the Framework in 2012 and, in any event, other residential properties already existed in proximity to the appeal site, which is presumably the reason that the original condition was imposed in 1988.
22. The appellant argues that the business has been operating outside the hours permitted by the planning condition and that the lack of objection from neighbours to the proposal is significant. It is also suggested that there is no history of enforcement action and that the Council's Environmental Protection service has no issue with the proposal. However, I note that the previous linked appeals decided in 2015, already referred to, include an appeal against an enforcement notice in relation to breach of the opening hours condition.

³ S.38(6) Planning and Compulsory Purchase Act 2004 and s.70(2) Town and Country Planning Act 1990

⁴ NPPG Noise: Paragraph:006 Reference ID: 30-006-20141224

23. Furthermore, the Council's Environmental Health Enforcement Officer responded to a consultation on the current proposal expressing concern about noise from customers arriving and leaving the premises in relation to nearby residential accommodation. The lack of specific objections from neighbours is not a good reason, in itself, to allow the appeal or an indicator of a lack of potential harm.
24. The appellant refers to the presumption in favour of sustainable development at the heart of the Framework in support of his case. However, paragraphs 12 and 15 of the Framework indicate that the development plan is the starting point for decision-making and that an up-to-date development plan is the vehicle for delivery of the presumption in favour of sustainable development. Moreover, I have found that the proposal conflicts with a recent DMP document which is part of the development plan and has been judged to be consistent with the Framework.
25. Whilst a history of previous applications to extend opening hours is not necessarily unusual, it is not clear to me that there has been any significant change in circumstances since the last similar application in 2013⁵ which was dismissed in the Appeal Decision issued on 17 February 2015. The Framework existed at that time and whilst the DMP has since been adopted, its policy in relation to noise is not markedly different from the UDP predecessor policies. Therefore, I see no good reason to take a different view from the previous Inspector.
26. Though unreasonable restrictions should not be placed on businesses which want to develop, I have found that the current conditioned opening hours, which are similar to other restaurants, bars and takeaways in the area, are not unduly restrictive. Moreover, I consider that the need to protect the living conditions of neighbouring residents outweighs any commercial benefit cited by the appellant or the convenience of the night-time economy.
27. It is likely that significant disturbance from noise would result from extending the opening hours to 0800 to 0500 every day. Furthermore, the late night noise described is not of a type that could be successfully controlled by noise mitigation measures or condition.
28. I conclude, therefore, that the existing condition is reasonable and necessary and that varying the opening hours would harm the living conditions of nearby residents, with particular regard to noise and disturbance. Removing the condition and extending the opening hours as suggested would conflict with DMP1 of the DMP, as it would unacceptably increase exposure to noise and general disturbance.

Other Matters

29. The appeal site is located within the Willesden Green Conservation Area (CA). The proposal to extend opening hours involves no physical development. Given that and the location on a busy urban high street, it would not have an adverse effect on the character or appearance of the CA. Whilst it would not enhance the character and appearance of the CA, as it would cause no harm, it would preserve it. Notwithstanding that aspect, I have dismissed the appeal for other reasons.

⁵ Ref 13/2775

Conclusion

30. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be dismissed and the condition retained in its present form.

Jonathan Tudor

INSPECTOR