
Appeal Decision

Site visit made on 10 April 2017

by Jason Whitfield BA (Hons) DipTP MRTPI

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

Decision date: 05 May 2017

Appeal Ref: APP/M4510/W/17/3166511

345 Benton Road, Four Lane Ends, Benton, Newcastle upon Tyne NE7 7EE

- 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 Mr Anthony Lang against the decision of Newcastle-upon-Tyne City Council.
 - The application Ref 2012/0276/04/RVC, dated 8 November 2016, was refused by notice dated 30 December 2016.
 - The application sought planning permission for change of use of ground floor from Class A1 (sandwich shop) to Class A5 (hot food takeaway) and erection of extraction flue/vent and 2 x air conditioning units to rear without complying with conditions attached to planning permission Ref 2012/0276/01/DET (varied on appeal Ref APP/M4510/A/12/217561), dated 26 April 2012.
 - The conditions in dispute are Nos 3 (No 1 on appeal), 9 (No 2 on appeal) and 10 which state that: "3 - *The premises shall close for business and all customers shall leave the premises by 22:30 hours on Sunday to Thursday and 23:00 on Fridays and Saturdays and the premises shall not re-open before 08:00 hours on Mondays to Saturdays and 17:00 on Sundays and Bank or Public Holidays; 9 - No deliveries shall be taken at or despatched from the site outside the hours of 08:00 and 22:30 hours on Mondays to Thursdays, 08:00 and 23:00 on Fridays and Saturdays and 17:00 to 22:30 hours on Sundays and Bank or Public Holidays; 10 - The external door(s) to the premises shall be self-closing and shall be kept closed at all times when not in use.*"
 - The reasons given for the conditions are: "3 - *To protect the living conditions of adjacent and nearby occupiers in terms of noise and disturbance in line with UDP Policies H2, POL7 and T7.1; 9 - To protect the living conditions of adjacent and nearby occupiers in terms of noise and disturbance in line with UDP Policies H2, POL7 and T7.1; 10 - In the interests of the amenity of the occupiers of neighbouring premises, in accordance with National Planning Policy and saved Policies H2 and EN1.1 of the Unitary Development Plan.*"
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Decision

1. The appeal is dismissed.

Procedural Matter

2. Although not explicitly set out within the Schedule of Conditions of the appeal decision referred to above, the Inspector's reasons for the imposition of Conditions 3 and 9 (noted as Conditions 1 and 2 on the appeal decision) are set out in the main body of the decision letter. The wording in the heading above reflects my understanding of the Inspector's reasons for imposing the disputed conditions.
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Background and Main Issue

3. Planning permission was granted for a change of use of the ground floor of the appeal property from a sandwich shop to a hot food takeaway in April 2012¹. A subsequent appeal² against the imposition of conditions No 3, 6 and 9 was allowed in September 2012. Condition 3 related to opening hours, Condition 6 related to sound insulation and Condition 9 related to deliveries. The three conditions were deleted from the original permission, though the Inspector imposed three new conditions which altered the opening hours (1), the hours for deliveries (2) and the submission of sound insulation details (3).
4. The premises are currently permitted to be open to customers between the hours of 08:00 and 22:30 Monday to Thursday, 08:00 and 23:00 Fridays and Saturdays, and 17:00 and 22:30 Sundays and Bank and Public Holidays. Deliveries to and from the premises are also permitted during these hours.
5. It is proposed to allow the premises to be both open to customers and for deliveries between the hours of 11:00 and 23:00 Monday to Thursday, 11:00 and 00:00 Fridays and Saturdays, and 11:00 and 23:00 Sundays and Bank and Public Holidays.
6. It is also proposed to delete Condition 10 which requires the external doors of the property to be self-closing and kept closed at all times when not in use, and impose a new condition which would allow the front door of the premises to be self-closing and kept open between 11:00 and 18:00 every day, whilst the side and rear doors would be kept closed at all times when not in use.
7. The Council refused the application based on its concerns that the revised hours and opening of the door would result in harmful levels of noise, disturbance and odours for nearby residents from increased pedestrian and vehicular activity.
8. The main issue is, therefore, whether the proposed opening times, the proposed delivery times and the opening of the external door to the premises would have a harmful effect on the living conditions of neighbouring residents with particular regard to noise and disturbance, and odour.

Reasons

9. The appeal property is located within a parade of shops and commercial premises separated from Benton Road by a service road which provides customer parking. Several of the properties, including the appeal property, contain residential uses at first floor level. The parade is a designated 'local centre' in the Newcastle-upon-Tyne Unitary Development Plan 1998 (UDP). Opposite the parade is a predominately residential area fronting onto Benton Road which is a heavily trafficked route. Behind the parade is the residential street of Benton Lodge Avenue.
10. The property previously operated as a fish and chip operation but is now operated as a fried chicken outlet. The appellant indicates the proposed opening hours would broadly accord with several existing premises on the parade at present and points to a late opening petrol station with a Tesco Metro convenience store and a very busy public transport interchange nearby. The

¹ 2012/0276/01/DET

² APP/M4510/A/12/2175631

Council indicates that a nearby sandwich shop is open until 21:00 on Fridays and Saturdays whilst the Tesco Metro convenience store is open until 23:00 Mondays to Saturdays and 22:00 on Sundays. I also note that several uses along the parade are unrestricted in their opening hours. In addition, Benton Road is heavily trafficked, including during the evenings, albeit it to a lesser extent than during the day. I therefore agree that background noise levels might well still be high until 23:00 Mondays to Saturdays and 22:00 on Sundays. However, that would not be a good reason to increase noise levels in the evening, if doing so would lead to unacceptable disturbance.

11. I have considered the concerns of local residents including those from Benton Road and Benton Lodge Avenue. However, I consider the residential properties most likely to be affected by the proposal are those immediately above the appeal premises and adjacent units. I agree with the previous Inspector that residents in established commercial areas adjacent to busy roads would be less susceptible to noise and disturbance from commercial units at the distances involved here and would have reasonable tolerance for the higher degrees of noise and activity. The appellant has referred me to appeal decisions, including one at 182-184 Whitley Road³, where Inspectors accepted that residents living in a town centre would expect some noise and disturbance in an evening. However, in both those cases the opening hours were restricted to no later than 23:00 and they were located in different authorities under a different policy context, thus I afford the decisions limited weight.
12. The potential sources of noise and disturbance would likely derive from visiting customers and delivery staff movements, both on foot and by vehicular transport. This would include raised voices outside the premises as well as brakes being applied, engines being revved and vehicles driven away. Moreover, if deliveries or customers are in cars or vans, doors would potentially be slammed shut. These sudden and intermittent types of noise would likely be audible above the continuous ambient levels and would sound intrusive within nearby dwellings.
13. I recognise that the proposed opening and delivery hours on an evening would be a relatively modest increase of 30 minutes on a Sunday to Thursday (including holidays) and 1 hour on a Friday and Saturday. However, the proposed hours would inevitably result in a material increase in comings and goings of both customers and staff around the premises later on evening than at present and at times when neighbours would have reasonable expectations for sufficient quiet to relax and sleep.
14. Moreover, the opening and delivery times would be brought forward on a Sunday from 17:00 to 11:00. This would result in increased comings and goings over a prolonged period. As with the Inspector in the previous appeal, I find that it is likely that many residents would appreciate a "lie-in" on Sunday mornings or a Sunday afternoon rest. Thus, the extended opening hours on a Sunday would result in increased comings and goings during these times and residents would be susceptible to the sources of noise and disturbance highlighted above. As a result, I find the proposed opening and delivery hours would likely result in harmful levels of noise and disturbance for neighbouring residents.

³ APP/W4515/A/07/2049120

15. I note that the proposal would result in a significant reduction in opening hours on a morning on Mondays to Saturdays. However, that would occur at times when other units are operating and ambient noise levels are likely at their highest due to rush hour traffic. Residents may well be at work or undertaking other daytime activities and would therefore be less susceptible to noise and disturbance at these times. The benefit of the reduction in morning hours would not therefore outweigh the harm from the extended hours on a Sunday or the later opening hours in the evening.
16. It is also proposed to open the front door of the unit between 11:00 and 18:00 on a daily basis which would provide a visual relief from closed frontages along the parade. I recognise that the premises have extraction equipment which assists in reducing odours from cooking. However, I have had regard to the comments of the Council's Public Safety and Regulation department which has objected on the basis that keeping the door closed forms part of the safeguarding against cooking odour emissions. In the absence of any substantive evidence to the contrary, I agree that it would likely undermine the efficiency of the extraction equipment as odours would be liable to escape through the open door. Whilst I recognise the door would be open during the day when the parade is busy, as with the opening and delivery times it would mean the door could be kept open on a weekends when residents would have reasonable expectations to relax in their homes in the absence of potentially obnoxious cooking odours.
17. Furthermore, internal sources of noise would likely derive from voices, playing of music and the handling of cooking equipment. With the door open, it is likely that such noise would transmit more readily out onto the street and the adjoining residential properties. In the absence of any substantive evidence to the contrary, it is reasonable to conclude that such noise could compound existing ambient noise levels within the dwellings, particularly if residents had windows open. As such, I find the proposed opening of the external door would be harmful in terms of both noise and disturbance, and odours.
18. I conclude, therefore, that the proposed opening times, the proposed delivery times and the opening of the external door to the premises would have a harmful effect on the living conditions of neighbouring residents with particular regard to noise and disturbance, and odour.
19. Consequently, the development would conflict with Policies CS14 of the Planning for the Future Core Strategy and Urban Core Plan for Gateshead and Newcastle upon Tyne 2010-2030, 2015 which seeks to prevent negative impacts on residential amenity. It would also conflict with UDP Policies H2 and POL7 which state that development which would harm the amenity of any dwellings will not be allowed and which seeks to prevent development which results in significant noise levels. The development would also conflict with the National Planning Policy Framework (the Framework), which seeks to secure a good standard of amenity for the occupiers of land and buildings.

Other Matters

20. I have been referred to an appeal at 42 - 44 Molesey Road, West Molesey, Surrey, (APP/K3605/A/11/2143384) in which the Inspector gave significant weight to the Ministerial Statement of 23 March 2011 'Planning for Growth' in which the Government set out its 'clear expectation that the answer to development and growth should wherever possible be 'yes', except where this

would compromise the key sustainable principles set out in national planning policy’.

21. The appellant suggests late opening and the ability to open the door during the day is necessary to best serve its potential patrons and to better assist with economic activity and employment. I recognise that later opening assists in providing a greater range and choice for consumers and that this would accord with the principles of economic growth set out in the Framework.
22. However, the appellant indicates that the business is not failing currently and no accounts or other evidence to support the economic case for the business have been provided. Thus it has not been adequately demonstrated that the development would give rise to such economic benefits as to outweigh the harm I have identified in respect of living conditions. The proposal would not therefore comprise sustainable development having regard to the Framework as a whole.

Conclusion

23. For the reasons given above and with regard to all other matters raised, I conclude that the disputed conditions on planning permission ref: 2012/0276/01/DET (varied on appeal Ref APP/M4510/A/12/217561) are necessary to protect the living conditions of neighbouring occupiers and satisfy all tests for conditions set out in paragraph 206 of the Framework. As a result, the appeal should be dismissed.

Jason Whitfield

INSPECTOR