
Appeal Decisions

Site visit made on 22 May 2017

by I Radcliffe BSc(Hons) MRTPI MCIEH DMS

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

Decision date: 22nd June 2017

Appeal A - Ref: APP/W3005/W/16/3166061

96-98 Victoria Road, Kirby in Ashfield, Nottinghamshire NG17 8AS

- 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 Miss Melissa Humphries against the decision of Ashfield District Council.
 - The application Ref V/2016/0480, dated 22 July 2016, was refused by notice dated 8 September 2016.
 - The application sought planning permission for the change of use from newsagents to café without complying with a condition attached to planning permission Ref 2007/0996, dated 20 December 2007.
 - The condition in dispute is No 2 which states that: The use of the hereby permitted development shall only take place during the following hours: 7.00am to 3.00pm Mondays to Saturdays.
 - The reason given for the condition is: To safeguard the amenities of residents living in the vicinity of the application site.
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Appeal B - Ref: APP/W3005/W/16/3168909

96-98 Victoria Road, Kirby in Ashfield, Nottinghamshire NG17 8AS

- 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 Miss Melissa Humphries against the decision of Ashfield District Council.
 - The application Ref V/2016/0662, dated 17 October 2016, was refused by notice dated 1 December 2016.
 - The application sought planning permission for the change of use from newsagents to café without complying with a condition attached to planning permission Ref 2007/0996, dated 20 December 2007.
 - The condition in dispute is No 2 which states that: The use of the hereby permitted development shall only take place during the following hours: 7.00am to 3.00pm Mondays to Saturdays.
 - The reason given for the condition is: To safeguard the amenities of residents living in the vicinity of the application site.
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Decision - Appeals A and B

1. The appeals are allowed and planning permission is granted for the change of use from newsagents to café at 96-98 Victoria Road, Kirby in Ashfield, Nottinghamshire NG17 8AS in accordance with the applications Ref
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V/2016/0480, dated 22 July 2016 and Ref V/2016/0662, dated 17 October 2016, subject to the following conditions:

- 1) The use hereby permitted shall be for a limited period being the period of 18 months from the date of this decision.
- 2) Customers shall only be permitted on the premises between the following hours:
7.00am – 9.30pm Mondays to Saturdays
9.00am – 2.00pm Sundays.
- 3) No tables or seating shall be sited externally to the front, side or rear of the building from 3.00pm until closing time on Mondays to Saturdays, and not at any time on Sundays.

Main issue

2. At present the opening hours of the café are restricted by condition 2 to 7.00am to 3.00pm, Mondays to Saturdays. The appellant seeks to change condition 2 to allow the café to open until 9.30pm Monday to Saturday and to open between 9.00am and 2.00pm on Sundays. If the appeals are successful, a new permission would be created with condition 2 altered in the manner sought.
3. On the basis of the reason for the condition and reasons for refusal of the applications, the main issue in both appeals is whether, having regard to the development plan and the National Planning Policy Framework ('the Framework'), condition 2 is reasonable and necessary in order to protect the living conditions of nearby residents from noise and disturbance.

Reasons

4. The appeal property is located within a residential area on Victoria Road close to the town centre of Kirby in Ashfield. As one of the main routes into the town, Victoria Road is characterised by a steady flow of traffic and associated noise. In the evenings, close to the appeal property, is a corner shop and post office that is open until 9pm.
5. 'Hot Food Takeaways, Cafes, Restaurants & Public Houses' is supplementary planning guidance that seeks to protect amenity and highway safety. As it was adopted following public consultation, I attach significant weight to it. It advises that cafes are not normally permitted in mainly residential areas. However where they are, as in this case, it advises that appropriate extract ventilation to control odour and adequate acoustic insulation, together with a restriction on opening hours to no later than 11pm, will be required to control noise.
6. Policies ST1 and SH9 of the Ashfield Local Plan seek to protect the residential amenity of local residents from development, including cafés, by restricting opening hours or refusing permission. A core planning principle of the Framework in relation to development is that a good standard of amenity should be provided. In planning policy 'amenity' is also referred to as 'living conditions'.
7. Permission was granted for a change of use of the appeal property from a shop to a café in 2007. In order to safeguard the amenities of nearby residents the opening hours of the café were restricted to 7.00am to 3.00pm with no opening on Sundays. At the time the application in Appeal A was determined

by the Council, a complaint regarding noise from the café affecting the attached house, No 100, was under investigation by environmental health. Their view was that noise from the extraction system, in addition to noise from the use of the tables and chairs to the front of the café was resulting in unacceptable levels of noise.

8. It is common ground that since then changes have been made to the extract system that have solved the noise problem associated with it. As part of its investigations environmental health were also satisfied that adequate noise insulation existed between the café and the adjoining neighbour. I am therefore satisfied that a café operated in a normal manner that is reasonable to expect would not result in levels of noise from inside the building that would cause disturbance to neighbours.
9. Later in the day, background noise levels along Victoria Road are likely to drop as traffic levels reduce. Similarly, background noise levels are likely to be lower on a Sunday when there is also less traffic. As a result, use of the outdoor seating area to the front of the café at such times could result in noise that stands out and disturbs neighbours; particularly as such use is likely to occur in fine weather when the windows to neighbouring dwellings are likely to be open. This matter though could be controlled by a suitably worded condition that prevents use of the seating area beyond existing opening times.
10. Operation of the café through to 9.30pm would result in customers entering and leaving the premises at a time currently when there is no activity associated with the premises. However, the cafe is reasonably small. As a local café it is a reasonable assumption that some customers would walk. For those who drive, given the competition for on road parking spaces, it is likely that parking would be spread out randomly along Victoria Road and its side streets. As a consequence, it is probable that there would not be a concentration of noise from customers' car doors closing and engines starting sufficient to materially disturb. There is no reason to believe that customers approaching or leaving the café would be any louder than other pedestrians. I also observed as part of the site visit that the door to the café closes relatively quietly. Customers though who smoke would have to stand outside the café to do so. In such circumstances, their conversation, if loud, could cause some disturbance.
11. Taking all these matters into account, it appears to me that the increase in opening hours sought, in compliance with policies ST1 and SH9 of the Local Plan and a core planning principle of the Framework, is unlikely to result in noise and disturbance that would materially harm the living conditions of neighbours. However, uncertainty exists and there is insufficient evidence to be sure on this matter. Given these circumstances, in accordance with Planning Practice Guidance¹, it is appropriate in this instance to grant by condition a temporary permission in order to give the longer opening hours sought at the café a trial run. In my assessment, a period of 18 months would be sufficient to assess the effect of longer opening hours. In order to prevent noise and disturbance associated with customers sitting outside past existing opening hours a condition is necessary to prevent this from occurring.

¹ Reference ID 21a-014-20140306 'When can conditions be used to grant permission for a use for a temporary period only?'

12. A condition has been suggested preventing the playing of amplified sound or music within the café. This would exclude the playing of radio or music in the background which, if at a sensible level, would not be problematic. This condition would therefore be unreasonable. In the event that loud amplified sound or music is played, the Council has statutory powers to abate a noise nuisance and prevent its recurrence.
13. Condition 3 to the original permission prevents implementation of the change of use until details of the extract system and a noise insulation scheme had been approved by the Council. As the café is now in use, the opportunity for discharging this condition has now passed and so it is unnecessary to repeat it on the new permission that I have created.

Other matters

14. Terraced houses on the same side of the road as the café have no off road parking. As a consequence, residents park on the road. The extended café opening hours would increase competition for on road parking in the evening and on Sundays. However, as the café is not large and there are nearby side roads available for parking, this would not result in material harm to the amenities of local residents.
15. In terms of highway safety, on road parking on Victoria Road is confined to long bays on either side of the highway with pedestrian crossing points in between. As a result, intervisibility between pedestrians crossing this busy road and vehicles would not be reduced by the slightly higher levels of parking that would occur.
16. In terms of littering, I saw no evidence that the cafe causes problems in this regard and so the extension of opening hours would not increase litter problems.

Conclusion

17. For the reasons given above, and having regard to all other matters raised, the appeals should therefore be allowed. In reaching this decision the views of local residents have been taken into account.

Ian Radcliffe

Inspector