
Appeal Decision

Site visit made on 26 June 2017

by Daniel Hartley BA Hons MTP MBA MRTPI

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

Decision date: 30 June 2017

Appeal Ref: APP/M2372/W/17/3173109

La Glacier, 51-53 Whalley Range, Blackburn, Lancashire BB1 6EA

- 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 Faisal Akbar (La Glacier) against the decision of Blackburn with Darwen Borough Council.
 - The application Ref 10/16/1299, dated 8 November 2016, was refused by notice dated 24 January 2017.
 - The application sought planning permission for change of use of No 53 from retail to café with ancillary use to the first floor (No's 51-53) and alterations to the shop front without complying with conditions attached to planning permission Ref 10/15/1402, dated 12 July 2016.
 - The conditions in dispute are Nos 1 and 3 which state that:
 - *"1. Frosted graphics to the first floor glazing detailed on drawing No 0480/002/A2/Rev G shall be implemented within 3 months of the date of this decision, and thereafter retained".*
 - *"3. The use hereby permitted shall only take place between the hours of 8.00 and 2300 Monday to Sunday".*
 - The reasons given for the conditions are:
 - *"1. To protect the neighbouring premises from any adverse overlooking in accordance with Policy 8 of the Local Plan Part 2, Site Allocations and Development Management Policies (Adopted 2015)".*
 - *"3. To ensure appropriate hours of use compliant with the requirement to minimise impact on residential amenity in accordance with Policy 8 of the Local Plan Part 2, Site Allocations and Development Management Policies (Adopted 2015)".*
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Decision

1. The appeal is allowed and planning permission is approved for change of use of No 53 from retail to café with ancillary use to the first floor (No's 51-53) and alterations to the shop front at La Glacier, 51-53 Whalley Range, Blackburn, Lancashire BB1 6EA, without compliance with condition No's 01 and 03 previously imposed on planning permission Ref 10/15/1402 dated 12 July 2016 and subject to the following conditions:
 - 1) Frosted graphics to the first floor glazing detailed on drawing No 0480/002/A2/Rev G shall be implemented prior to first occupation and thereafter retained.
 - 2) Prior to the first floor being brought into use, a scheme detailing soundproofing shall be submitted to and agreed in writing by the Local
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Planning Authority. The development shall be implemented in accordance with the approved details, and thereafter retained.

- 3) The use hereby permitted shall only take place between the hours of 08.00 and 23.00 on Monday-Thursday and Sunday and 08.00 and 00.15 on Friday and Saturday. Upon the expiry of 12 months of the date of this decision the use hereby permitted shall only take place between the hours of 08:00 and 23:00 Monday-Sunday.
- 4) This consent relates to the submitted details marked received on 3 November 2015, as amended by plans received on 13 July 2016 and numbered 0480/002/A2/Rev H.

Procedural Matter

2. The planning application form refers to planning conditions 1, 2 and 3 of planning permission Ref 10/15/1402. However, the Council's decision notice and delegated report refer only to planning conditions 1 and 3. In respect of this issue, I have obtained clarification from the main parties. The Council have commented that *"the applicant initially applied for a section 73 to modify the wording for condition no's 1 and 3, and discharge of condition No 2 of application reference number 10/15/1402. However condition no 2 relates to the submission of a soundproofing scheme and could not be dealt under a section 73 application, rather the applicant must apply for a discharge of planning condition in order for the council to assess the scheme and offer formal discharge. Therefore, it was agreed to remove the modification of this condition with a revised development description"*. I have therefore determined the appeal on the basis of considering only a variation of planning conditions 1 and 3 of 10/15/1402.

Background and Main Issue

3. Planning permission was approved (Ref 10/15/1402) on 12 July 2016 for the change of use of No 53 Whalley Range from retail to a café with ancillary use to the first floor (No's 51-53) and alterations to the shop front. The Council has provided me with copies of the approved drawings for this development.
4. In order to protect the living conditions of the occupiers of residential properties opposite the site planning condition No 1 of the planning permission required first floor windows to be frosted in accordance with drawing No 0480/002/A2/Rev G. The application seeks to vary the wording of condition No 1, as detailed in the banner heading above, in so far that such frosted graphics would be provided "prior to occupation". I have no reason to disagree with the Council that such a variation would be acceptable. Indeed, the graphics would not be needed unless and until the first floor is used/occupied.
5. The planning application also seeks to vary condition No 3 of planning permission 10/15/1402. This currently states *"the use hereby permitted shall only take place between the hours of 8.00 and 2300 Monday to Sunday"*. It is proposed to vary this condition in order to allow later evening hours of use on a Friday and Saturday night, but keep the existing hours of use on Monday-Thursday and Sunday. It is therefore proposed that the condition would read as follows: the use hereby permitted shall only take place between the hours of 8.00 and 23.00 on Monday-Thursday and Sunday and 8.00 and 00.15 on Friday and Saturday.

6. The Council considers that the change in the hours of use of the appeal premises would result in unacceptable levels of noise and disturbance arising out of general comings and goings, the revving of engines, the slamming of car doors and raised voices in the street. I note that internal noise issues have already been considered by the Council in respect of the consideration of the original planning application and including an assessment of a noise report. On the evidence that is before me, I have no reason to consider that the proposal would be unacceptable in respect of potential noise break out from inside the building.
7. The main issue is therefore the effect of the proposed hours of use upon the living conditions of the occupiers of surrounding residential properties in respect of noise and disturbance from activities outside the building.

Reasons

8. The appeal property falls within Whalley Range District Centre. There is a mixture of both commercial and residential uses in the area. The commercial premises include shops and eating/drinking establishments and there are flats at first floor level. There are also some dwellings close to the appeal site including on the opposite side of Whalley Range and at Brookhouse Close.
9. There are double yellow lines and bollards in front of the appeal building. I note that the Council consider that the proposal would result in increased noise and disturbance in the area due to the slamming of car doors and the revving of engines. I do not consider that this would be an issue on Whalley Range itself where there are traffic restrictions and bollards in place. I acknowledge that there appears to have been some issues in the past with cars parking on pavements and double yellow lines. I cannot be certain if this was from all the clients of the appeal property, but the provision of recently erected bollards and double yellow lines would provide both a physical and legal impediment to the parking of vehicles on Whalley Range.
10. Whilst only a snap shot in time, I did visit the site between the hours of 10.30 and 11.30 on Friday 2 June 2017 and noticed that there was spare capacity on surrounding streets for the parking of vehicles. People visiting the appeal premises arrived on foot and when leaving the building went in different directions. This suggests that either they did not arrive by private motor vehicle, or if they did, they were parked in different areas. Whilst there may be increased parking activity elsewhere in the area between 23.00 and 00.15 hrs, I consider that it is reasonable to conclude that this would be dispersed amongst the various surrounding streets.
11. Given the likely dispersed nature of car parking, I do not consider that any car parking (i.e. doors being closed, engines revving or people talking) between the extended hours of use period would give rise to significant levels of noise disturbance for the occupiers of residential properties in the locality. Furthermore, and notwithstanding the comments made by the Council's Highway Authority, I have not been provided with any evidence to indicate that there are significant on-street car parking pressures in the area between the hours of 23.00 and 00.15 hrs.
12. I note the representations made by the occupier of No 60 Brookhouse Lane and in particular the comments made about unauthorised late night opening at the premises (they refer to two occasions). I note the appellant accepts that this

has taken place at least once, for example during the Ramadan period, and that the Council visited the site during these events to monitor activities from a statutory noise nuisance point of view. Therefore, I do not doubt that the appellant has previously breached the existing hours of use condition.

13. However, I am not certain whether events relating to late night opening associated with Ramadan (and at other times) would be typical of most Friday and Saturday nights if the premises were allowed to be open until 00.15 hrs. I note that the Council has completed some noise monitoring from No 60 Brookhouse Lane, which did seem to suggest that noise levels were relatively high during this period taking into account BS 8233:2014. However, again I do not know if all the noise and activity generated was associated with the appeal property and the Council has not provided me with full details of its noise monitoring data.
14. In appendix B of the Council's appeal statement it states that on 27 February 2016 the Council's monitoring revealed that noise was mainly from people getting into and out of their parked vehicles. It is not clear whether this related to cars parked on Whalley Range, but if this were the case then car parking enforcement powers could be utilised to stop this happening in the future. In other words, the existence of double yellow lines and bollards should be enough to deter people from parking on Whalley Range and therefore to minimise the "slamming of car doors" and "occasional sounding of car horns" close to residential properties in this area.
15. The occupier of No 60 Brookhouse Lane has referred to past anti-social behaviour in the area and that these matters have been raised with the police and the Council. He indicates that in the past anti-social behaviour has tended to peak at about 23.30 hrs. I do not doubt that there have been some issues in the past, but, on the evidence that is before me, I do not know if these issues were directly related to use of the appeal property. I note the comments made about people parking on the double yellow lines and blocking the road. I have no photographic or video evidence to show that this was entirely associated with the appeal premises or, in any event, if this now occurs routinely. In any event, there are separate enforcement powers available to deal with unauthorised parking on the highway.
16. The appeal property can accommodate a significant number of people including at first floor level. The appellant states that the extended hours of use for a Friday and Saturday night are needed in order to sustain their business. They also say that this would be the busiest time for them. I do not know whether the business normally operates in a manner where lots of customers tend to arrive and leave all at once and hence activity within the street is very concentrated. If this were the case, then there may be potential for some sleep disturbance for the occupiers of those residential properties which are in very close proximity to the appeal premises. However, it must be recognised that the appeal property falls within a District Centre and fronts a relatively busy main road. Hence, it is reasonable to expect that levels of noise and activity would be higher than in areas which are more residential.
17. I note that the appellant says that the take-away adjacent to the appeal building (Sultan Hot Food Take-Away - No 47-49 Whalley Range) operates on an unrestricted hours of use basis although on 2 June 2017 (my first site visit) it was not open. I do not have any information relating to how this business

operates or indeed when it is most busy. However, there is potential for it to be also open between 23.00 and 00.15 hrs and hypothetically for there to be high concentrations of people coming and going within a relatively confined area and close to residential properties. This might then cause harm to the living conditions of the occupiers of nearby residential properties in respect of noise and disturbance during a time when they would wish to sleep.

18. I acknowledge that this is a District Centre environment and that whilst my site visit did reveal that most of the commercial uses were closed by 23.00 hrs (including the appeal property), some were nonetheless still open. This included a restaurant and some take-aways along Whalley Range. One such take-away was Khyber which is also opposite a number of residential properties. The opening hours of these premises is on the front door of the property and is Monday to Thursday 17.00 – 02.30 hrs; Friday and Saturday 17.00 – 03.30 hrs and Sunday 17.00 – 02.00 hrs.
19. As part of my site visit, I noticed that there was still some noise and activity in the area after 23.00 hrs including from some pedestrian movement and vehicles using Whalley Range. However, the level of pedestrian activity and associated noise in the area was slightly less than earlier in the evening. Despite the fact that the site is within a District Centre there are nonetheless residential properties very close by. It is therefore important that the occupiers of such properties are afforded reasonable levels of peace and quiet during times when they would wish to sleep.
20. In this case, it is not possible to determine with absolute certainty whether or not use of the appeal building between the hours of 23.00 hrs and 00.15 hours would give rise to a significant increase in levels of disturbance and noise from customers entering or leaving the premises. Any extension to the hours of use would need to be also assessed against the frequency and concentration of comings and goings associated with other uses in the immediate area including the Sultan Hot food Take-Away and Khyber. Furthermore, I note that there have been issues with customers parking on Whalley Range, although this should not happen given the existence of double yellow lines and bollards. In addition, I do not know if my site visit on a Friday night was typical of weekend activity in Whalley Range. It was of course only a snap shot in time.
21. I note that alcohol is not sold from the premises and as part of my site visit I did not see any public houses in close proximity to the appeal site. In that sense, I agree with the appellant that the customers of the appeal site are not likely to engage in the sort of anti-social behaviour which is sometimes associated with those that drink alcohol. In this case, the principal issue is whether the scale/numbers of customers entering and leaving the premises, in conjunction with the neighbouring hot food take-away use and other late night establishments, would be so concentrated and significant between the extended hours of use so as to lead to unacceptable levels of disturbance and noise. In considering this matter, it is also necessary to establish whether or not the business can reasonably operate without customers parking on Whalley Range and in close proximity to residential properties.
22. In considering the above, I consider that in order to reach a reasonable and fair conclusion on this matter a trial run would be necessary. The Planning Practise Guidance states that "*circumstances where a temporary permission may be appropriate include where a trial run is needed in order to assess the effect of*

the development on the area". I allowed both the Council and the appellant to comment on a possible temporary hours of use planning condition and I have taken all comments into account. I consider that a trial run of 12 months is justified in so far that it would give the Local Planning Authority an opportunity to monitor the full impact of the extended hours of use. This period of time would establish whether or not the business could reasonably co-exist with surrounding residential uses between 23.00 and 00.15 hrs on a Friday and a Saturday.

23. Subject to the imposition of a temporary hours of use planning condition, I do not consider that the proposal would result in significant conflict with the amenity aims of Policy 8 of the adopted Blackburn with Darwen Borough Council Local Plan Part 2 - Site Allocations and Development Management Policies 2015.

Conditions

24. The guidance in the Planning Practice Guidance makes clear that decision notices for the grant of planning permission under Section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. I do not know if the other conditions have already been discharged and so I have repeated them again. In the event that such conditions have been discharged this is a matter that can be addressed between the Council and the appellant.
25. For the reasons outlined above, I shall impose a temporary planning permission.

Other Matters

26. I have taken into account the supportive representations received from the occupiers of No 49 and No 55 Whalley Road including comments that any anti-social behaviour in the past was not related to the appeal premises and that there were problems occurring near the traffic lights.
27. I do not have any evidence before me to suggest that any past anti-social problems in the area have been as a direct result of the exclusive use of the premises as a café. This is a matter which would need to continue to be monitored by the police. I have decided to issue a temporary planning permission in respect of the extended hours of use for other reasons. However, this temporary period could also be used to monitor whether or not the extended hours of use for the appeal premises results directly in any anti-social behaviour in the area. However, on the evidence that is before me, I have no reason to think that this would occur.
28. The Council contend that if planning permission is allowed it would set a precedent for other late night opening in the area. There is of course already some late night opening in the area and, in any event, I have concluded that it is necessary that there is a trial run for the appeal proposal. The 12 month period would establish whether or not the premises could open until 00.15 hrs on a Friday and Saturday night without material harm being caused to the living conditions of the occupiers of surrounding residential properties. However, and, in any event, each application should be considered on its individual planning merits and in terms of noise and disturbance any such assessment should be based on the site conditions that exist at that time. It

does not follow that in allowing one business to open later at night it automatically means that another should be allowed.

29. None of the other matters raised alter or outweigh my overall conclusion on the main issue.

Conclusion

30. For the reasons outlined above, and taking into account all other matters raised, I conclude that the appeal should be allowed.

Daniel Hartley

INSPECTOR