



Appeal Decision

Site visit made on 18 July 2017

by Amanda Blicq BSc (Hons) MA CMLI

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

Decision date: 08 August 2017

Appeal Ref: APP/F0114/W/17/3171848

40 Moorland Road, Oldfield Park, Bath BA2 3PN

- 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 Team West Ltd against the decision of Bath & North East Somerset Council.
 - The application Ref 16/06186/VAR, dated 16 December 2016, was refused by notice dated 14 February 2017.
 - The application sought planning permission for change of use from Opticians (Class A1) A2 to Hot Food Takeaway (Class A5) and external alterations including the installation of extraction and ventilation equipment and the erection of a single storey 17.1 sq m rear extension without complying with a condition attached to planning permission Ref 15/04912/FUL, dated 14 December 2015.
 - The condition in dispute is No 3 which states that: The use hereby approved shall not be carried out and no customer shall be served or remain on the premises outside the hours of 1100 – 2300hrs.
 - The reason given for the condition is: to safeguard the amenities of nearby occupiers.
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Decision

1. The appeal is dismissed.

Background and Main Issue

2. This application was made to vary a condition from the original permission in respect of opening hours.
3. The evidence before me indicates that the determinative factor in this appeal is whether the increased opening hours would generate noise and disturbance from comings and goings late at night, and whether this would be disruptive for the occupiers of nearby dwellings and alter the underlying character of the area.
4. Accordingly, the main issue is whether the condition is reasonable and necessary, with reference to the living conditions of occupiers of nearby dwellings in respect of noise and disturbance.

Reasons

5. The appeal site (Domino's Pizza) is a ground floor commercial premises on Moorland Road, Oldfield Park. Moorland Road has a large proportion of small independent shops and restaurants, as well as a national supermarket, a bank

and a few takeaway outlets. It is a one way street with on-street parking and at the time of my visit (mid-morning) did not appear to have particularly high levels of through traffic.

6. Shoppers at that time appeared to be drawn from a wide age range and although the evidence indicates that Oldfield Park has a student population, this is a local shopping centre serving a family residential area. I also note that interested parties have highlighted that there is some rowdiness late at night.
7. A significant proportion of first floor accommodation fronting Moorland Road appeared to be residential, as were dwellings lining adjoining roads. The Council states that other hot food takeaways in the area close at 2300 hrs and the condition now appealed was imposed on the change of use application in order to ensure consistency with those outlets in the interests of residential amenity.
8. The appellant argues that the increased opening hours would be a response to market demand and to provide more choice for customers. However, there is no supporting evidence to suggest there is an unmet demand for longer opening hours to serve the local community.
9. Furthermore, the appellant's statement indicates that where extended opening hours are in place in other outlets, there is only a modest level of business during those additional hours. However, I consider it unlikely that an application for extended opening hours would not be predicated upon a sound business case, and as such I give this argument little weight. Moreover, I am not satisfied that the appellant's wish to align the opening hours of this outlet to others in the group is a material consideration in planning terms.
10. The outlet has a Premises Licence for the hours now applied for, and the appellant's argument relies heavily on other successful appeal decisions where Inspectors have given weight to the existence of such a licence. However, I do not have the information available to those Inspectors, and in any case, those appeal sites were in different parts of the country and varied also in their proximity to town centres, arterial roads and dwellings, as well as planning context. As such, I am unable to conclude if they are directly comparable to this. In addition, the evidence before me indicates that a recent appeal to extend opening hours at a Domino's in Swindon was dismissed at appeal for reasons similar to those now before me.
11. Moreover, the threshold for complaint against a Premises Licence is high. Low level disturbance arising from increased traffic, doors opening and closing, and greater footfall and associated noise would not necessarily fall into any of these categories and the guidance states that such issues, where they occur might be addressed by signage at the premises' exit. I am not satisfied that this would be sufficient mitigation to address low level nuisance in this context.
12. Similarly, controls under the Environmental Protection Act 1990 would only be applicable in relation to noise emitted from the premises, rather than the more widespread effects of increased activity in the area.
13. In any case, Planning Practice Guidance (PPG) states that local planning authorities should not presume that licence conditions will provide for noise

management in all instances and should liaise with the licensing authority¹. Although the evidence before me does not show whether such liaison has occurred, the Council's refusal appears to indicate that the planning authority has outstanding concerns, which I share.

14. I appreciate that the Council's Environmental Protection Officer has not raised an objection. However, it is clear that there is significant local concern relating to the nascent development of a night-time economy in Oldfield Park. I also appreciate that there have been no complaints in relation to this outlet since it opened last year but that is not determinative to the appeal as the outlet currently closes at 2300hrs, in line with other food outlets. The main issue before me is the effect of extended opening hours.
15. Furthermore, the appellant states that residents are already affected by the existing environment. However, the current activity and noise associated with use of restaurants and other hot food outlets ceases around 2300hrs, which is appropriate for a residential area. It is entirely reasonable that local people should expect that noise and activity to diminish after 2300 hrs.
16. I appreciate that there do not appear to be objections from occupiers of dwellings immediately affected by the development but there may be many reasons why objections are not received. It does not indicate a lack of harm and as noted above, lack of objection to the current opening hours does not indicate that there would be no harm from extended opening hours.
17. I appreciate that the appellant has suggested a temporary planning permission in order to allow monitoring of the situation. However, in the absence of evidence of unmet demand for extended opening hours I am not satisfied that it would be appropriate to allow an appeal that would require the situation to be revisited in the future. Nor does the absence of a formal policy in relation to opening hours in this road justify an extension of operating hours beyond that of all other outlets.
18. The appellant also indicates a willingness to limit custom to delivery sales and to limit the number of delivery vehicles, but I have reservations about the enforceability of such conditions and as such I give this suggestion little weight. In any case, the appellant argues that the city centre outlet serves this area and consequently there would be no additional noticeable vehicular activity associated with the appeal premises. However, this observation only reinforces my concern that the appellant has provided very little evidence in the way of a business need for the development to weigh against my concerns in relation to late night noise and disturbance. It also conflicts with the appellant's argument that there is unmet local customer demand.
19. Accordingly, even taking into account that there would be no counter sales during the extended hours there would be the comings and goings of delivery vehicles as well as noise generated by the extraction and ventilation units.
20. In the light of the above, I see no reason to disagree with the Council that the current opening hours limit the noise and disturbance experienced by local residents. I consider an extension to those hours would have the potential to

¹ Paragraph: 006 Reference ID: 30-006-20141224

have significant adverse effects on the living conditions of occupiers of nearby dwellings in that regard.

21. I conclude that the development would be contrary to Policy ES12 of the Local Plan² (LP) which seeks to protect general amenity in respect of noise. It would also be contrary to Paragraph 17 of the National Planning Policy Framework, which seeks to secure a good standard of amenity for all existing and future occupants of land and buildings.
22. The Council has cited policies from the emerging Placemaking Plan³ (PP). PP Policies PCS2 and D6 reinforce and support the local policies and national guidance referred to, but I give them only moderate weight as they are not formally adopted and may yet change.
23. LP Policy D4 does not mention the amenities of occupiers of neighbouring dwellings and as such I do not consider it is of relevance to this appeal.

Other matters

24. Interested parties have raised concerns in relation to precedent and the potential harm to the ongoing viability and vitality of independent businesses in the area. However, as I have found harm in relation to the main issues it is not necessary for me to consider these issues further.
25. I give little weight to the activity surveys of stores in Leicester and Sandhurst as there is little information to indicate the context in which these outlets operate.
26. The fact that the objections received in relation to this application are largely duplicates of those received for the Premises Licence is irrelevant to this appeal.

Conclusion

27. I conclude that the disputed condition is necessary and reasonable in the context of local policies. It is also relevant to planning and to the development previously permitted, enforceable, precise and reasonable in all other respects. As such, I conclude that the appeal should be dismissed.

Amanda Blicq

INSPECTOR

² Bath and North-East Somerset Local Plan including minerals and waste policies, adopted October 2007

³ Bath and North-East Somerset Placemaking Plan, Pre-Submission Draft December 2015