



Appeal Decision

Site visit made on 12 July 2017

by Jason Whitfield BA (Hons) DipTP MRTPI

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

Decision date: 15th August 2017

Appeal Ref: APP/X1355/W/17/3173005

92 Claypath, Durham DH1 1RG

- 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 Babakir Khidir against the decision of Durham County Council.
 - The application Ref DM/16/02674/VOC, dated 16 August 2016, was refused by notice dated 4 October 2016.
 - The application sought planning permission for change of use of existing retail unit and residential flat to mixed use of retail (A1), café/restaurant (A3), takeaway (A5) and community centre with training and demonstration rooms (D1) at ground floor level and self-contained dwelling at first and second floors without complying with a condition attached to planning permission Ref 4/09/00251/FPA, dated 1 June 2009.
 - The condition in dispute is No 4 which states that: *"The use of the property as a retail shop and café and hot food takeaway shall be open to the public between Monday and Sunday 9am to 11pm and at no other times unless agreed in writing by the Local Planning Authority."*
 - The reasons given for the condition is: *"In the interests of amenity."*
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The hot food takeaway at 92 Claypath is currently open to customers beyond the 23.00 closing time required under Condition 4 of the planning permission¹. The Council served a breach of condition notice on the property, and others on Claypath, on 27th February 2017. I have therefore determined the appeal on the basis that the proposal has already occurred.
3. A previous s73 application² was made for the premises to be open to customers until 03.00 hours 7 days a week. The application was refused. It is now proposed that permission be granted for the takeaway subject to a new condition which would allow it to be open to customers until 03.00 hours on Fridays and Saturdays only.

¹ 4/09/00251/FPA

² DM/16/01268/VOC

Main Issue

4. The main issue is the effect of the proposed opening hours on the living conditions of neighbouring residents, with regard to noise, disturbance and fear of crime.

Reasons

5. The ground floor premises at 92 Claypath currently operate as a hot food takeaway. The upper floors of the building are in residential use. The appeal site forms part of a row of largely commercial properties. The row contains other hot food takeaways, pubs and restaurants, as well as A1 and A2 uses. Most properties, including those either side of the appeal site, have residential units above. There are also residential uses opposite.
6. A hot food takeaway use operates at No 86. It was granted planning permission in 2009 with opening hours until 03.00. The appellant also indicates that the hot food takeaway at No 85 opens until 02.30, 7 days a week, whilst the Subway sandwich shop at No 92A opens until 03.00 Wednesday to Sunday. Otherwise the appellant's survey indicates that no other food or drink uses on this stretch of Claypath open beyond midnight.
7. Close to the appeal site is Walkergate. It contains several bars, nightclubs and restaurants, some of which open until the early hours of the morning. It seems to me that there is frequent movement of customers between the establishments of Walkergate and the food and drink outlets on Claypath, particularly on an evening. Furthermore, to the front of the appeal site is a busy city centre thoroughfare which carries a regular flow of traffic including cars, buses and taxis.
8. I therefore agree that the area is characterised by a high level of night time activity and background noise levels might well still be high late into the evening and the early hours of the morning. However, that would not be a compelling reason to materially increase levels of noise, disturbance and anti-social behaviour in the evening and early morning, if doing so would lead to unacceptable disturbance for neighbouring residents. Indeed, I am not persuaded by the appellant's argument that the existence of other late opening outlets necessarily sets a clear precedent by which all subsequent decisions should be determined.
9. I note that the appellant has reduced the number of days for which the extended opening hours are sought since the previous application was refused by the Council. However, the opening of the premises until 03.00 hours on Fridays and Saturdays will inevitably result in a considerable increase in the level of comings and goings of customers, both in the premises and congregating outside, later on evening than is currently permitted.
10. Such levels of activity are likely to give rise to noise and disturbance from visiting customers and staff movements. This would include raised voices inside and outside the premises. Indeed the appellant's evidence shows that significant numbers of people can congregate at any one time both inside and outside the premises. Such gatherings will give rise to sudden and intermittent types of noise that will likely be audible above the continuous ambient levels and sound intrusive within neighbouring dwellings.

11. As the appellant notes, the premises can be at its busiest following the closure of a nearby nightclub at 02.00. As such, the 03.00 closing time will mean high levels of noise and disturbance for a considerable proportion of the time when neighbours have reasonable expectations for sufficient quiet to relax and sleep.
12. The appellant indicates that the extending opening hours will improve the flow of customers late on an evening and that it is the limited capacity of existing food outlets that gives rise to the highest levels of noise and disturbance. I am not persuaded. It seems to me that if there is insufficient capacity to provide for customers on Claypath then people will look further afield or not seek hot food at all. The presence of an additional hot food takeaway only serves to increase the available capacity and therefore the number of people congregating at such times. This is clear from the appellant's evidence which shows the appeal premises accommodating a significant number of people at around 02.30, whilst several more are shown to congregate outside.
13. Moreover, concerns have been raised by local residents regarding existing levels of noise, disturbance and anti-social behaviour and evidence has been provided by Durham Police that the operation of the late night refreshment houses on Claypath to 03.00 effectively extends late night activity in the area to 03.30 - 04.00 which creates serious policing issues. As a result, I agree the extended opening hours and associated gatherings of people will likely result in the material increase in the potential for anti-social behaviour which will, in turn, increase the fear of crime for neighbouring residents.
14. I conclude, therefore, that the proposed opening hours will have a harmful effect on the living conditions of neighbouring residents, with regard to noise, disturbance and fear of crime. Consequently, the proposed opening hours conflict with saved Policies S10 and H13 of the City of Durham Local Plan 2004 (LP) which state that food and drink uses will be permitted provided there are no adverse effects on the amenities of nearby occupants and that changes of use which have a significant adverse effect on the amenities of residents within residential areas will not be permitted.
15. LP Saved Policy S2B relates to the effect of food uses on retail character rather than living conditions and I therefore find it is not relevant in respect of this main issue. Nevertheless, given the conflict with saved LP Policies S10 and H13, the proposal would not accord with the presumption in favour of sustainable development, set out in paragraph 14 of the National Planning Policy Framework (the Framework), which states that proposals that accord with the development should be approved without delay.
16. Whilst paragraph 123 of the Framework recognises that businesses wanting to develop in continuance of their business should not have unreasonable restrictions put on them because of changes in nearby land uses since they were established, it does state that decisions should avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of new development.
17. The proposal would also conflict with paragraph 17 of the Framework which states that development should secure a good standard of amenity for all existing and future occupants of land and buildings, and with paragraph 69 of the Framework which states that decisions should achieve safe and accessible environments where the fear of crime does not undermine quality of life.

Other Matters

18. The appeal property is located in the Durham City Centre Conservation Area which has considerable historical and aesthetic significance. Given the lack of physical alterations, I am satisfied that the extended opening hours would preserve the character and appearance of the conservation area.
19. The appellant suggests that, by not allowing extended opening hours, other operators would be given an unfair competitive advantage and that the opening hours would allow the operation of a viable business. However, there is no evidence that the business is failing currently, indeed it is suggested that longer opening hours would offer increased income and improved business viability and vitality. No business accounts or other evidence has been submitted to support his case.
20. As a result, whilst I afford significant weight to the economic benefits, in line with paragraphs 19, 21 and 70 of the Framework, it has not been shown that the those economic benefits are of sufficient scale as to outweigh the harm I have identified in respect of living conditions. The proposal would fail the environmental and social roles of sustainability and thus would not be sustainable development as described in the Framework.
21. The appellant indicates that, in the event that the proposed 03.00 closing time is considered unacceptable, that I should impose alternative opening hours as I see fit, having regard to the number of business on Claypath opening beyond 23.00 on weekends. However, to impose alternative opening hours would result in a material change to the original proposal. The Council and other parties would not have the opportunity to comment on revised opening hours and, therefore, in the interests of fairness and natural justice, I have considered the appeal on the basis of the opening hours sought by the appellant. Nevertheless the appellant is not precluded from discussing revised opening hours with the Council outside of this appeal process.
22. The appellant has referred me to an appeal decision in Retford³ where it was accepted that longer hours would not significantly alter the existing situation. However, that appeal was located in a different authority under a different policy context and I do not have the full details of the case so am unable to ascertain if the circumstances were comparable to those here. In contrast, the Council has referred to two recent appeal decisions⁴ at 94 and 97 Claypath, where clearly circumstances are more reasonably comparable and in both instances the Inspectors drew similar conclusions to those I have here. Thus I afford the Retford decision limited weight.

Conclusion

23. For the reasons given above, I conclude that the condition 4 of the planning permission is necessary to protect the living conditions of neighbouring occupiers and satisfies all tests for conditions set out in paragraph 206 of the Framework. The appeal should therefore be dismissed.

Jason Whitfield

INSPECTOR

³ APP/A3010/A/07/2061754

⁴ APP/X1355/A/13/2192998 and APP/X1355/W/16/3155884