



Appeal Decision

Site visit made on 14 November 2017

by M Aqbal BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 March 2018

Appeal Ref: APP/B0230/W/17/3179752

The Parade, Hancock Drive, Luton LU2 7SF

- 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 Sheet Anchor Properties Limited against the decision of Luton Council.
 - The application Ref 17/00490/VARCON, dated 23 March 2017, was refused by notice dated 19 May 2017.
 - The application sought planning permission for Change of Use from Class A1 Retail to Class A5 Hot Food Takeaway and fume extraction details - Variation of Condition 3 (Opening Hours) of Planning Permission 16/00926/COU dated 18th August 2016 without complying with Condition 3 attached to planning permission Ref 16/01872/VARCON, dated 15 December 2016.
 - The condition in dispute is No 3 which states that: The use hereby permitted shall not operate outside the following hours 10am-10pm Monday to Thursday, 10am to 11pm Friday to Saturday and 10am to 6pm on Sundays and Bank Holidays.
 - The reason given for the condition is: To protect the amenities of neighbouring properties. To accord with the objectives of Policy(ies) LP1 of the Luton Local Plan.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. Since the determination of the application the Council has adopted The Luton Local Plan 2011-2031 (LP). The Council has advised that Policy LP1 has now been replaced. I have therefore considered the proposal against the relevant policies of the new LP.

Background and Main Issue

3. The appeal premises was granted planning permission¹ by decision notice dated 8 August 2016, for change of use from Class A1 (Retail) to Class A5 (Hot Food Takeaway). This permission includes condition No 3, which states: 'The use hereby permitted shall not operate outside the following hours: 10am – 10pm Monday to Friday and not at all on Sundays and Bank Holidays'.
4. As the above opening hours condition did not permit any trading on Saturdays, Sundays or Bank Holidays, in October 2016, the appellant submitted a further

¹ Application No. 16/00926/COU

application² to vary the above condition, which was approved by decision notice dated 15 December 2016. Condition No 3 of this permission states: 'The use hereby permitted shall not operate outside the following hours 10am-10pm Monday to Thursday, 10am to 11pm Friday to Saturday and 10am to 6pm on Sundays and Bank Holidays'.

5. The appellant has advised that at the time the above application was made, there was no end user in place for the appeal premises. However, in March 2017, an end user was in place that required different opening hours.
6. Consequently, the appellant submitted a further application³ to vary the opening hours as follows: 'The use hereby permitted shall not operate outside the following hours 10am to 10pm Monday to Thursday, 10am to 11pm Friday to Saturday and 10am to 11pm on Sundays and Bank Holidays'.
7. As such, the variation of condition application, which is the subject of this appeal, seeks later opening hours on a Sunday and Bank Holidays, until 11pm.
8. Accordingly, the main issue is whether the variation of the condition to allow later opening hours until 11pm on Sundays and Bank Holidays would affect the living conditions of nearby neighbours in respect of noise and disturbance.

Reasons

9. The appeal property comprises a centrally located ground floor unit in 'The Parade', which comprises a collection of commercial units, known as Bushmead Shopping Centre within a local centre. The Parade includes a number of retail and other food outlets. There is also a public house next to The Parade and a number of community uses nearby.
10. To the front of The Parade is a communal car park, which serves the local centre and to the rear is a small service road, accessed off Hancock Drive.
11. Although the local centre is surrounded by residential development, the nearest dwellings to the appeal site are flats above The Parade and dwellings to the rear along Hancock Drive and Gleneagles Drive.
12. The application subject of this appeal was accompanied by a Noise Impact Assessment (NIA v1)⁴. Based on the conclusions of this assessment the Council acknowledges that atmospheric noise emissions from future plant installations are within the limits required by the Council. However, the Council is concerned that the NIA v1 did not take into account other sources of noise such as customers and staff using the appeal property.
13. To address the Council's concerns in respect of other sources of noise, as part of the appeal submissions the appellant has provided a further Noise Impact Assessment (NIA v2)⁵.
14. The most recent NIA v2 has been updated to consider other sources of noise, including walk in customers and delivery personnel, speech noise levels and vehicle noise levels. The updated noise assessment concludes that other

² Application No.16/01872/VARCON

³ Application No. 17/00490/VARCON

⁴ Noise Impact Assessment – Report 7919 NIA Prepared 23 March 2017, Revision Number:1

⁵ Noise Impact Assessment – Report 7919/NIA Prepared 4 July 2017, Revision Number:2

- sources of noise would not have a significantly harmful impact on the noise levels at the nearest residential facades (flat above appeal premises).
15. However, while the report assesses the effect of car doors slamming, this is modelled on the basis of predicted LAeq noise levels. The report advises that this is the level of notional steady sound which, over a stated period of time, would have the same A-weighted acoustic energy as the A-weighted fluctuating noise measured over that period. The report also indicates that very short bursts of noise such as sudden bangs, shouts and car horns, which audibly stand out from the general level of noise, may not have any effect on the Leq value. The report advises that such noises are often measured in terms of LmaxT, which indicates the instantaneous maximum sound pressure level during the measurement period. However, there is no consideration of car door slams, or other potential bursts of noise, such as shouts or car horns, on this basis.
 16. Based on my observations and experience, due to the very close proximity of flats above The Parade, the occupiers of these flats would be particularly susceptible to sudden activities such as shouting from customers, doors on vehicles being slammed and other disturbance such as stereos playing in vehicles as customers or delivery drivers wait for food orders to be prepared. Such activity would result in noise and disturbance to the detriment of the living conditions of the occupiers of the flats above The Parade.
 17. Moreover, there is no evidence to suggest that any of the existing businesses except for the public house operate until late at night particularly on Sundays and Bank Holidays. Despite this, it is apparent from third party representations that neighbours already experience noise and disturbance, I attach significant weight to this. Consequently, I am of the view that extending the opening hours of the appeal premises to trade until 11pm on Sundays and Bank Holidays would introduce activity late at night, resulting in additional noise and disturbance during days and times when neighbours would reasonably expect a degree of peace and quiet.
 18. I acknowledge that the public house opens until 10.30pm on Sundays. However, this seems to be an exception to the prevailing opening hours in the area, and in any event, is not as late as the appellant is proposing. The Council has also confirmed that the flat above the public house is linked with it and occupied by the landlord. As such, the opening hours of the public house do not weigh in favour of the proposal.
 19. I conclude that condition No 3 is reasonable and necessary in the interests of protecting the amenities of adjacent properties and that the variation of this condition as proposed would harm the living conditions of neighbours.
 20. The Council has referred me to policies LLP1 and LLP23 of the LP. However, neither of these specifically relate to safeguarding the living conditions of neighbours.
 21. Paragraph 14 of the National Planning Policy Framework (the Framework) states that where the development plan is absent, silent (as in this case) or relevant policies are out-of-date, granting permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a

whole, or specific policies in the Framework indicate development should be restricted.

22. In this case I have identified significant harm arising from the proposal and no benefits have been drawn to my attention. In my judgement, the adverse impacts of allowing the appeal would significantly and demonstrably outweigh the benefits. I am also mindful that Paragraph 17 of the Framework seeks to secure a good standard of amenity for all existing and future occupants of land and buildings.

Conclusion

23. For the reasons given above, I conclude that the appeal should be dismissed and condition No 3 retained in its present form.

M Aqbal

INSPECTOR