The Planning Inspectorate

Appeal Decision

Site visit made on 31 January 2019

by G Powys Jones MSc FRTPI

an Inspector appointed by the Secretary of State

Decision date: 12th March 2019

Appeal Ref: APP/J1860/W/18/3212655
Land at The Oxhey, Bushley, Tewkesbury, GL20 6HP

- 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 a condition subject to which a previous planning permission was granted.
- The appeal is made by Miss Sorrel Griffiths against the decision of Malvern Hills District Council.
- The application Ref 18/00047/FUL, dated 15 December 2017, was refused by notice dated 20 July 2018.
- The application sought planning permission for change of use of land from agricultural to mixed use for agricultural, commercial dog exercise area and amenity area for dog walking (sui generis) without complying with a condition attached to planning permission Ref 17/00533/FUL, dated 21 September 2017.
- The condition in dispute is No 2 which states that *The development hereby permitted shall not be open to customers outside the following hours of: 10am - 3pm Monday to Friday; 8:30am - 6pm Saturdays.*
- The reason given for the condition is: *To ensure the proposal preserves residential amenity and to prevent unacceptable noise pollution to the detriment of human health contrary to policy SWDP31 of the South Worcestershire Development Plan.*

Decision

1. The appeal is allowed and planning permission is granted for change of use of land from agricultural to mixed use for agricultural, commercial dog exercise area and amenity area for dog walking (sui generis) at land at The Oxhey, Bushley, Tewkesbury, GL20 6HP in accordance with the application Ref 18/00047/FUL, dated 15 December 2017, without complying with condition No 2 set out in planning permission Ref 17/00533/FUL granted on 21 September 2017 by the Malvern Hills District Council, but otherwise subject to the conditions set out in the Schedule attached to this decision.

Preliminary matters

2. The original planning permission was granted retrospectively, but the appellant operates in breach of the terms of condition 2 imposed on that permission. This condition imposes time limits on the operation of the permitted use, which the appellant now seeks to vary. She wishes to operate the business from 7am-7pm on every days of the week. It is claimed that the use has operated on this basis since its unauthorised inception, prior to the grant of the original permission.

3. The appellant has made an application for costs against the Council. This is the subject of a separate decision to be issued at a later date.

Main Issue

4. The main issue is the effect of extending the authorised hours of operation on the living conditions of local residents with particular reference to noise and disturbance.

Reasons

5. As the Council acknowledges, the principle of the use of the appeal site is established by the extant planning permission. The Council also acknowledges that some of the limitations on the hours of operation set out in the condition in dispute were imposed in error.

6. In this respect, when applying for the original (retrospective) permission, the appellant's suggested opening times were 10.00 – 18.00hrs Monday to Friday and 08.30 – 18.00hrs on Saturdays and Sundays. The application leading to this appeal sought, in part, to address this error, but also sought extensions to the time periods originally proposed.

7. The appeal site is comprised of two large fields set to the south of the A438 in what I would describe as open countryside. The fields are securely fenced off from the road and adjacent agricultural fields. Access is derived from a country lane, at a point 100m or so south of its junction with the A438. The access leads into a small car park and control area.

8. The Council's concerns centre on the prospect that the extended use of the site would materially affect the living conditions of nearby residents by reason of noise and disturbance arising principally from dogs barking whilst they exercise on the appeal site. I note that the appellant has received a large measure of support, particularly from the users of the facility. I fully understand the attractions and benefits of the facility to dog owners, but my central concern lies with protecting those residents closest to the facility from possible harm.

9. The nearest noise-sensitive development to the appeal site is a care home for the elderly. This is accessed off the same lane as the facility subject of appeal. Just to the north of the nursing home, but on the other side of the A438 stand three dwellings. The residents of 2 of these dwellings have made representations, one objecting largely on the grounds of noise nuisance, whilst the other claims not to have been affected by the development and has therefore no cause to object. No objection has been raised by the management of the residential care home, by any resident of the home or by any of the residents' relatives. Indeed, the anecdotal indications are that some residents of the home draw comfort from the presence of the dogs.

10. The appellant has submitted an Environmental Noise Report (ENR) prepared by a firm of Acoustic Consultants. I found the report to be useful in certain respects, but as the consultant points out in the final chapter of the report:

    '..the assessment of noise disturbance from dog barking is not one which falls into a simple assessment by comparison with guidance values or consideration of decibel level. The impact of dog barking depends on several factors..'

11. I share that view. The ENR highlights the position of the nearest noise sensitive developments and their closeness to the A438. It is therefore not surprising

that the empirical evidence derived from the monitoring stations shows the greatest influence on their acoustic environment to be traffic noise.

12. Nonetheless, during the survey, barking was perceptible at one of the monitoring points, that closest to the nursing home, for a very limited period, albeit that this was '*not considered disturbing*', which is, of course, a subjective assessment.

13. To my mind, having regard to the type of facility operated by the appellant, particularly the manner of the use, it is inevitable that some dogs using it will bark and that some barking will be heard outside the confines of the site at some times of the day. However, that has to be weighed against the competing effect of other noises, including traffic and that associated with agricultural activities.

14. For most part of the day, traffic noise will be largely dominant, but this would not always be the case. At some times of the day and at week-ends, particularly early morning and late evening, when levels of traffic are generally lower, there is a risk that the sounds of dogs barking would be clearly perceptible at the nearby noise-sensitive locations, and that this would cause nuisance and harm to local residents.

15. For these reasons, I consider the hours of operation proposed by the appellant now to be somewhat excessive. On the other hand, I consider the Council's imposed hours of operation to be too restrictive. Having regard to the submitted evidence, and taking all matters into account, I consider the acceptable hours of operation would be 08.00-19.00 on weekdays and between 08.30-18.00 at the week-end.

16. I conclude, having regard to those provisions of policies SWDP21 of the South Worcestershire Development Plan designed to protect neighbouring amenity, that the condition in dispute may be varied without causing harm to the nearest residents.

17. Accordingly, a fresh planning permission will be granted, with condition 2 amended. The Council has also suggested the imposition of other conditions, most of which reflect the content of the conditions imposed on the original permission. All are necessary and shall be imposed, albeit with some of the suggested wording amended. The reasons for their imposition, with which I concur, are set out in the original planning permission and the Council's schedule of recommended conditions.

18. All other matters raised in the representations have been considered, and I note in particular the concerns expressed by a local farmer as to the effect of the facility on the welfare of sheep grazing adjacent fields. Whilst I understand those concerns, the planning permission already exists, and this appeal is concerned with a variation to the permitted hours of operation.

19. I note too the views of the local Parish Council. I have already dealt with the planning-related points raised.

20. I have noted the benefits arising to at least some of the users arising from the present ability to use the facility, albeit on an unauthorised basis, before and after working hours. However, this benefit must be weighed in the balance from the risk that the use of the facility may disrupt the enjoyment of local people's homes and residences. This I have done.

21. No other matter raised in the representations outweighs those that led me to my conclusions.

G Powys Jones

INSPECTOR

Schedule of conditions

1. The development hereby permitted shall be carried out in accordance with the following approved plans: the unreferenced location and block plans.
2. The development hereby permitted shall not be open to customers outside the hours of 08.00 – 19.00 on Monday-Friday or outside the hours of 08.30-18.00 on Saturdays, Sundays & Bank Holidays.
3. Within 3 months of the date of this permission, the first 5 metres of the access, measured from the edge of the carriageway, shall be surfaced in a bound material. The access shall thereafter be retained in this condition for the duration of the development.
4. Only one caravan may be sited within the site at any time. The caravan shall be used solely in connection with the approved development as a commercial dog exercise area. Should the commercial dog exercise and amenity business use cease the caravan shall be removed within a period of 3 months of that date.
5. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (as amended) (or any order revoking, re-enacting, substituting, amending, extending, consolidating, replacing or modifying that Order), no new structures, boundary treatments, or surfacing shall be erected/constructed/carried out on the application site.
6. No external lighting shall be installed or erected within the site without the prior written consent of the local planning authority.
7. Within 2 months of the date of this decision, details of a sign showing the approved development's hours of opening to customers shall be submitted to the Local Planning Authority. The sign shall be erected within 2 months of receiving the local planning authority's written approval to the details.