



Appeal Decisions

Site visit made on 30 September 2019

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 20 November 2019

Appeal Ref: APP/X5990/W/19/3233294 ('Appeal A') **Basement and Ground Floor, 54 Queensway, London W2 3RY**

- 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 Mark Byrne against the decision of City of Westminster Council.
- The application Ref 19/00270/FULL, dated 15 January 2019, was refused by notice dated 12 March 2019.
- The application sought planning permission for use of ground floor and basement as a hot food take-away (class A5) without complying with conditions attached to planning permission Ref 18/00574/FULL, dated 19 April 2018.
- The conditions in dispute are Nos 3 and 4 which state that:
 - (3) *Customers shall not be permitted within the takeaway premises before 08:00 or after 23:00 on any day of the week.*
 - (4) *The plant/machinery in connection with the takeaway use shall not be operated except between the hours of 08:00 to 23:00 on any day of the week.*
- The reasons given for the conditions are in each case:
 - To protect the privacy and environment of people in neighbouring properties, as set out in S29 of Westminster's City Plan (November 2016) and ENV13 of our Unitary Development Plan that we adopted in January 2007.*

Appeal Ref: APP/X5990/W/19/3233312 ('Appeal B') **Basement and Ground Floor, 54 Queensway, London W2 3RY**

- 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 Mark Byrne against the decision of City of Westminster Council.
 - The application Ref 19/00475/FULL, dated 23 January 2019, was refused by notice dated 20 March 2019.
 - The application sought planning permission for use of ground floor and basement as hot food take-away (class A5) without complying with a condition attached to planning permission Ref 18/00574/FULL, dated 19 April 2018.
 - The condition in dispute is No 9 which states that: *You must not operate a delivery service, nor shall the premises utilise a delivery and collections service operated by third parties, for the takeaway use hereby approved.*
 - The reason given for the condition is: *To protect the environment of neighbouring occupiers. This is as set out in S29 and S32 of Westminster's City Plan (November 2016) and ENV6 of our Unitary Development Plan that we adopted in January 2007.*
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Decision

Appeal A

1. The appeal is dismissed.

Appeal B

2. The appeal is allowed and planning permission is granted for the use of the premises at Basement and Ground Floor, 54 Queensway, London W2 3RY as a hot-food takeaway (Class A5) in accordance with application Ref 19/00475/FULL, dated 23 January 2019, without complying with condition number 9 previously imposed on planning permission Ref 18/00574/FULL, dated 19 April 2018, but subject to the following conditions:
 - 1) Customers shall not be permitted within the takeaway premises before 0800 hours or after 2300 hours on any day of the week.
 - 2) The plant/machinery in connection with the takeaway use shall not be operated except between the hours of 0800 to 2300 hours on any day of the week.
 - 3) (1) Where noise emitted from the proposed plant and machinery will not contain tones or will not be intermittent, the 'A' weighted sound pressure level from the plant and machinery (including non-emergency auxiliary plant and generators) hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 10 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the Council. The background level should be expressed in terms of the lowest LA90, 15 mins during the proposed hours of operation. The plant-specific noise level should be expressed as LAeqTm, and shall be representative of the plant operating at its maximum. (2) Where noise emitted from the proposed plant and machinery will contain tones or will be intermittent, the 'A' weighted sound pressure level from the plant and machinery (including non-emergency auxiliary plant and generators) hereby permitted, when operating at its noisiest, shall not at any time exceed a value of 15 dB below the minimum external background noise, at a point 1 metre outside any window of any residential and other noise sensitive property, unless and until a fixed maximum noise level is approved by the Council. The background level should be expressed in terms of the lowest LA90, 15 mins during the proposed hours of operation. The plant-specific noise level should be expressed as LAeqTm, and shall be representative of the plant operating at its maximum. (3) Following installation of the plant and equipment, you may apply in writing to the Council for a fixed maximum noise level to be approved. This is to be done by submitting a further noise report confirming previous details and subsequent measurement data of the installed plant, including a proposed fixed noise level for approval by the Council. Your submission of a noise report must include:
 - (a) A schedule of all plant and equipment that formed part of this application;
 - (b) Locations of the plant and machinery and associated: ducting; attenuation and damping equipment;
 - (c) Manufacturer specifications of sound emissions in octave or third octave detail;
 - (d) The

location of most affected noise sensitive receptor location and the most affected window of it; (e) Distances between plant & equipment and receptor location/s and any mitigating features that may attenuate the sound level received at the most affected receptor location; (f) Measurements of existing LA90, 15 mins levels recorded one metre outside and in front of the window referred to in (d) above (or a suitable representative position), at times when background noise is at its lowest during hours when the plant and equipment will operate. This acoustic survey to be conducted in conformity to BS 7445 in respect of measurement methodology and procedures; (g) The lowest existing L A90, 15 mins measurement recorded under (f) above; (h) Measurement evidence and any calculations demonstrating that plant and equipment complies with the planning condition; (i) The proposed maximum noise level to be emitted by the plant and equipment.

- 4) No vibration shall be transmitted to adjoining or other premises and structures through the building structure and fabric of this development as to cause a vibration dose value of greater than 0.4m/s (1.75) 16 hour day-time nor 0.26 m/s (1.75) 8 hour night-time as defined by BS 6472 (2008) in any part of a residential and other noise sensitive property.
- 5) Within 3 months of the date of this permission, approval of details of a supplementary acoustic report demonstrating that the plant will comply with the Council's noise criteria as set out in Condition 5 and 6 of this permission shall be sought in writing from the Council. No customer deliveries shall take place from the site before the Council's approval of those details has been given.
- 6) The door to the premises shall be fitted and permanently maintained with a self-closing door.
- 7) Any delivery service operated from the site must not operate before 0800 hours or after 2300 hours on any day of the week.
- 8) Within 3 months of the date of this permission, approval of the details of an operational management plan for the proposed takeaway and delivery use shall be sought in writing from the Council which provides details of the following:
 1. How the takeaway use will operate.
 2. How customers leaving premises will be prevented from causing nuisance for people in the area, including people who live in nearby buildings.
 3. General procedures to prevent noise and nuisance.
 4. Waste, recycling storage and collections provision.
 5. Staff welfare facilities provision.
 6. How daily and customer deliveries to and from the premises are managed effectively.
 7. Litter patrols

No customer deliveries shall take place from the site before the Council's approval of those details has been given, and the use hereby permitted shall be operated in accordance with the approved details.

- 9) Within 3 months of the date of this permission, approval of details of how waste is going to be stored on the site and how materials for recycling will be stored separately shall be sought in writing from the Council. No customer deliveries shall take place from the site before the Council's approval of those details has been given, The stores for waste and materials for recycling shall be provided in accordance with these details. The stores shall be clearly marked and made available at all times to everyone using the premises.

Main Issues

3. The main issue arising in both appeals is the effect of the proposed development on the living conditions of the occupiers of nearby residential properties, and accordingly whether the existing conditions restricting the hours of operation and deliveries are necessary to protect the living conditions of those occupiers.

Reasons

4. The appeal site is presently in use as KFC take-away premises, the change to a Class A5 use from the former restaurant having been permitted in 2017 subject to conditions (among others) limiting the opening hours and prohibiting the operation of an associated delivery service. The appeal site lies on Queensway, close to Bayswater tube station and in a 'Stress Area' designated by the Council in recognition of the potential cumulative impacts that entertainment and other late-night uses may have upon local residents.
5. A number of similar uses prevail at the street level in the local area, with an abundance of cafes and restaurants as well as retail premises. Immediately opposite the appeal site to the north lies a branch of Sainsbury's, with a block of flats above. Opposite to the south are restaurants at street level with a substantial residential block of flats, Princess Court, above. To the north of the appeal site, beyond a currency exchange shop, Inverness Place branches off Queensway and a substantial hotel lies on that road to the rear of the appeal site.
6. The Council's reasons for refusing the application to extend the opening hours (to 0100 on Sundays to Thursdays, and to 0300 on Fridays and Saturdays) related to, first, the cumulative impacts of late night activity and disturbance to the local community and, secondly, to the potential for nuisance to result from the mechanical plant and ventilation. In relation to the second concern, since the Council determined the application the appellants have produced an acoustical report demonstrating that the plant could be operated without unacceptable consequences, and the Council does not dispute this save to say that the plant operating hours should match the opening hours.
7. In relation to the first issue, the appellant refers to the extended opening hours of other premises nearby, and to the fact that the upper floors of the appeal site are not in residential use. An acoustic assessment of 'customer speech' is also provided to demonstrate that customer noise levels would not exceed background levels.

8. It appears that the other nearby premises operating beyond the existing opening hours of the appeal site have not been subject to planning controls. The other take-away premises in the area of the appeal site mostly lie at a greater distance from the Princess Court development than the appeal site. I accept the findings of the acoustic assessment concerning customer voices emanating from the appeal premises, but this does not answer the wider concerns about late night activity, noise and disturbance in the street.
9. Policy TACE 9 of the Westminster Unitary Development Plan adopted 24 January 2007 ('the UDP') is permissive of development only where no adverse effects, including cumulatively adverse effects, result upon residential amenity or local environment quality from noise or increased late night activity. Despite the findings of the acoustical assessment, I am unable to conclude that this would be the case. Later opening hours would inevitably attract later custom and footfall, with the likelihood of noise and disturbance in the street at a time when residents can reasonably expect quiet. For these reasons the opening hours of the premises do not warrant extending.
10. Turning to the question of deliveries, at my site visit I observed that Queensway is a busy one-way road. There is high pedestrian footfall, which as the Council say is the majority activity, but there is also significant vehicular use of the street, which provides the predominant noise environment.
11. The supporting text to UDP policy SS6 explains that in this area, the number of A3 uses and growth in night-time activity is considered to have reached a high level of environmental stress and has had an unacceptable impact on residential amenity. The policy seeks to avoid proposals that would harm residential amenity or local environmental quality. Policy TACE 9 seeks to avoid developments that would harm residential amenity or local environmental quality by reason of (among other matters) noise or increased parking and traffic.
12. Policy TACE 9 is expressed in terms that the City Council should be satisfied that no such adverse effects would occur in order for a permission to be granted. The Council point in this case to the potential for increased noise and disturbance for residents from delivery vehicles parking up and pulling off, and have exercised a 'cautious approach'. The Council express concern that the increased activity resulting from the operation of a delivery service would deviate from the 'low impact' use in the stress area and result in conflict with these policies seeking to preserve residential living conditions and the local environment.
13. The appellant suggests that the provision of a delivery service associated with the use would potentially not result in different levels of comings and goings at the premises. I consider that this is unrealistic. There may be some displacement, including by combined trips of delivery service providers as identified by the appellant's final comments. However, a delivery service would be likely to result in additional visits to the premises, rather than merely replacing those customers who would otherwise have visited the premises in person, or those delivery service providers otherwise servicing nearby take-away premises. As the Council point out, the site would no longer serve only visiting members of the public, but would be available to a much wider proportion of the local area, potentially increasing the number of trips, especially vehicular ones, to and from the site.

14. However, overall it appeared to me that a delivery service could be accommodated within the existing environment of the street, during the same hours as the existing opening times, without giving rise to adverse impacts on neighbouring residents. In this I accept the appellant's argument that, when assessed against the high levels of existing activity within the immediate locality, which include a number of take-away delivery services and a predominant noise environment of vehicular traffic, the introduction of a delivery service would result in negligible additional impacts so long as its hours of operation are restricted to be in keeping with the existing take-away use.
15. Subject to the hours of deliveries being limited to the same as those of the existing take-away, I am unable to conclude that a delivery service would harm those interests that policies SS6 and TACE 9 seek to protect. I therefore conclude that a delivery service can reasonably be accommodated within the existing environment without harm to residential living conditions.

Conditions

16. The Council have suggested a number of planning conditions, mostly carried over from previous permissions. As the A5 use is already taking place, the first two proposed conditions, requiring compliance with application plans and avoiding building works outside of certain hours, appear unnecessary as any works will already have been completed.
17. The third condition, prohibiting customers from attending the premises except between midday and 2300 on any day of the week, requires amendment to reflect a previous section 73 permission allowing the premises to open at 0800. For the reasons discussed above, these opening hours should remain. Its corollary concerning plant and machinery is also required. Noise and vibration are required to be controlled. The proposed condition prohibiting 'work on this part of the development' prior to the approval of details appears to be no longer apt and I shall instead require the supplementary acoustic report to be submitted within 3 months of this decision, and require that the delivery service now permitted should not begin until those details have been approved. A self-closing door is required to limit noise emissions.
18. The Council also propose that deliveries should be made only by pedal bike. Given the existing noise environment, I do not consider that such a condition is reasonable or necessary, and I note the appellant's objections on enforceability grounds, which also have some force. I therefore do not propose to control the mode of travel of the delivery drivers.
19. The final two conditions relate to an operational management plan and waste storage. The appellant suggests that such conditions are no longer necessary because the details have previously been approved under application Ref 18/00574/ADFULL. However, those details relate to what is now a different permission, and may require some amendment as the result of the deliveries now permitted, and so I shall reimpose them, with a slight re-wording of the operational management plan to deal with the customer deliveries element. Again, however, I shall require the details within 3 months of this decision, rather than in advance of the premises' occupation or before starting work, as suggested by the Council, and the deliveries not to begin before those details have been approved.

Conclusion

20. Subject to those conditions, for the above reasons Appeal A is dismissed and Appeal B is allowed.

Laura Renaudon

INSPECTOR