



Appeal Decision

Site visit made on 3 December 2019

by K A Taylor MSC URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 January 2020

Appeal Ref: APP/C4615/W/19/3237704

McDonald's Restaurant, Birmingham New Road, Coseley WV14 9JH

- 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 McDonald's Restaurants Ltd against the decision of Dudley Metropolitan Borough Council.
 - The application Ref P19/0646, dated 16 April 2019, was refused by notice dated 14 August 2019.
 - The application sought planning permission for '*variation of condition 9 of planning approval 96/50298 to opening hours of 06.00 to 23.00 hours on any day*' without complying with a condition attached to planning permission Ref P12/0508, dated 31 July 2012.
 - The condition in dispute is No 2 which states that: *The premises shall not be open to the public before the hours of 06.00 nor after 23.00 daily.*
 - The reason given for the condition is: *In order to safeguard the amenities of the occupiers of the surrounding area and to comply with UDP Policy DD4.*
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Decision

1. The appeal is allowed and planning permission is granted for *variation of condition 9 of planning approval 96/50298 to opening hours of 06.00 to 23.00 hours on any day* at McDonald's Restaurant, Birmingham New Road, Coseley WV14 9JH in accordance with the application Ref P19/0646 dated 14 August 2019, without compliance with condition number 2 previously imposed on planning permission Ref P12/0508 dated 31 July 2012 and subject to the conditions set out in the schedule attached to this decision.

Background & Main Issue

2. The McDonald's restaurant which includes a drive-thru was constructed at the appeal site in 1996, following the grant of planning permission¹ allowed on appeal. Various planning applications have been submitted for extending operating hours, external appearance and operational facilities. In December 2000², the hours were varied for the restaurant to trade between 07:00 to 23:00 daily. In August 2011³, an application was refused to vary the opening hours to 24 hours a day, 7 days a week and the revised timings of 05:00 to

¹ 96/50298

² Application Ref: P00/51901

³ Application Ref: P11/0707

midnight, 7 days a week. A six-month temporary permission to change the opening hours from 06:00 to 23:00, 7 days a week was approved in October 2011⁴ and was subsequently approved permanently in July 2012⁵.

3. The appellant now wishes to remove the condition to enable the business to trade 24 hours a day seven days a week. The Council's officer recommended that the application should be granted for a temporary period of 12 months, to assess and test the impacts of development, however it was refused on grounds of noise and disturbance by members of the development control committee.
4. The main issue is the effect that removing the condition would have on the living conditions of the occupiers of nearby residential properties, with particular regard to noise and other disturbances.

Reasons

5. The appeal site is a single storey detached restaurant with associated parking and a 'drive thru' facility. It is adjacent to a busy junction of Birmingham New Road (A4123) and Ivyhouse Lane. The A4123 being a major route through Dudley to Wolverhampton. The vehicular access to the site is directly from Birmingham New Road, with the northern side of the site for customer parking and the 'drive thru' positioned towards the south. The nearest residential dwelling is approx. 40m from the appeal site, with residential dwellings on the opposite side of Birmingham New Road. There is a working men's club to the rear of the site and a petrol station, open 24/7 on the opposite side to Ivyhouse Lane. There are also several retail shops adjacent to the appeal site, which include other hot food take away premises with residential flats above.
6. The National Planning Policy Framework 2019, (the Framework) at Paragraph 180 says planning decisions should also ensure that new development is appropriate for its location, taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment. In doing so they should mitigate and reduce to a minimum, potential adverse impacts resulting from noise giving rise to significant adverse impacts on health and quality of life.
7. Policy D2 of the Dudley Borough Development Strategy, 2017 (DBDS), restricts development if it is incompatible, in terms of its environmental impact, with surrounding uses including occupiers of dwellings, buildings and the users of public realm at/or near the site in terms of undue harm from noise, disturbances, light and air pollution, odours and fumes. Whilst Policy D5, requires developments that generate noise to include measures that would minimise noise emissions and intrusions to agreed, acceptable levels. It does not permit development where noise levels are assessed as being significant to the extent that amenity will be demonstrably prejudiced despite the provision of mitigation measures.
8. The appellants evidence includes a comprehensive Noise Impact Assessment⁶ (NIA). The NIA was revised in response to comments from the Council's Environmental Safety and Health (ESH) and considers the potential noise

⁴ Application Ref: P11/1007

⁵ Application Ref: P12/0508

⁶ Savills (UK) Limited: MCDONALD'S, COSELEY #743 Noise Impact Assessment: Report No. 14-0167-74 R02: Dated 03 July 2019.

impacts arising from the proposals of extending the opening hours; from people, vehicles, communications operating devices (COD) and roof plant at the site. It demonstrates that the existing background level is already high and the principle contributor to that is road traffic noise. The kitchen extract noise has been reduced by operating at lower speeds and that the extract systems would meet the Council's criteria for BS4142. It shows that there would be no impact on nearby residential amenity, without mitigation and the NIA recommends implementation of protective measures.

9. Appendix E, of the NIA sets out McDonald's national guidance on managing anti-social behaviour (ASB) with the aims of reducing the risk of this happening. This is in addition to Appendix B of the NIA, which is a site-specific Premises Noise Management Plan (PNMP), which sets out the control measures to identify, mitigate and address instances of anti-social behaviour including additional signage, CCTV and incident recordings, restrictions on the car park and no movement of bins before 06:30. The NIA also advises that the measurements of car door closure noise, would meet the World Health Organisation guidelines for night time noise at the nearest receptor.
10. Furthermore, as part of the appellants appeal submission, at Appendix 7 they have provided a site management plan (SMP), which sets out 'good practice' measures to be adopted at the appeal site for mitigation of any adverse impacts on the wider locality by maintaining a safe and efficient operation, with regards to litter, minimising COD and vehicle noise, rodents, ASB, signage and servicing.
11. I acknowledge the Council's and residents' concerns on ASB, but I have no substantive evidence other than anecdotal that ASB has taken place at the appeal site, nearby petrol station and/or that it would potentially occur in the future at the appeal site, and even if this was the case, it could be addressed through the premises licence. Nonetheless, a condition could be imposed to require the appeal site to be operated in accordance with the PNMP.
12. The Council have advised that complaints have been received relating to the noise of the 'drive-thru' speaker system, the COD, but due to setting changes this has resolved the problems. The distance between residential properties and the COD is circa 40m. The NIA, Appendix D, measured the COD noise levels and concluded that during the surveys the automated announcement from the first COD was subjectively loud and clear from across the road and is likely to have caused the complaints.
13. The NIA recommends that the COD is set specifically to daytime and night-time level settings including the automated announcement, meaning that both COD at the appeal site are set at 'medium sensitivity setting' and would be below 45dB(A), Appendix B of the NIA sets out the control measures to be put into place for the COD and that these are maintained within the PNMP, and is also within the SMP, of which could be secured by condition.
14. However, whilst considering the NIA I do acknowledge there is considerable local feelings on noise and disturbance, particularly noise from people and cars and the COD, these are all matters which were assessed within the NIA. There is very little technical evidence from the Council to dispute the findings of the NIA.

15. The illuminated signage at the premises has no restrictions in place which controls the hours of operation, other than the condition placed on the application P12/0508 for lighting associated with the building, including signage for use during the agreed hours of opening. The illuminance levels would be controlled under the previous advertisement consents⁷. Although residents have raised concerns that these conditions have been breached, these are matters for the Council to deal with. As such, further controls on hours of operation for the illuminated signage are outside the scope of this appeal.
16. The Planning Practice Guidance⁸ (PPG) sets out that conditions can be used to grant planning permission for a temporary period where circumstances may be appropriate, including where a trial run is needed in order to assess the effect of the development on the area. Notwithstanding, the overall conclusion of the NIA and the technical evidence, that the proposals would not have an unacceptable impact on the living conditions of nearby residents and sets out a noise management plan, these require implementation and monitoring, particularly in regard to settings of equipment being manually modified and correct procedures being followed by staff, that would likely mean ongoing training and familiarisation is carried out. As such, in coming to my conclusion I consider it would be reasonable that the proposal is for a temporary basis to be assessed over a limited time for a 12-month period. I also note that this was originally suggested by the ESH and the appellant would not be prejudiced in any way, as they have set out, they would agree to this, subject to a suitable worded condition.
17. For the reasons given above, I conclude that the proposed change in opening hours for 12 months would not cause significant harm to the living conditions of nearby residents. As a result, there would be no conflict with Policies D2, D5 and D9 of the DBDS (2017). These policies taken together aim to not permit development if it is incompatible with surrounding uses, as a result of undue harm to the amenity of existing and proposed buildings and the users of the public realm at or near to the site; require measures to minimise noise emissions and intrusions to an agreed, acceptable level; and for hot food takeaways, have no impact on public or highway safety and for equipment not to be detrimental to the area or host property. It would also be in accordance with paragraph 180 of the Framework.

Other Matters

18. Local residents and Councillors have argued that the proposal would result in higher traffic generation, increased use of the car park and illegal vehicle movements. However, I note that the Council's highways officer has no objections to the proposal and in any event, traffic generated by the proposal during these extended hours is expected to be low and generally from people who are working during the night and so are already using the road network and pass-by.
19. Whilst I note the concerns regarding existing litter, air pollution, smells, obesity, crime, and sleep deprivation, there is no persuasive evidence to suggest that the increase in hours of use at the premises would lead to significant increases of those in this regard. Moreover, the litter protocol at the site is set out within the SMP.

⁷ Refs: P16/1380 and P16/1382

⁸ PPG: Paragraph: 014 Reference ID: 21a-014-20140306 Revision date: 06 03 2014

20. Local objections have also been raised that the additional hours of use are not necessary as there are other restaurants nearby in the area that function 24 hours, but it is not the role of the planning system to restrict competition or persuade customer choice. Furthermore, the proposal would positively impact on the economy, job and wage creation, such benefits have to be considered to weigh favourably to the proposal.
21. My attention has been drawn to various previous appeal decisions⁹ for McDonald's restaurants. Although there are similarities to the appeal proposal, I do not have the full details of these, so cannot be sure that they are comparable in terms of location, residential surroundings, noise levels and development plan policies. I have, in any case, reached my own conclusions on the appeal proposal on the basis of the evidence before me.

Conditions

22. The Council has provided a list of suggested conditions that it considers would be appropriate. I have considered these in light of the PPG. In allowing the appeal I have made reference to compliance with other conditions imposed on the original permission, so far as the same are still subsisting and capable of taking effect. I have therefore granted a new permission, removing the disputed condition.
23. In the interests of the living conditions of nearby occupiers I have replaced the disputed condition with one that limits the use of the revised opening hours to a 12-month period. The Council's suggested wording of this condition would not be precise and enforceable, I have therefore amended this as necessary to comply with the six tests¹⁰.
24. In addition, for the same reason I have imposed conditions requiring operation in accordance with the Premises Noise Management Plan, the Site Management Plan and the suggested conditions relating to the lighting and noise levels for fixed plant and machinery. I have not imposed the suggested condition regarding plans as it is not appropriate as the development has commenced and updated delivery arrangements/times as there are no changes proposed to delivery arrangements.

Conclusion

25. For the reasons set out above, I conclude that the appeal should be allowed subject to conditions.

KA Taylor

INSPECTOR

⁹ APP/C4235/W/18/3195177, APP/P3420/W/3196812, APP/Z3635/W/18/3217395

¹⁰ Planning Policy Guidance (PPG): Paragraph: 003 Reference ID: 21a-003-20190723: Revision date: 23 07 2019

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McDonald's Restaurant, Birmingham New Road, Coseley WV14 9JH

Schedule of conditions attached to planning permission

- 1) The restaurant and 'drive-thru' may operate for 24 hours a day on any day for a limited period of one calendar year. This limited period must be commenced within three years of the date of this decision and the applicant must provide the local planning authority with written notification of the start and end date 10 days prior to first commencement. From the first trading day following the end of the limited period, the opening hours shall revert to 0600 hours to 2300 hours daily.
- 2) Lighting associated with the building, including the lighting up of existing signage, shall only be in use when the premises are open in accordance with the agreed opening hours set out by condition 1.
- 3) The rating level of sound emitted from any fixed plant and/or machinery associated with the development shall not exceed background sound levels by more than 5dB(A) between the hours of 0700 and 2300 (taken as a 15 minute LA90 at the nearest sound sensitive premises) and shall not exceed the background sound level between the hours of 2300 and 0700 (taken as a 15 minute LA90 at the nearest sound sensitive premises). All measurements shall be made in accordance with the methodology of BS4142 (2014) (Method for rating and assessing industrial and commercial sound) and/or its subsequent amendments. Where access to the nearest sound sensitive property is not possible, measurements shall be undertaken at an appropriate location to be agreed in writing with the Council and corrected to establish the noise levels at the nearest sound sensitive property.
- 4) The premises shall operate in complete accordance with the recommendations made within Appendix B (Premises Noise Management Plan of the submitted Noise Impact Assessment, (Savills (UK) Limited: MCDONALD'S, COSELEY #743 Noise Impact Assessment: Report No. 14-0167-74 R02: Dated 03 July 2019.) and the Noise and Site Management Plan (SMP), Appendix 7, September 2019.