



Appeal Decision

Site visit made on 18 May 2020

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 10 June 2020

Appeal Ref: APP/X1355/W/19/3242138

17 Hallgarth Street, Durham DH1 3AT

- 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 N Gadd against the decision of Durham County Council.
 - The application Ref: DM/19/02669/VOC, dated 16 August 2019, was refused by notice dated 17 October 2019.
 - The application sought planning permission for 'Retention of Existing Shopfront and Two-Storey Rear Extension' without complying with a condition attached to planning permission Ref: DM/16/03376/FPA, dated 11 January 2018.
 - The condition in dispute is No 4 which states that: The premises subject to this permission shall not be open for business outside of the hours of 1130 to 2300hours Monday to Saturday and 1130 to 1500hours Sundays.
 - The reason given for the condition is: In the interests of residential amenity in accordance with saved Policy S10 of the City of Durham Local Plan 2004.
-

Decision

1. The appeal is dismissed.

Procedural Matters

2. Due to the Covid-19 pandemic, at the time of my site visit the restaurant was closed. In addition, the adjoining seven bedroom shared student property appeared to be vacant and the adjacent public house was closed. I have therefore determined the appeal on the basis of the evidence before me and with consideration to what the noise environment would be like under normal circumstances.
3. The appellant has referenced policies within the emerging County Durham Plan (emerging CDP) as part of the Statement of Case, but neither party has provided a copy of the policies and, despite a request to the Council, I have not received confirmation of their status. From information provided by the appellant it would appear that the emerging CDP is at an advanced stage. Nonetheless, the policies are not yet fully adopted and therefore I have afforded them moderate weight.
4. I note that plans of the kitchen extraction were submitted as part of the application and referred to in both the Design and Access Statement and the Heritage Statement. However, as this appeal relates to the variation of condition 4 regarding the opening hours of the premises and not the

regularisation of the extract as installed, I have not taken these plans into account in my determination of the appeal.

5. There is inconsistency between the proposed variation of hours as requested in the application form (i.e. between 12noon and 2300hours on a Sunday) and as stated in the Council's delegated report and reason for refusal (i.e. between 1100hours until 0020hours Monday to Saturday and between 1200hours until 2300hours on Sundays). In addition, the appellant's Statement of Case affirms that the application was solely to seek an extension to the Sunday opening hours and requests that the appeal is determined on the basis of the revised description of development of 'Variation of Condition 4 of DM/16/03376/FPA to extend Sunday opening hours to 2230.'
6. The appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by the Council as local planning authority and on which interested people's views were sought. The Council has been given the opportunity to comment on the requested variation of hours as stated in the application form and as assessed, but no response has been received.
7. Taking the above into account and having regard to what was originally applied for, I have determined the appeal on the basis that it is to modify condition 4 of planning permission Ref: DM/16/03376/FPA, so that instead of reading, 'The premises subject to this permission shall not be open for business outside of the hours of 1130 to 2300hours Monday to Saturday and 1130 to 1500hours Sundays', it reads 'The premises subject to this permission shall not be open for business outside of the hours of 1130 to 2300hours Monday to Saturday and 1200 to 2230hours on Sundays'. I am satisfied that no party has been prejudiced by this approach.
8. Due to the appellant being unaware of the limited Sunday trading hours, the restaurant has been open for business on Sunday evenings since opening in August 2018. However, the Sunday opening hours have not been confirmed by the appellant and it is not clear whether they are the same as those proposed under this appeal. I have therefore determined the appeal on the basis that the variation of hours of trading on Sundays has, at least in part, already occurred.

Main Issue

9. In the context of the above, the main issue is the effect of the proposed variation of condition 4 to allow the premises to open from 1200 to 2230hours on Sundays on the living conditions of occupiers of neighbouring properties, with regard to noise and disturbance.

Reasons

10. The appeal property is a two storey building dating from the early-to-mid 19th Century. It is sited on the outskirts of the main centre of the City on the corner of Hallgarth Street and Mavin Street. A seven bedroom shared student property adjoins the appeal premises and the immediately surrounding area is predominantly comprised of residential properties, which are mainly occupied by students. A public house is located nearby on the opposite side of Hallgarth Street.
11. Whilst Hallgarth Street is a moderately busy thoroughfare in terms of vehicular traffic, it would be reasonable to assume that, under normal circumstances and

when compared to the main centre of the City, the principally residential nature of the immediately surrounding area would cause it to have a relatively quiet background noise environment in the evening.

12. The premises is currently permitted to open between 1130 to 1500 hours on Sundays. The proposed variation of condition 4 would delay the opening time by 30 minutes and extend the closing time by 7.30 hours.
13. I acknowledge that the use of the premises as a restaurant is well established and that the proposed variation of trading hours on Sundays would not extend its use into the more acoustically sensitive night time hours between 2300 and 0700. Nevertheless, the premises is already permitted to open until 2300 on every other day of the week. The proposed variation of condition 4 would introduce additional activity on Sunday evenings within and around the restaurant and from the extract equipment to the rear. This would have the potential to result in further noise and disturbance during a day of the week and at a time of the day when neighbours would reasonably expect a degree of peace and quiet.
14. Whilst the Council has not provided any evidence which confirms that the use of the premises on Sunday evenings would result in harm to the living conditions of occupiers of neighbouring properties, no noise survey or noise impact assessment has been provided by the appellant which validates the assertion that it would not have an adverse effect. Similarly, even though the property may have been trading late on Sundays since August 2018 without complaint, it has not been confirmed that it has been open until as late as the proposed time of 2230 and a lack of complaints does not attest to a lack of disturbance. Indeed, representations made by interested parties make reference to noise created by the disposal of bottles and the running of the extraction equipment. Furthermore, in my determination of the appeal, I must have regard to the potential effects of the proposed variation of condition 4 on both existing and future occupiers of nearby properties.
15. I am aware that the proposed hours of trading on a Sunday would be the same as those of the adjacent public house, and note the appellant's comments that, in this context, restricting the restaurant's opening hours on a Sunday evening is neither necessary nor reasonable having regard to Paragraph 55 of the National Planning Policy Framework (Framework). It is apparent that the unrestricted opening hours of the public house are historic. Moreover, I noted on site that, unlike the appeal premises, the public house is a detached building with no immediately adjoining residential properties. Given the adjoining nature and close proximity of the appeal premises to residential properties and its late opening on every other night of the week, I consider the restriction of its opening hours on a Sunday to be necessary and reasonable with regard to Paragraph 55 of the Framework.
16. I note the intention that all customers would leave the restaurant by 2200 with all extraction equipment switched off, all staff leaving and the building locked up by 2230, and that the appellant is willing to accept a condition to this effect. Nevertheless, I do not consider that this condition would meet the six tests as set out in Paragraph 55 of the Framework as it would be difficult to enforce.
17. I have had regard to the appellant's assertion that the proposed variation of condition 4 is necessary in order to protect the economic viability of the

business, as the inability to operate on Sunday afternoons and evenings is judged to significantly affect profitability. I also note the reference to local policies, both saved and emerging, and national policy guidance which seek to promote the vitality and viability of city centres¹.

18. Whilst I acknowledge these local and national objectives in the planning balance, no evidence has been provided which confirms that the business would not be profitable or viable if the appeal were to fail. Other relevant factors, such as the living conditions of neighbours, are required to be taken into account in the assessment and determination of the appeal. In my judgement, the evidence before me does not offer adequate clarity and robustness to allow me to conclude that the living conditions of nearby residents would not be harmed by any potential additional noise and disturbance on Sunday evenings.
19. Taking the above into account, I conclude that it has not been sufficiently demonstrated that the proposed variation of condition 4 to allow the premises to open from 1200 to 2230hours on Sundays would not have a harmful effect on the living conditions of occupiers of neighbouring properties, with regard to noise and disturbance. As such, it would conflict with saved Policies S10 and H13 of the City of Durham Local Plan, 2004 as amended 2007 (CDLP), insofar as they seek to permit development for class A3 use where there are no adverse effects on the amenities of nearby occupants, and restrict new development or changes of use which have a significant adverse effect on the amenities of residents within residential areas.
20. It would also not comply with Paragraphs 170 and 180 of the Framework insofar as they aim to prevent existing development contributing to unacceptable levels of noise pollution and avoid noise giving rise to significant adverse impacts on health and the quality of life.
21. The Council also includes saved Policy S7 of the CDLP in its reason for refusal. However, this policy seeks to permit individual small shops provided that, amongst other things, they will not adversely affect the character and amenity of the surrounding area. As such, it is not relevant to the main issue of this appeal.

Other Matters

22. The appeal premises lies within the Durham (City Centre) Conservation Area (DCA). Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, requires that special attention is paid to the desirability of preserving or enhancing the character or appearance of the conservation area. The special interest and significance of the DCA is primarily derived from a combination of the quality and architectural coherence of its historic buildings and the preservation of its medieval street pattern along with the dramatic topography of the City.
23. Having regard to the main issue of the appeal, the proposed variation of condition 4 to allow the premises to open from 1200 to 2230hours on Sundays

¹ City of Durham Local Plan (2004 as amended 2007) Policy CC1: Vitality and Viability. Emerging County Durham Plan Policy 7: Visitor Attractions and Policy 9: Retail Hierarchy and Town Centre Development.
National Planning Policy Framework Paragraphs 80 : Building a strong, competitive economy and Paragraphs 85 and 92: Ensuring the vitality of town centres.

would have a neutral impact on, and would therefore preserve, the character and appearance of the DCA. As such, it would not conflict with Policies E6 and E22 of the CDLP insofar as they seek to preserve or enhance the special character or appearance of the DCA. It would also accord with provisions within the Framework which seek to protect the significance of designated heritage assets. Notwithstanding this, the avoidance of harm in this regard weighs neutrally and does not amount to a consideration in support of the appeal.

24. I am aware that the premises has a liquor licence which allows the sale of alcohol on the premises until 2300 seven days per week. However, the liquor licence is the subject of a separate legislative procedure. I have determined the appeal before me on its own planning merits and the specific context of the appeal site.
25. I note the alleged failure of the Council to work proactively with the appellant in determining the application, contrary to Paragraph 38 of the Framework. However, such matters are not material considerations to which I can give any significant weight in the context of an appeal under Section 78 of the Act.
26. Reference has been made by interested parties to alleged breaches of conditions attached to planning permission Ref: DM/16/03376/FPA. Nonetheless, this is a matter between the appellant and the Council and not one for me to consider as part of this appeal.

Conclusion

27. For the reasons given above, I conclude that the appeal should be dismissed.

F Cullen

INSPECTOR