



Appeal Decision

Hearing Held on 5-6 January 2021

Site visit made on 6 January 2021

by Roger Catchpole BSc(hons) PhD MCIEEM IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 18 February 2021

Appeal Ref: APP/K2420/W/19/3236523

Crown Crest, Desford Lane, Kirby Muxloe LE9 2BJ

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to previous planning permissions that were granted.
 - The appeal is made by Mr Gerry Loughran (Poundstretcher Ltd) against Hinckley & Bosworth Borough Council.
 - The application Ref: 19/00253/CONDIT is dated 1 March 2019.
 - The application sought planning permission for the "erection of warehouse (Class B8 Use)" without complying with a condition associated with planning permissions Ref: 10/00332/FUL and Ref: 12/00313/CONDIT, dated 1 September 2010 and 22 August 2012 respectively.
 - The condition in dispute is No 11 which states that: "No deliveries shall be taken at or dispatched from the site outside the hours of 6.00am to 7.00pm Mondays to Fridays and 8.00am to 3.00pm on Saturdays nor at any time on Sundays, Bank or Statutory Public Holidays".
 - The reason given for the condition is: "To protect the amenities of neighbouring properties and to ensure that the permitted use does not become a source of annoyance to nearby residents to accord with policy BE1 of the Hinckley & Bosworth Local Plan."
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. The Council's putative reason for refusal relies upon policy DM10(a) of the Site Allocations and Development Management Policies DPD 2016 (DPD) that seeks, among other things, to ensure that any adverse effects on the amenity of nearby residents are avoided with respect to noise. The appellant has questioned whether this can apply to residents who are not in the immediate vicinity of the site. However, the policy also has regard to the 'occupiers of adjacent buildings' which suggests that the term 'nearby residents' has a broader geographic scope. The narrative for this policy suggests that the amenity of existing residents should be 'fully considered' when assessing planning applications. As the proposed increase in the hours of HGV operation is inimically linked to an increase in vehicle movements along defined routes, I find that it would be perverse not to consider nearby residential properties along these routes to be within the scope of this policy. As such, I find it relevant and give it full weight in my decision making.

Main Issue

3. The Council failed to give notice within the statutory time period but has set out its putative reason for refusal in its Statement of Case. Consequently, I find the main issue to be the effect of varying the hours of heavy goods vehicle (HGV) operation on the living conditions of local residents along the designated HGV routes with regard to noise.

Reasons

4. The appeal site is located within an existing employment zone to the south of Desford Lane in open countryside between Desford and Kirby Muxloe. The area occupied by the appellant is bounded by Desford Lane to the north and a railway line to the south. It encompasses two large warehouses. There is an isolated residential dwelling immediately to the north of the main site entrance as well as a number of other dwellings in relatively close proximity to the west, in the hamlet of Newtown Unthank. A waste recycling site abuts the eastern boundary and the wider setting comprises open fields that are in agricultural use.
5. The appeal site covers approximately 7 ha and includes the western warehouse and its adjoining curtilage as well as an access corridor from the main entrance. It does not include the eastern warehouse nor an associated secondary access serving that development which is the subject of a separate planning permission. It was established at the Hearing that the eastern warehouse is primarily associated with operations related to store openings and closings as well as the recycling of waste and the storage of seasonal goods. The western warehouse is used to receive, sort and despatch goods arriving from a variable range of suppliers located in the UK and overseas.
6. There are currently two designated HGV routes that serve the site which link it to the strategic road network. These routes also serve a range of other commercial operations in the wider area. They comprise the following:

Route One – vehicles using this route turn west along Desford Lane and then turn north onto Botcheston Road to follow a route that takes them to strategic routes to the northwest (A50) and the north (M1).

Route Two – vehicles using this route turn east along Desford Lane and then onto Ratby Lane to follow a route that takes them to strategic routes to the northeast (A46) and the south (M1).
7. Route One is a predominantly rural route covering a total distance of approximately 9.4 km. Around 1.5 km of this route (~16%) is characterised by residential properties fronting onto the carriageway either on one or both sides of the road. Route Two is considerably shorter and covers a total distance of approximately 5.5 km. Whilst initially rural, the road rapidly changes to a more residential, urbanised form. Around 1.6 km of this route (~29%) is characterised by residential properties fronting onto the carriageway either on one or both sides.
8. The baseline traffic flows along these routes were quantified through two different surveys that were undertaken prior to the Covid19 pandemic. The first comprised six automated traffic counts (ATCs) where data was recorded over a seven-day period. Four locations along Route One and two locations along Route Two were surveyed. This was done between Tuesday 10 July and

Monday 16 July 2018 to ascertain two-way flows and the proportion of HGVs that were using each route at that time. The second comprised a repeat ATC survey at the same locations and times between Wednesday 6 November and Tuesday 12 November 2019.

9. Neither the Highway Authority nor the Council dispute the veracity of these baseline observations although the extent of HGV movements on a Sunday was questioned during the course of the Hearing by local residents. However, no alternative, quantitative assessment is before me for the extended operating hours that are the subject of this appeal, *i.e.* 19:00-23:00 on weekdays, 15:00-18:00 on Saturdays and 09:00-13:00 on Sundays. I also note that HGV movements were below 10% of the total traffic volume on Sundays along both routes (see below) which would account for the perception that there were considerably fewer movements than at peak times.
10. Quantitative evidence establishes that HGV movements are present on the local road network during the extended hours of operation¹ but at a considerably reduced level in comparison to peak flows². Bearing in mind the reason for refusal, it follows that the key question to be answered in this appeal is whether there would be a material change in the number of HGV movements during the extended hours of operation and the effect that this would have on the living conditions of local residents along the designated routes.
11. The appellant estimates the increase in the number of movements of HGVs at the various ATC survey points in written evidence³. In 2018, the two-way movements at the nearest ATC survey points on Botcheston Road (ATC 2) immediately to the west of the site and Desford Lane (ATC 3) immediately to the east of the site were as follows:

Botcheston Road (ATC 2)

- Weekdays - 52 HGVs (9.6% of total movements) with 2 HGVs predicted (3.8% increase)
- Saturdays - 73 HGVs (10.1% of total movements) with 3 HGVs predicted (4.1% increase)
- Sundays - 86 HGVs (7.8% of total movements) with 3 HGVs predicted (3.5% increase)

Desford Lane (ATC 3)

- Weekdays - 90 HGVs (9.5% of total movements) with 3 HGVs predicted (3.3% increase)
- Saturdays - 117 HGVs (9.3% of total movements) with 7 HGVs predicted (6% increase)
- Sundays - 137 HGVs (8.2% of total movements) with 7 HGVs predicted (5.1% increase)

¹ Tables 8-10 of the Highway Impact Statement, October 2018, Bancroft Consulting

² Tables 2C-7C of the Highway Impact Statement, October 2018, Bancroft Consulting

³ Tables 16-18 of the Highway Impact Statement, October 2018, Bancroft Consulting

12. On this basis and despite the small decline in overall HGV movements in 2019, it is clear that the estimated movements would only account for a relatively small proportion of the HGV baseline during the extended operating hours. However, the suggested change in the wording of condition 11 is such that there would be nothing to stop unlimited movements to and from the western warehouse during these hours. Consequently, a significant, material change in HGV movements at these times cannot be ruled out if the logistical requirements of the appellant or some future occupier were to change.
13. The Planning Practice Guidance⁴ (PPG) advises that conditions can enable development proposals to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects of the development. In this particular instance and bearing in mind the CCTV recording at the main entrance, I am satisfied that a suitably worded condition mitigating the harm arising from unlimited movements could be imposed and that this would satisfy the tests set out in paragraph 55 of the National Planning Policy Framework 2019 (the Framework) and be acceptable to the appellant, as discussed towards the end of the Hearing.
14. Turning to the materiality of the number of additional HGV movements that are estimated, I note that the robustness of the projections relating to all movements associated with the site, which includes LVs, has been questioned by local residents despite the fact that neither the Council nor the Highways Authority object to the proposal on highways grounds. This led the residents of Kirby Muxloe to commission an independent review⁵ of the appellant's original highway impact statement⁶ and undertake a survey of turning movements from the main site entrance during the permitted operating hours.
15. The independent review, by its own admission, is 'broad brush, informal and not formatted or intended to be submitted in any formal context'. Consequently, it does not offer any alternative quantification of likely highway impacts capable of informing my decision-making. Instead, it seeks to highlight deficiencies in the appellant's own assessment. Having carefully considered the appellant's technical response to this document⁷, as well as the fact that it did not alter the Highway Authority's conclusion, I am satisfied that the concerns expressed in this review do not significantly undermine the robustness of the assessment or the estimated increase in HGV movements during the extended hours.
16. A number of unspecified accidents along the designated routes were identified in written submissions with concerns being expressed in relation to highway safety. I note that the appellant has considered the official accident record over the most recent five years relative to the time at which the assessment was done and that there is consequently no corroborating evidence to suggest that there would be an unacceptable impact on highway safety during the extended hours of operation. Although the effect of parking at different locations on Sundays was raised at the Hearing, I am not persuaded that this would have a material effect on highway safety given the low number of predicted movements that would occur in proportion to the existing movements

⁴ Paragraph: 001 Reference ID: 21a-001-20140306

⁵ Independent Appraisal of Highway and Transportation Matters Pertaining to Planning Application No. 19/00253/CONDIT, 16 May 2019, Lennon Transport Planning

⁶ Highway Impact Statement, October 2018, Bancroft Consulting

⁷ Technical Note: Response to Lennon Transport Planning Independent Appraisal, May 2019, Bancroft Consulting

along these routes. For the same reason, I find the extensive photographic evidence of HGV movements to be inconclusive.

17. Paragraph 109 of the Framework states that development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety or the residual, cumulative impacts on the road network would be severe. I understand the concerns of local residents with regard to existing congestion and the manoeuvres of HGVs along the designated routes and do not doubt the reality of the difficulties that are faced. However, I can find no significant deficiencies in the transport assessment or subsequent addendum that would lead me to conclude that there would either be an unacceptable impact on highway safety or a severe impact on traffic flows across the wider road network as a consequence of this proposal. In the absence of any substantiated, technical evidence to the contrary, I have no credible grounds on which to dismiss this appeal on highway impact which is consistent with the views of both the Council and the Highway Authority in relation to the original application.
18. Turning to potential noise impacts, the Council highlights the fact that the proposal would represent a significant increase in operating hours during which HGVs can enter and leave via the main entrance. It notes that HGV operating hours would increase from 72 to 99 hours per week and that this would extend the period over which disturbance could occur by 27 hours per week. The Council maintains that the designated routes already give rise to significant adverse impacts on the residential amenity, quality of life and wellbeing of local residents and that any increase would be detrimental. The Council suggests that the extended hours of operation would further compromise periods of potential respite from HGV noise.
19. The extent to which local residents are affected by noise from existing HGV movements was corroborated by the extensive written representations at the application and appeal stages as well as the testimony of local community representatives during the course of the Hearing. This included an observation that it was possible to hear intermittent HGV noise more than a mile away from the designated routes. Although local residents also expressed concerns in relation to structural damage from vibration caused by passing HGVs, the Hearing established that this was not supported by any structural engineering studies. Even if this were the case, the attribution of cumulative structural damage to a particular operator would be equivocal given the wide range of users that utilise the designated routes.
20. The appellant has undertaken a quantitative noise assessment which considers the potential acoustic impacts arising from docking and loading operations at the site as well as the movement of vehicles on the wider road network. I note that the ambient noise environment was characterised from measurements that were taken at seven different locations in accordance with standard methods⁸ with potential changes in noise being considered across a representative range of receptors.
21. The appellant concludes that internal daytime noise and night-time noise at nearby receptors from all potential site-based sources would be below the Lowest Observable Adverse Effect Level. The PPG defines this as a level of noise exposure above which adverse effects on health and quality of life can be

⁸ BS 7445-1:2003 The Description and Measurement of Environmental Noise: Guide to Procedures.

- detected⁹. This is not disputed by the Council and I am satisfied that any residual harm from activities within the site could be controlled through a suitable condition.
22. Turning to the road traffic noise, the appellant concludes that noise levels at nearby receptors would change by less than 0.4 dB above the ambient background which would fall within the No Observed Adverse Effect Level because changes of less than ± 3 dB are generally imperceptible to the human ear. The PPG defines this as a level of noise exposure below which no effect at all on health or quality of life can be detected¹⁰.
23. This is at odds with the views of the Council which maintains that the assessment was deficient because it only considered acoustic averages rather than individual, peak noise events that can be more intrusive. During the Hearing, the appellant indicated that peak noise events from HGVs can generally be as much as 85 dB $\pm$ 15 dB (at around 1 m) and conceded that the WHO sleep disturbance threshold of 45 dB¹¹ could be exceeded in properties within 5 m of the designated HGV routes if windows were open, as might be the case on a warm, summer evening.
24. Indeed, the appellant's own baseline monitoring at ST5 indicates the presence of intrusive noise events with a maxima of between 77-82 dB ($L_{Amax,15min}$)¹² being recorded during an early evening on a Sunday and an early morning during the week. This is consistent with the observations of local residents who attest to the fact that they are frequently woken by early morning, HGV movements. Whilst these times are outside the proposed extended operating hours, they nevertheless indicate the presence of significant, impulsive noise events along these routes.
25. Written representations from local residents suggests that there is a substantive level of community annoyance already present and that this goes beyond early morning sleep disturbance. Moreover, it was established at the Hearing that the level of intermittent disturbance that currently occurs is such that it has already caused a material change in behaviour in terms of local residents keeping windows closed or avoiding certain activities during periods when the noise is present. The PPG advises that if the exposure is predicted to be above the Significant Observed Adverse Effect Level then the planning process should be used to avoid any such effect¹³.
26. Whilst I have no quantitative predictions that confirm this, I also have no quantitative evidence to disprove it. Moreover, I do not have any evaluation of potential impulsive noise along the designated routes despite the fact that this was evaluated in relation to potential changes in operational noise that would be experienced at receptors around the appeal site. Even if it had been, the PPG advises that the subjective nature of noise means that there is not a simple relationship between noise levels and the impact on those affected¹⁴.
27. Consequently, adverse effects will depend on how various factors combine in any particular situation which cannot necessarily be resolved through a purely

⁹ Paragraph: 004 Reference ID: 30-004-20190722

¹⁰ Paragraph: 004 Reference ID: 30-004-20190722

¹¹ Night Noise Guidelines for Europe, World Health Organisation, 2009

¹² Weighted maximum sound pressure level during a measurement period of 15 minutes.

¹³ Paragraph: 005 Reference ID: 30-005-20190722

¹⁴ Paragraph: 006 Reference ID: 30-006-20190722

mechanistic approach. The Noise Policy Statement for England [HD1] also recognises the fact that noise exposure can impact on people's quality of life which it characterises as a subjective measure relating to emotional, social and physical wellbeing. On this basis I give significant weight to the views of the local community with regard to the existing impact of impulsive, HGV related, noise events.

28. The appellant maintains that the need to consider impulsive noise events is not covered in any transport-related legislation or guidance and that the assessment has followed the recommended approach as set out in LA111 of the Design Manual for Roads and Bridges. This document defines the requirements for noise assessments in relation to road projects. I note that the appellant has evaluated changes in accordance with this guidance and has expressed the results as a weighted sound pressure level exceeded for 10% of the 18-hour measurement period (i.e. $L_{A10,18hr}$). Whilst I accept that this is the standard index that is used to describe road traffic noise, it does not take the local context into account which the appellant acknowledges comprises an already sensitised, local community.
29. Considering the limited number of movements that are predicted, this begs the question of whether there would be a material increase in the incidence of impulsive noise events. Bearing in mind the 2018 ATC survey, as summarised above, it is clear that there would be increases in HGV movements of between 3-6% along the designated routes during the extended hours of operation with all exceeding approximately 3% of existing HGV movements. It is highly likely that residents will be present in their homes and gardens between 19:00-23:00 during the week, 15:00-18:00 on Saturdays and 09:00-13:00 on Sundays which would maximise the potential for disturbance. It is also likely that some residents, who go to bed early, would be subject to sleep disturbance during the week.
30. This level of increased movement would pose a tangible risk of increased exposure to impulsive noise events thus adding to the adverse effects that are already being experienced by the local community. Whilst the precise proportion may well be lower, given the decline in HGV movements observed in 2019, I cannot be satisfied that the overall reduction specifically relates to the extended hours of operation on the basis of the evidence that is before me. Furthermore, the lack of any quantification of impulsive noise events along the designated routes during the extended hours of operation means that a material change cannot be ruled out.
31. Given the density and proximity of residential dwellings along the designated routes, as well as the fact that most residents would be more likely to be at home at these times, it is likely that even small changes in HGV movements would have an appreciable adverse impact on living conditions of the local community. This would still be the case even if no movements were to occur on Sundays and public holidays and limited at other times through a condition. I therefore find that the proposal would be contrary to policy DM10(a) of the DPD.

Planning Benefits

32. The benefits of the proposal and the degree of weight that can be attributed can be summarised as follows:

- The appellant highlights a fall-back position in relation to a secondary access point serving the eastern warehouse that is the subject of a separate planning permission (Ref: 08/00187/COU). However, as there is no intention to use it on an unlimited basis, due to operational constraints and cost, it is unlikely to be implemented. Moreover, when asked if it would be more harmful, the appellant confirmed this would not be the case during the course of the Hearing. Consequently, I find that the fallback argument carries little weight in favour of the variation because it does not represent an alternative that has a realistic chance of implementation.
- The appellant states that the principal reason for the variation is to allow drivers who are delayed to park at the site without resorting to parking on the local highway which has been identified as an issue in the emerging Desford Neighbourhood Plan. I accept that the opportunistic purchasing and variable product lines make it difficult to build a relationship with particular hauliers to ensure overnight parking at designated lorry parks at Junction 22 and 23 of the M1 as well as at Leicester Forest East Services. Whilst I appreciate that past policing has been problematic, there are readily accessible alternatives and the appellant conceded that an active community liaison group might be capable of significantly improving compliance. Moreover, there is a viable alternative form of control through traffic regulation and enforcement actions. Consequently, this matter carries limited weight in favour of the variation.
- The appellant suggests that only being able to deliver and receive goods for 43% of the time places it at a competitive disadvantage to internet-based offers operating from 'unrestricted' warehouses. The appellant also emphasises the fact that the proposal would enable more efficient processing of incoming goods and help ensure a greater flexibility in serving its 'bricks and mortar' retail offer. The appellant maintains that the proposed variation would help to support conditions in which it can invest, expand and adapt and points out that paragraph 80 of the Framework requires significant weight to be placed on the need to support economic growth and productivity. However, this benefit was not substantiated with any financial evidence to demonstrate how the extended hours of HGV operation would lead to tangible, economic benefits. Whilst I am mindful of the effects of the Covid19 pandemic, I have no information to substantiate this claim. Consequently, this matter carries limited weight in favour of the variation.
- The appellant maintains that the variation would support employment opportunities for key rural centres such as Desford and the allocated use of the site. As above, I have no financial viability information before me that would lead me to conclude that the extended hours of HGV operation would lead to any greater benefits than are already present from the ongoing use of the site. Consequently, this matter carries little weight in favour of the variation.

Conclusion

33. The extended hours of HGV operation would be at times when local residents should reasonably be able to expect some respite from the disturbance caused

by impulsive noise events even though the transit of vehicles would be along designated HGV routes. The limited hours of operation relating to condition 11 were imposed to protect the living conditions of the local community for good reason. This still holds true and the proposed variation would be inconsistent with paragraphs 127(f), 170(e) and 180(a) that seek, among other things, to ensure that development promotes a high standard of amenity and does not undermine the quality of life, avoids the adverse effects of noise pollution on existing development and minimises the adverse effects of noise on people's quality of life.

34. Given the above, the harm I have found would significantly and demonstrably outweigh the benefits of the scheme when assessed against the policies in the Framework taken as a whole and would be contrary to the development plan. Consequently, the presumption in favour of sustainable development does not apply in this case. There are no other material considerations that indicate a decision should be reached other than in accordance with the development plan.
35. For the above reasons and considering all other evidence, I conclude that the appeal should be dismissed.

Roger Catchpole

INSPECTOR

Appearances

For the Appellant

Mr Peter Wilkinson (Landmark Planning)

Mr Nigel Mann (WYG)

Ms Joanna Posnett (BSP Consulting)

For the Council

Ms Helen Knott

Interested Parties

Cllr Margaret Bowler (Markfield Parish)

Cllr Kirsteen Thomson (Kirby Muxloe)

Cllr Matthew Lay (Markfield)

Cllr Robin Webber-Jones (Newbold Verdon with Desford & Peckleton)

Cllr Ozzy O'Shea (Ratby)

Cllr Malcolm Fox (Kirby Muxloe Parish Council)

Cllr Andy Furlong (Markfield, Stanton & Field Head)

Rev Gareth Hutchinson (St Bartholomew's Church)

Mr Lee Godwin (Kirby Muxloe HGV Action Group)

Mr Philip Richardson (Local Resident)

Mr Mark Stevens (Local Resident)

Me Mark Dunkley (Local Resident)

Documents Submitted

HD1 Noise Policy Statement for England (NPSE) March 2010 Department for Environment, Food and Rural Affairs.