



Appeal Decision

Site Visit made on 12 April 2021

by Mr Ben Plenty BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 April 2021

Appeal Ref: APP/W2465/W/20/3260483

13 Belgrave Boulevard, LEICESTER LE4 2JD

- 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 KL Ventures Ltd against the decision of Leicester City Council.
- The application Ref 20200214, dated 28 January 2020, was refused by notice dated 7 April 2020.
- The application sought planning permission for 'variation of condition 4 (opening hours) attached to planning permission 20050886 (to extend opening hours from 0730 to 2300 hours Monday to Saturday and 0730 to 2200 hours on Sundays to 0730 to 2300 hours Monday to Saturday and 0730 to 2200 hours on Sundays and deliveries to customers between the hours of 0730-0500 the following day on a daily basis) to hot food takeaway (Class A5)' without complying with a condition attached to planning permission Ref 20050886, dated 8 July 2005.
- The condition in dispute is No 4 which states that: The premises shall be closed for business outside the hours of 0730 to 2300 Monday to Saturday and 0730 to 2200 hours on Sundays.
- The reason given for the condition is: In the interests of residential amenity, and in accordance with Policy S12 of the City of Leicester Local Plan and Policy R07 of the Replacement City of Leicester Local Plan (2nd Deposit Copy).

Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is the effect of the proposed variation of condition on the living conditions of nearby residents with particular respect to noise and disturbance.

Reasons

3. The appeal site is a hot-food take-away within a small parade of shops. Red Hill Way, a dual carriageway beyond Belgrave Boulevard, is subject to a 30mph speed restriction. As a result, despite the commercial setting, the surrounding area is predominantly residential in character. The majority of units above the parade of shops are also in residential use, including above the appeal site.
4. Paragraph 180 of the National Planning Policy Framework (The Framework), states that planning decisions should ensure that new development is appropriate for its location, taking into account the likely 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.

5. The proposed variation of hours would result in the take-away being in use for most of a 24-hour period. The delivery service would only be inactive between the hours of 05:30 and 07:00. The appellant's Noise Impact Assessment¹ (NIA) identified that existing background noise levels, in front of the site, were relatively consistent throughout the day and night. It also found that the rear area recorded a drop in levels during the night. It is accepted that plant installed to the rear of the building either already operates through the night or could be sufficiently mitigated with silencers to operate -5dB below background noise levels.
6. The NIA found that the sound of car doors shutting and cars leaving would achieve noise levels of 67dB and 72dB respectively. This compares to a background noise level of between 63dB to 56dB at night. Adjustments were then made, taking account of the quantity of deliveries and location of loading, and found only minor noise impacts. However, I am unconvinced that these adjustments enable the NIA to take sufficient account of the impact of late-night disturbance. Furthermore, although drivers would operate alone it is conceivable that staff would have occasion to discuss issues in front of the store in the night. Such behaviour could not be readily mitigated through management controls. Therefore, despite the findings of the NIA, vehicle noise and staff voices would be likely to cause irregular significant noise impacts throughout the night.
7. The NIA states that background noise levels are significantly reduced to the rear of the building at night-time. During summer months, staff would be likely to take breaks outside the rear of the premises. In such circumstances the facility would cause noise disturbance through human activity within the rear area of the building at unsociable times. Therefore, the combined activity associated with the use at both the front and rear of the premises would be likely to create substantial noise and disturbance to neighbouring residents. These concerns are also raised by the Council's Pollution Control officer, a point of significant weight.
8. The Delivery Driver Management Plan (DDMP) would limit the number of drivers to three after 21:00 hours. This would also ensure that deliveries are made from the front only, are made by cars or electric vehicles and that fascia signage is switched off when the store is closed. These measures are clearly defined and could be readily observed from an enforceability perspective. However, the DDMP would also require staff to keep noise and disturbance to a minimum with adherence overseen by the on-site manager. Furthermore, other measures that would seek to regulate the behaviour of staff, have staff take individual breaks and to limit areas of the site they can occupy at certain times. These measures would be reliant on the considerate conduct of staff. Many of these requirements are imprecise and attempted compliance would be unlikely. These measures would therefore be difficult for a manager, or ultimately the Council, to enforce and regulate.
9. Therefore, although it is recognised that management plans can be used to regulate activity on site, the DDMP would in parts be unenforceable. This would not therefore effectively mitigate the anticipated noise effects of late-night activity. As such, a condition requiring adherence to the DDMP would not pass the test of paragraph 55 of the Framework.

¹ Cole Jarman Extended opening Hours Noise Assessment 18 September 2020 (Amended version)

10. Consequently, the proposal would result in a significant adverse noise impact to the living conditions of neighbouring occupiers. Accordingly, the proposal would not satisfy policies CS03 and CS11 of the Leicester City Core Strategy (2014). These seek, among other matters, for development to contribute positively to an area and for food and drink facilities to be subject to considerations of residential amenity. Furthermore, the proposal would be contrary to saved policies PS10, PS11 and R05 of The City of Leicester Local Plan (2006) and the Council's Residential Amenity guidance². These policies include the requirement for food related proposals to be refused where it would be significantly detrimental to the amenities of the occupiers of residential properties. These policies are generally consistent with the Framework.

Other Matters

11. During the pandemic access to hot food deliveries has been of benefit to customers who undertake shift work, such as key workers. The proposal would also create further employment opportunities. However, these benefits would be limited and would not outweigh the harm identified to the living conditions of local residents.
12. Several planning decisions have been submitted in evidence. The decisions have been included principally to show cases where conditions have been used to separate the hours of delivery from the hours of opening. This concept would pass the test of paragraph 55 of the Framework subject to clear wording. However, the context of these cases and the associated Council's reasoning is not before me. Furthermore, an appeal decision³ for a drive-thru McDonalds, allowed a variation of condition for the use to trade 24 hours a day seven days a week. This included a condition for the use to adhere to a Premises Noise Management Plan. The site is described as being adjacent to a busy junction and the nearest residential dwelling being 40 metres from the appeal site. This therefore describes a different context to the appeal site. Each case must be judged on its own merits and I am unconvinced that the referenced cases are similar in location or policy context to draw any substantive comparisons an assist with the main issue of this case.

Conclusion

13. The proposal would result in a significant adverse impact on the living conditions of neighbouring residential properties and would conflict with the development plan when taken as a whole. There are no material considerations that indicate the decision should be made other than in accordance with the development plan. Therefore, for the reasons given, I conclude that the appeal should not succeed.

Mr Ben Plenty

INSPECTOR

² Residential Amenity – Supplementary Planning Guidance 2008

³ Planning Appeal Reference: APP/C4615/W/19/3237704