



Appeal Decision

Site visit made on 23 November 2022

by Rachel Hall BSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 January 2023

Appeal Ref: APP/P4605/W/22/3298041

126 Billesley Lane, Moseley B13 9RD

- 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 Moseley Food & Drink Ltd against the decision of Birmingham City Council.
 - The application Ref 2021/10137/PA, dated 26 November 2021, was refused by notice dated 2 February 2022.
 - The application sought planning permission for demolition of existing single storey outbuilding, erection of single and two-storey extensions to side and rear, to extend the existing retail unit and provide a new shop front, provide a new retail unit, provide security shutters to both retail units and provide two first-floor flats without complying with a condition attached to planning permission Ref 2014/03677/PA, dated 21 August 2014.
 - The condition in dispute is No 4 which states that: *The new retail unit (Retail Unit 2) shall only be open for customers between the hours of 0800-2000 Mondays to Saturdays, and 0800-1900 Sundays and Bank Holidays.*
 - The reason given for the condition is: *In order to define the permission and safeguard the amenities of occupiers of premises/dwellings in the vicinity in accordance with Paragraphs 3.8 and 3.10 of the Birmingham UDP 2005 and the National Planning Policy Framework.*
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Decision

1. The appeal is dismissed.

Background and Main Issues

2. The appellant seeks to extend the hours of use to enable the premises to remain open until 2200 hours daily. The main issues are whether the condition is reasonable and necessary in the interests of:
 - protecting the living conditions of nearby occupants, with particular regard to noise and disturbance; and
 - highway safety, with particular regard to parking provision.

Reasons

Living conditions

3. The appeal property is an end of terrace retail unit with residential accommodation at first floor level. The adjoining property at 124 Billesley Lane is also a retail unit at ground floor with residential accommodation above. The site is within a predominantly residential area with houses located to the rear

on Southlands Road and on both sides of Billesley Lane (the Road). A convenience store is located in the vicinity, on the opposite side of the Road. An allotment is located on the opposite side of Southlands Road. Aside from the first floor residential accommodation there is a degree of separation between the appeal building and the nearest houses. However the defining character of the area is of a relatively quiet, residential nature.

4. Whilst formal complaints to Environmental Health may be lacking, and some letters of support were submitted by members of the public, there were also a number of comments submitted to this appeal by local residents expressing concerns about noise and disturbance. Currently any noise and disturbance associated with the operation of the appeal premises is restricted by its evening closing times. In contrast, the proposed increase in opening hours would mean the potential for disturbance to nearby residential occupants later into the evening, every day of the week.
5. Disturbance from the proposed later opening hours would be likely to include noise from customers coming and going, talking outside, returning to vehicles and shutting car doors. In respect of the latter, and notwithstanding that the Council encourages sustainable travel modes and the restaurant is said to have a local customer base, a reasonable proportion of customers are likely to arrive by car. Noise from such comings and goings would not be controlled by compliance with the license agreement or the appellant's suggested conditions. The presence of the acoustic fence would also do little to minimise the nature of these noise and disturbance impacts. Furthermore, customer behaviour need not be deliberately anti-social to cause disturbance in this relatively quiet residential area.
6. There is no indication that complaints have been made in respect of noise and disturbance from the adjacent retail unit which has later opening hours. However, I note that the accommodation schedule in the submitted marketing evidence indicates that the appeal site has a considerably larger internal seating area. This indicates that it would have a comparatively greater customer capacity than the adjacent unit and the potential to attract larger groups. Moreover, in the event that both units were open later into the evening, their proximity to one another would be likely to lead to cumulative harm to living conditions from noise and disturbance.
7. I note that the current occupant of the flat above the appeal premises has written in support of the proposal. The noise insulation between ground and first floor accommodation would limit noise transmission to the first floor accommodation to a certain extent. However, notwithstanding that much of the seating is in the basement area, noise impacts from comings and goings and customers talking outside the premises later in the evening would be particularly evident from the flat above and nearby homes in summer months when local residents' windows are more likely to be kept open.
8. The Road is not a particularly busy one. Therefore it is highly unlikely that after the current closing time of 2000 (1900 on Sundays and bank holidays), traffic noise on the Road, or any other background noise, would be sufficient to mask noise associated with operation of the appeal site to any meaningful extent. No robust evidence is before me to indicate otherwise.
9. I accept that some noise and disturbance for occupants of those houses closest to the appeal site is inevitable given the nature of the use and their proximity

to it. The proposed opening hours may not interfere with the World Health Organisation's recommended hours of restful sleep. Nevertheless, given its location in a predominantly residential area, local residents should reasonably be able to expect quieter times in the evenings on a regular basis. Consequently, residents are likely to be particularly sensitive to increased noise and disturbance during the proposed later evening opening times.

10. The response from the Council's environmental protection team indicates that opening hours up to 2300 are common in residential areas within Birmingham. I note the police did not object. The appellant also submits that it is not unusual for pubs, restaurants and bars to be close to residential uses, including in the local area. Whilst that is the case, such uses are more commonly in retail centres or on high streets where residents would expect a degree of noise. The appeal building has previously been in commercial use. However, it is within a predominantly residential context where sensitivity to noise and disturbance into the evening would be much greater than from residents in houses close to or within a retail centre.
11. Furthermore, the presence of other restaurants close to houses, and the later opening hours of the adjacent unit, does not justify allowing the appeal in circumstances where I have found there would be unacceptable harm to nearby residents with respect to noise and disturbance. I have no reason to doubt that the current occupants of the appeal premises intend to occupy the site for the long term, with consideration for its effects on the locality. However, as the planning permission generally runs with the land rather than its occupants, the potential for the building in future to be operated by others, to the full limits of its planning permission, is a relevant consideration.
12. Accordingly, I conclude that the effect of varying the opening times as proposed would not provide sufficient control on the existing use so as to safeguard against residents suffering undue noise and disturbance. The appellant has indicated that they would accept a restriction until 2100 or any extension deemed acceptable. However, for the reasons given I find that the existing condition is reasonable and necessary in the interests of protecting the living conditions of nearby occupants, with particular regard to noise and disturbance.
13. Therefore, the proposal would be contrary to Policy PG3 of the Birmingham Development Plan (2017) (Local Plan) which requires that developments are designed to be responsive to their surrounding context. It would also be contrary to Policy DM2 of the Local Plan which requires that developments avoid unacceptable impacts on the amenity of nearby occupants. Further, it would be contrary to Policy DM6 of the Local Plan. This requires proposals to be suitably designed to reduce exposure to noise. Similarly, it would be contrary to paragraph 185 of the National Planning Policy Framework (Framework), which seeks to ensure proposals are appropriate taking into account likely effects on living conditions.

Highway safety

14. The appeal site is located in an area where parking on local roads is unrestricted. The site is within a relatively high density residential area where occupants are likely to be reliant on street parking to varying degrees. There is also likely to be demand for on-street parking generated by the existing operation of the appeal premises and adjacent unit, along with visitors to the

allotment. On-street parking is likely to be at a premium at evenings and weekends, when more people tend to be at home.

15. However, I have been given no reason to indicate that extending the opening hours of the appeal premises as proposed would necessarily lead to customers or staff parking illegally or dangerously, particularly in light of the absence of parking restrictions on roads in the wider area. The existing development has been shown to provide considerably lower parking spaces with respect to the maximum standards in the Birmingham Parking Standards Supplementary Planning Document (2021) (SPD). However the principle of the use is not for debate within this appeal.
16. Therefore, accepting that the proposal would likely result in more customers seeking to park on nearby roads in the evenings, there is no substantive evidence to suggest that this would result in harm to highway safety. Whilst this may cause slightly greater inconvenience to local residents seeking to park on nearby roads, this would not be sufficiently harmful to indicate that planning permission should be withheld were the proposal acceptable in all other respects.
17. Accordingly, and notwithstanding my reasoning with respect to the potential harm from increased noise and disturbance, I conclude that the effect of extending the opening hours of the appeal site as proposed is unlikely to be so detrimental as to result in an unacceptable impact on the safety of any users of the highway.
18. Therefore, despite the existing use not achieving the maximum parking standard within the SPD, I find that the appeal proposal would accord with Policy TP44 of the Local Plan which seeks to avoid development where the residual cumulative impacts would be severe. It would also accord with Policy DM14 of the Development Management in Birmingham Development Plan Document (2021). This seeks to ensure developments avoid unacceptable impacts on highway safety. Furthermore, it would accord with paragraph 111 of the Framework which advises that developments should only be prevented or refused on highway grounds if there would be an unacceptable impact on highway safety.

Other Matters

19. The appellant has sought to address comments made by the Inspector in the previous appeal for extension of the opening hours at this premises (Ref APP/P4605/W/18/3215241). At that time the appeal site was not occupied and it was submitted that the opening hours were a constraint on securing a suitable business to occupy the premises. However, the premises have since been occupied and the current restaurant appears to be operating successfully under the existing opening hours. No substantive evidence has been provided to indicate otherwise.
20. I appreciate the economic benefit of having extended opening hours, enabling the business to attract customers later into the evening and the potential to attract a greater range of operators in future. The Framework (paragraph 81) requires that significant weight is placed on the need to support economic growth and productivity. However, whilst desirable to the business, no robust evidence is before me to indicate that the existing opening hours are

hampering the ability of the business to thrive and grow, or that it would prevent a suitable alternative business occupying the premises in future.

21. Furthermore, in the particular circumstances of this case, the economic benefit would not outweigh the potential for enduring harm to living conditions of local residents from noise and disturbance. Local planning policies referenced in the original decision have since been superseded. Nevertheless, the principle of ensuring development is appropriate to its context and provides suitable living conditions for nearby residents remain part of the adopted development plan.

Conclusion

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

Rachel Hall

INSPECTOR