



Appeal Decision

Site visit made on 3 January 2023

by J Bowyer BSc(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 February 2023

Appeal Ref: APP/H5960/W/22/3298848

Tooting Market 21-23 Tooting High Street, Wandsworth, London SW17 0SN

- 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 Palas Properties Limited against the decision of the Council of the London Borough of Wandsworth.
 - The application Ref 2021/4003, dated 26 August 2021, was refused by notice dated 18 November 2021.
 - The application sought planning permission for 'alterations to the approved market extension including changes to the north-western building line and the inclusion of a flat roof section with plant over-run to the rear; change of use from the approved A3/A4 to include A1/A3/A4/B1 uses; and use of the Totterdown Street entrance to the site for general access during market opening hours (part retrospective)' without complying with conditions attached to planning permission Ref 2017/5511, dated 1 December 2017.
 - The conditions in dispute are Nos 6 and 7 which state that:
 - 6 The ground floor doors to the Market extension building fronting Totterdown Street shall be closed to the public between the hours of 8pm and 8am the following morning, 7 days a week, except for emergency access only.
 - 7 The existing Totterdown Street entrance to Tooting Market shall be closed to the public between the hours of 8pm and 8am the following day, 7 days a week, except for emergency access only.
 - The reasons given for the conditions are:
 - 6 In the interests of the amenity of residential properties, in accordance with policy DMS1.
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Decision

1. The appeal is allowed and planning permission is granted for 'alterations to the approved market extension including changes to the north-western building line and the inclusion of a flat roof section with plant over-run to the rear; change of use from the approved A3/A4 to include A1/A3/A4/B1 uses; and use of the Totterdown Street entrance to the site for general access during market opening hours (part retrospective)' at Tooting Market 21-23 Tooting High Street, Wandsworth, London SW17 0SN in accordance with application ref 2021/4003 dated 26 August 2021 without compliance with conditions 6 and 7 previously imposed on planning permission ref 2017/5511 dated 1 December 2017 but subject to the conditions in the attached schedule.

Background and Main Issue

2. Planning permission was granted under application reference 2017/5511 ('the Original Permission') subject to a number of conditions. Conditions 6 and 7

require respectively that the 'extension' and 'existing' entrances to Tooting Market from Totterdown Street are closed to the public between the hours of 2000 and 0800 the following day, save for emergency access.

3. The appeal relates to an application made to vary Conditions 6 and 7 to extend the hours during which each of the Totterdown Street entrances may be used. The appellant proposes that the conditions would be amended to require that the entrances are closed to the public between the hours of 2230 and 0800 the following day and operated under controlled secure access between 2230 and midnight, except for emergency access.
4. As part of the application, the appellant also submitted plans indicating alterations to the 'existing' Totterdown Street entrance. The plans indicate that doors would be provided at the entrance behind the roller shutters where there is currently only a plastic curtain. Although the application form did not specifically refer to variation of condition 2 of the Original Permission to substitute these plans, the alterations would enable the controlled access at this entrance sought by the application, and which the supporting information indicates would also avoid spillage of noise into the street. The Council has listed the plans as information submitted in relation to the disputed conditions, and has not raised concerns in relation to these physical alterations which I consider would be reasonably related to the variation of conditions applied for. Given the minor nature of the resulting changes, I am also satisfied that they would not result in material change to the Original Permission development, and I have considered the appeal accordingly.
5. The main issue is the effect of the proposal on the living conditions of nearby residential occupiers with particular regard to noise disturbance.

Reasons

6. Tooting Market hosts units in a mix of uses within a broadly-L-shaped' building. The Market has an entrance on Tooting High Street, as well as the two entrances on Totterdown Street which are the subject of the disputed conditions.
7. The first element of the amendments to the disputed conditions sought by the appellant would extend the public use of the Totterdown Street entrances later, proposing their closure at 2230 rather than 2000 currently. The Council is concerned that this would result in noise disturbance to nearby residents, referring to people arriving and leaving and congregating outside, including to smoke or while they wait for taxis. The Market would not be able to control behaviour outside of the premises, and the Council states that it would also have no legislative powers to control noise in the street.
8. However, Condition 5 of the Original Permission already provides that the Market premises may be open to customers until midnight which could result in noise and activity within the premises close to Totterdown Street. The proposed doors to the 'existing' entrance onto Totterdown Street would provide a barrier when closed that would be likely to reduce potential noise spillage from the interior of the Market in comparison to the current plastic curtain behind a roller shutter with skeleton door. In my view, this would offer some, albeit modest, benefit that would help to offset the overall effect of noise from comings and goings associated with use of the entrances.

9. Taken as a whole, I appreciate that Totterdown Road is residential, but dwellings in the vicinity of the appeal site are certainly very close to the town centre and its mix of uses with varying hours, including some which I saw are open into the late evening and beyond. Given their proximity to these uses, I consider that some level of background noise and activity would be reasonably expected by residential occupiers nearest to the site into the evening.
10. Moreover, the appellant indicates that the Totterdown Street entrances have already been used until 2300 in breach of the Original Permission conditions since around 2013. The Council has not disputed this, and the appellant's evidence includes copies of comments made in support of the proposal, some of which also refer to the Totterdown Street entrances being open later than 2000. I acknowledge that these were not representations made in response to the planning application consultation itself. Nevertheless, I have no firm reason to doubt that the entrances have been used as the appellant indicates.
11. I note reference to instances of anti-social behaviour in the vicinity of the entrances as patrons of the market gathered outside during periods of lockdown associated with the COVID-19 pandemic. However, the appellant advises that issues ceased once restrictions had eased, and it seems to me that they were likely to have been a consequence of the specific restrictions on people meeting and using inside seating that were in place at that time. Outside of the lockdown periods which were an extraordinary occurrence, there is no substantive evidence before me such as records of any complaints to relevant authorities, nor objections to the appeal proposal from nearby residents, to suggest that the use of the Totterdown Street entrances later than 2000 over an extended period of time has otherwise resulted in meaningful noise disturbance, including through comings and goings, people waiting for taxis or smoking.
12. To my mind, this suggests that activity at the Totterdown Street entrances until 2230 as sought can reasonably occur without resulting in intrusive noise disturbance so as to stand out or detract from the quality of life of nearby residents, and I have no firm reason to find that this would not continue to be the case in future. Given all of these factors, I find that varying the disputed conditions to permit public use of the Totterdown Street entrances until 2230 would not cause unacceptable harm to the living conditions of nearby residents.
13. The second element of the amendments to the disputed conditions put forward by the appellant refer to controlled secure access of the Totterdown Street entrances between 2230 and midnight. During these hours, the appellant proposes that a keypad would allow access for delivery drivers picking up orders from units within the Market. I note that there is a bay for motorcycles on Totterdown Street close to the junction with Blakenham Road which the appellant indicates is used by delivery drivers, and the Council has raised concern that permitting access via the Totterdown Street entrances would encourage delivery drivers to congregate at the rear, leading to noise, disturbance and antisocial behaviour.
14. However, the disputed conditions only require closure of the Totterdown Street entrances to the public between 2000 and 0800 the following morning. The Council suggests that delivery drivers are part of the public, and therefore the conditions would restrict their access using these entrances, but the basis for this assertion has not been explained. Against this, the appellant notes that

delivery drivers are contracted to access the building to service the food outlets that sustain their employment. Given that they are essentially servicing the function of the market and are contracted to do so, I am not persuaded from the evidence before me that delivery drivers would be considered 'public' within the ordinary meaning of the word.

15. Even if I were wrong in this though, I have not been directed to and did not see any closer designated moped/motorcycle bays to the Market's Tooting High Street entrance than those on Totterdown Street. Given the relatively short distance, it therefore seems to me that delivery drivers could well elect to use the designated parking space here, to then access the Market from Tooting High Street. Moreover, the evidence before me indicates that the Totterdown Street entrances have been used by delivery drivers during the hours proposed for some time, and I have not been provided with substantive evidence to indicate that this has or would be likely result in meaningful noise disturbance to nearby occupiers. Given these factors, I find that the proposed variation of the disputed conditions would not cause additional harmful noise or disturbance related to delivery driver access.
16. Be that as it may, the appellant's evidence also suggests that the controlled secure access between 2230 and midnight would allow exit from the Market using a push button. Although re-entry would not then be possible from Totterdown Street, this would introduce public movements from the Market out onto Totterdown Street significantly later than is currently permitted, and later too than the hours that the appellant notes the entrances have in the past been used. Notwithstanding my finding that nearby residents would not have the same expectation of peace and quiet as in a solely residential area, I consider that public activity close to dwellings here after 2230 at times when residents would be more likely to be trying to sleep would result in noise disturbance that would be noticeable and detrimental to their living conditions. In the absence of substantive information to demonstrate otherwise, I find that the Totterdown Street entrances should be closed to the public, for both entrance and exit, between the hours of 2230 and 0800 the next morning.
17. Furthermore, I consider that this arrangement could be more effectively managed and enforced given the proposed doors to the 'existing' Market entrance. In comparison to the skeleton door in the roller shutter, the doors would facilitate practical prevention of unauthorised public access outside of the permitted hours and during times where the entrance may otherwise be used by delivery drivers. This would further help to mitigate potential noise disturbance associated with the proposal.
18. The disputed conditions currently include exceptions so that there are no time restrictions on emergency access using the Totterdown Street entrances. The exceptions therefore allow for an alternative escape/evacuation route to the Tooting High Street entrance should this be necessary, and I have no firm reason to find that such exceptions should no longer apply.
19. The National Planning Policy Framework outlines that planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.
20. For the reasons above, I find that use by Market customers of the Totterdown Street entrances later than 2230 would detract from the quality of life of

nearby residents. Subject though to the proposed doors to the 'existing' Market entrance which would in part mitigate the effects of the proposal, I conclude that variation of Conditions 6 and 7 of the Original Permission to allow the Totterdown Street entrances to remain open to the public until 2230, and controlled secure access between 2230 and midnight, would not unacceptably harm the living conditions of nearby residential occupiers through noise disturbance. I find that variation of the disputed conditions in this way would not result in conflict with Policy DMS1 of the Development Management Policies Document 2016 which includes a requirement that development does not harm the amenity of occupiers and nearby properties including through unacceptable noise. Nor would there be conflict with similar provisions in Policy LP2 of the emerging Local Plan, although the weight that I give to this is limited given that it is not yet an adopted part of the development plan and is therefore subject to change. On this basis, I find that the disputed conditions are not necessary in their current form, and should not be imposed.

Other Matters

21. The Council has referred to dismissed appeals involving proposals for extended opening hours that were found to cause noise disturbance to neighbouring occupiers. Not all of the details of each case have been provided to enable direct comparison with the circumstances in this appeal. However, from the extracts provided, the appeal at 294 Cavendish Road would have enabled 24 hour use of a taxi rank, and the appeal at 3 and 5 Boundaries Road refers to proposed take-away operations into the early morning hours. Because they therefore relate to development with associated activity either throughout or later into the night when nearby residents would be much more likely to be sleeping, I find that these examples are not directly comparable to the appeal development where the entrances would be open to the public only until 2230.
22. The Council suggests that the appeal for a fitness studio at 1 Holbeach Mews considered similar hours to those sought here. Be that as it may, I have little information to demonstrate that such a use would result in activity of similar nature and effect to the appeal proposal, noting for example that fitness studio uses can in my experience often include loud music, and clusters of people arriving and leaving at similar times where there are group classes. Moreover, the appeal site has in this case already been operating with similar or later hours of public use of the Totterdown Street entrances to that sought with no compelling evidence of resulting harm to neighbouring living conditions, and it is not clear that the same applied in the Holbeach Mews appeal.
23. These examples are accordingly distinguishable from the appeal before me, and they do not alter my findings which I have reached having regard to the specific circumstances of the proposal and the evidence before me.
24. In making the application, the appellant referred to variation of the disputed conditions being required to ensure appropriate fire safety measures and to provide an accessible emergency escape route. The Council asserts that a more coordinated management plan for activity within the Market should be considered, including whether the entrances could remain closed but with the shutters up to enable emergency access. It also comments that the appellant submitted no evidence regarding impacts of the disputed conditions on the viability of the Market. However, these factors do not alter my findings on the main issue that extending the hours during which the Totterdown Street

entrances are permitted to be used as set out above would in any event be acceptable having regard to the living conditions of nearby residents.

Conditions

25. I have imposed replacement conditions relating to the hours of use of the Totterdown Street entrances reflecting my findings above, subject to the implementation of the alterations to the 'existing' Market being implemented given that I have found this would offer some mitigation and would be necessary to manage access in the interests of the living conditions of neighbouring occupiers. As part of these conditions, I have included a requirement for submission of further details of how the secured controlled access will be controlled and managed which I consider is necessary to ensure that it will be effective in the interests of neighbouring living conditions. I have also imposed a replacement condition which identifies the approved plans and which includes the updated plan numbers showing the 'existing' Totterdown Street entrance.
26. In addition, the Government's Planning Practice Guidance makes clear that permission granted under Section 73 of the Act should restate the conditions imposed on the earlier permission that continue to have effect, but should not extend the time limit under which the original permission must be started.
27. Given that the Original Permission development has commenced, it is not necessary to re-impose its condition 1 which specified the time limit. Conditions 3 and 4 of the Original Permission required details of noise insulation measures and a BREEAM Post Construction Certificate. The Council indicates that details were approved pursuant to these conditions, but I have no information before me confirming that the development was carried out in accordance with the details approved which would remain necessary in the interests of the living conditions of neighbouring occupiers and energy efficiency and sustainability. I have therefore imposed replacement conditions which require that development is carried out in accordance with the details approved, although I have amended the Council's suggested conditions in the interests of succinctness and to avoid unnecessary prescription of detail. I have reimposed Condition 5 of the Original Permission which relates to the opening hours of the Market premises to customers and which remains necessary in the interests of the living conditions of neighbouring occupiers.
28. The Council's list of suggested conditions also includes a purported condition referring to positive and proactive working with the applicant, but this is more of an informative which is not necessary to make the development acceptable in planning terms, and I have not therefore imposed it.

Conclusion

29. For the reasons given above, I conclude that the appeal should be allowed.

J Bowyer

INSPECTOR

Schedule of Conditions

- 1) Unless otherwise amended under the conditions below, the development shall be carried out in accordance with the drawings and specifications

approved pursuant to planning permission ref 2017/5551 dated 1 December 2017, save for the 'existing' Totterdown Street entrance to the Market which shall be carried out in accordance with plan nos 21-11.A.04 and 21-11.A05.

- 2) Noise insulation measures shall be implemented in accordance with the details approved under application ref 2018/1041 dated 16 May 2018 prior to the commencement of the use/occupation of the premises.
- 3) The building hereby approved shall be built to a minimum standard of BREEAM Very Good and in accordance with the BREEAM Post Construction Certificate and details approved under application ref 2018/1041 dated 16 May 2018.
- 4) The premises shall not be open to customers other than between the hours of 1000 and midnight Monday to Sunday and at no other times.
- 5) Notwithstanding the details on the approved plans, the ground floor entrance to the Market extension building fronting Totterdown Street shall be closed to the public between the hours of 2000 and 0800 the following day, 7 days a week, except for emergency access UNLESS doors have been installed to the existing Totterdown Street entrance to Tooting Market in accordance with approved plan nos 21-11.A.04 and 21-11.A05 and remain in place, in which case and notwithstanding the details on the approved plans the ground floor entrance to the Market extension building fronting Totterdown Street shall be closed to the public (for both entrance and exit) between the hours of 2230 and 0800 the following day, and operated under controlled secure access only between the hours of 2230pm – midnight in accordance with details of how the secure access will be controlled and managed which have first been submitted to and approved in writing by the Local Planning Authority, 7 days a week, except for emergency access.
- 6) Notwithstanding the details on the approved plans, the existing Totterdown Street entrance to Tooting Market shall be closed to the public between the hours of 2000 and 0800 the following day, 7 days a week, except for emergency access UNLESS and until doors have been installed to this entrance in accordance with approved plan nos 21-11.A.04 and 21-11.A05 and remain in place, in which case and notwithstanding the details on the approved plans, the existing Totterdown Street entrance to Tooting Market shall be closed to the public (for both entrance and exit) between the hours of 2230 and 0800 the following morning, and operated under controlled secure access only 2230 – midnight in accordance with details of how the secure access will be controlled and managed which have first been submitted to and approved in writing by the Local Planning Authority, 7 days a week, except for emergency access.