



Appeal Decision

Site visit made on 15 November 2022

by John Dowsett MA DipURP DipUD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1st March 2023

Appeal Ref: APP/N5090/W/22/3299102

847 High Road, London, N12 8PT

- 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 Merkur Slots UK Ltd. against the decision of the Council of the London Borough of Barnet.
 - The application Ref: 21/6176/S73, dated 24 November 2021, was refused by notice dated 25 April 2022.
 - The application sought planning permission for development described as: Change of use from Sui Generis (Betting Shop) to Sui Generis (Adult Gaming Centre), without complying with a condition attached to planning permission Ref: 20/2503/FUL, dated 22 July 2020.
 - The condition in dispute is No. 3 which states that: *The use hereby permitted shall not be open to members of the public between midnight and 8am on any day.*
 - The reason given for the conditions is: *To safeguard the amenities of occupiers of adjoining residential properties.*
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Decision

1. The appeal is allowed, and planning permission is granted for Change of use from Sui Generis (Betting Shop) to Sui Generis (Adult Gaming Centre) at 847 High Road, London, N12 8PT in accordance with the terms of the application, Ref: 21/6176/S73, dated 24 November 2021, subject to the conditions in the attached schedule.

Preliminary Matters

2. On 4 June 2020 planning permission was granted for the change of use of the ground floor of the appeal building from a betting shop to an adult gaming centre (planning permission reference: 20/2503/FUL). That permission was subject to several conditions. These included a condition (Condition 3) that restricts the hours of operation of the adult gaming centre to between 08:00 and midnight on any day of the week. The appeal proposal sought to extend the opening hours of the adult gaming centre to permit opening until 02:00 every day.
3. Although the proposal seeks to vary Condition 3 of planning permission reference: 20/2503/FUL, the effect of granting planning permission under Section 73 of the Town and Country Planning Act 1990 (as amended) (hereinafter the Act) is that a new, separate, planning permission is created for the same development but subject to different conditions. The original grant of planning permission remains intact and unamended.

Main Issue

4. The main issue in this appeal is the effect of extending the opening hours of the premises on the living conditions of nearby residential occupiers, with particular regard to noise and disturbance.

Reasons

5. The appeal proposal relates to the ground floor of a three storey, mid-terrace, building with residential accommodation on the first and second floors, located on High Road, a busy principal route through this part of north London. The terrace of which the appeal building forms part is similarly comprised of properties with various commercial uses at ground floor level and one or two floors of accommodation above. Opposite is a similar mixed use terrace and a large Sainsbury's supermarket.
6. At the south end of the terrace, Woodside Park Road runs perpendicular to High Road. Woodside Park Road is primarily residential in nature but provides vehicular and pedestrian access to Woodside Park Underground station. At the north end of the terrace, Avenue Road is similarly a predominantly residential street. Other residential streets branch regularly off High Road giving access to extensive residential areas to the east and west of the linear mixed use area running along High Road at this point.
7. The use as an adult gaming centre has been implemented and the evidence indicates that it has been operating as such since approximately November or December 2020. The current planning permission granted in July 2020 allows the premises to operate from 08:00 to midnight, seven days a week. The appeal proposal seeks to alter these permitted opening hours to allow the premises to operate until 02:00 every day.
8. The application was accompanied by a Noise Assessment and two reports detailing observations of patron behaviour at the appeal premises. A supplementary Noise Assessment that considered the effect of patrons talking or gathering to smoke outside the premises was submitted with the appeal. Whilst I recognise that this supplementary information was not before the Council when it determined the planning application, the Council has had the opportunity to comment on this in its appeal submissions.
9. These reports conclude that the current level of background noise in the area is relatively high, and remains so until after midnight, and that there is no noticeable transmission of noise from the current operation of the adult gaming centre to the residential accommodation above. The supplementary Noise Assessment also concluded that the predicted noise from smokers and patrons gathering outside would be below the British Standard criteria. The Noise Assessments and the observation reports also contain observations of patron behaviour, both at the appeal site and at other sites operated by the appellant. These indicate that the level of patronage later at night is low; that whilst patrons may stand outside the premises to smoke, there were not large groups and conversations were at normal volumes; and that patrons did not engage in activities that might cause disturbance. The Observation Reports, which each cover a period of several hours, record no evidence of anti-social behaviour in the area either in connection with the appeal premises, or unrelated to it.

10. There is no evidence in respect of the dispersal pattern or routes taken by patrons leaving the appeal building. I noted that there are night bus services from the bus stops on High Road close to the appeal building and a night time Underground service also operates on the Northern Line which serves Woodside Park station. Patrons leaving the premises may use these public transport services or may disperse via other routes, including the nearby residential streets, which would result in a slight increase in late night movements in the vicinity of residential accommodation.
11. The Council has not submitted any technical evidence in respect of noise to contradict the evidence submitted by the appellant. I have also noted that the Council's Environmental Health Officer has advised that no complaints have been received regarding noise transferred to the flats above since the appeal premises opened, and that there have been no complaints regarding patrons leaving the Adult Gaming Centre.
12. The appeal site is within a town centre area and, at the time of my site visit, was a busy and vibrant place with heavy traffic on the roads and large numbers of pedestrian movements. There was less activity and fewer movements on the residential streets leading off High Road, with the exception of Woodside Park Road which had regular vehicle and pedestrian movements due to the presence of the Underground Station, although this was still below the levels observed on High Road. I recognise, however, that levels of activity will vary at different times of the day and, indeed, the photographs included in the appellant's observation reports, indicate that the area becomes significantly less busy in the time period between midnight and 02:00.
13. In the vicinity of the appeal site, as is typical of most town centre areas, there are a number of uses including bars, restaurants, and takeaways. I also saw that there are two traditional betting shops close to the appeal site. It is clear that there is some element of an evening/night time economy in the area. That said, I saw that where premises display opening times, most of these uses which operate into the evening close before midnight.
14. The exceptions that I saw to this are the McDonald's restaurant and takeaway which is open until 01:00 every day, except Fridays when it is open 24 hours, and the Tally Ho public house, which has been brought to my attention by the appellant. I noted on my visit that this latter premises, whilst open until 02:00 on Fridays and Saturdays, closes at midnight or earlier on other nights of the week. Both of these premises are located some distance to the south of the appeal site and so are not likely to cumulatively add to the noise levels in its immediate vicinity.
15. My attention has been drawn to an appeal decision that granted planning permission for an adult gaming centre at 48 Ballards Lane in Finchley, where the Inspector imposed a condition restricting opening to midnight. From the limited evidence that I have in respect of this case, the context of the site at Ballards Lane appears to be generally similar to the appeal site in the case before me in that it is located in a town centre where residential accommodation is present at upper floors above ground floor commercial uses, and quieter residential streets run off the main road.
16. The Inspector in that case was considering a new adult gaming centre facility operating 24 hours a day, which differs from the proposal before me which seeks to extend the permitted opening hours of an existing facility. There is

also no indication that evidence such as the observations of patron behaviour were available to that Inspector. In the present case there is uncontested evidence that indicates that congregation of large groups outside the premises does not appear to occur, although small numbers do go out to smoke, and that patrons do not leave the premises in large or noisy groups. The Inspector concluded that a 24 hour use would not be appropriate in that location but found that the opening hours that had been suggested by the Council, requiring closing at midnight, to be acceptable. However, there is nothing in the decision letter which would indicate that opening later than midnight but less than 24 hours was either suggested to or considered by the Inspector. For these reasons, I find that the case at Ballards Lane is not directly comparable to the present appeal.

17. Nonetheless, I agree with the Inspector in that case, in so far as the perception of noise and disturbance as a nuisance is subjective and will also vary depending on the time of day. I am also mindful that the observed patron behaviours in both the Noise Assessments and the Observation Reports were recorded at times when various restrictions were in place as a result of the coronavirus pandemic. Consequently, these may not be typical and representative due to more general behavioural changes during the pandemic caused by adaptation to the various restrictions that had been in place suppressing social activities.
18. I do accept that the appellants headcount data, which was collated prior to the coronavirus pandemic, does indicate that night time usage is likely to be by relatively low numbers of patrons. The headcount data broadly correlates with the two observations of the appeal premises, although it is not clear whether source premises for this data are in comparable locations or of a similar size to the appeal premises. This notwithstanding, due to the subjective nature of noise perception, what may be tolerated in one area may not be in a different location.
19. I am advised that a licence has been granted in respect of 24 hour operation of the premises. However, the licencing regime is separate from, and independent of, the planning process and the fact that a licence has been issued adds little weight to the appellant's case.
20. Drawing these strands together, there is not clear evidence that the proposal would be harmful to the living conditions of nearby residents and should be refused planning permission. Whilst there is evidence that indicates that it is likely that the premises could operate without detriment to the local area, that evidence is not wholly conclusive.
21. The Planning Practice Guidance sets out that it may be appropriate to grant planning permission on a temporary basis where a "trial run" is needed in order to assess the effect of the development on the area. This was the approach that was advocated in the Council Planning Officer's report. In the event that it is found, in practice, the proposal causes harm, a temporary permission would limit the duration of any harm and allow a return to the current situation.
22. Policy CS5 of the Barnet Core Strategy Development Plan Document 2012 (the Core Strategy) expects new development to respect local context and local character. Policy DM01 of the Barnet Development Management Policies Development Plan Document 2012 (the DMP) also expects that development proposals should be based on an understanding of local characteristics and

should preserve or enhance local character. Both policies are general design policies and neither specifically refers to the effect of noise and disturbance on living conditions. Although the prevailing noise climate is part of the broader local character, there is no substantiated evidence that the appeal proposal would make the prevailing noise climate worse. As set out above, the evidence provided by the appellant indicates that it is likely that the proposal would have a neutral effect on the noise climate, however, due to some uncertainties, a trial period of operation would verify this. In this context, the appeal proposal would not directly conflict with either Policy CS5 or Policy DM01.

23. I therefore conclude that, subject to a condition limiting the extension of opening hours to one year, the proposed development would not cause harm to the living conditions of nearby residents. It would comply with the relevant requirements of Core Strategy Policy CS5 and DMP Policy DM01.

Other Matters

24. A number of representations have been received from interested parties and local residents raising concerns in respect of increased opportunities for gambling, antisocial behaviour, reduction in safety in the area, and that the use is inappropriate in the area as opposed to uses such as shops.
25. The use as an adult gaming centre already exists and has been granted planning permission. The principal of this cannot be revisited as part of an application made under Section 73 of the Act. The protection of children and other vulnerable people from being harmed or exploited by gambling falls within the purview of the licencing regime and is not a matter that I can consider within the context of a planning appeal.
26. There is no substantiated evidence that indicates that the existing use as an adult gaming centre has resulted in an increase in anti-social behaviour or a reduction in safety in the area, or that the proposed extension to the opening hours would do so. A generalised fear in respect of these matters in not, in itself, a reason to withhold planning permission.

Conditions

27. I have had regard to the conditions that have been suggested by the Council.
28. In order to provide certainty in respect of what has been granted permission. I have attached a condition that specifies the operating hours of the premises.
29. As set out above, it is necessary to grant planning permission subject to a condition which makes it temporary for a period of one year in order to allow any potential effects to be monitored. After that period expires, the opening hours would revert to those granted by planning permission reference: 20/2503/FUL.
30. In order to minimise any potential disturbance arising from the extended opening hours, it is necessary to impose the Council's suggested condition requiring the submission of a management plan which sets out the measures to be taken to ensure there is no congregation of patrons outside the premises during the period of the extended hours as suggested in the Noise Assessment Report dated 17/05/2022. I have amended the wording of the condition to include an implementation clause requiring the premises operate in accordance with the approved management plan.

31. The Council has suggested that it is necessary to attach a condition specifying that the development be carried out in accordance with a number of documents. However, the documents identified primarily contain factual information or consist of technical reports. It is not clear from the wording of the suggested condition what, if any, aspects of these documents the development is required or expected to comply with.
32. The Noise Assessment Report dated 17/05/2022 does contain a number of suggested control measures to cover activities during the extended opening period. However, these measures would also be covered in the Council's suggested condition requiring the submission of a Management Plan. The other documents cited do not contain any mitigation measures or other operational requirements and, consequently, as it is worded this condition is insufficiently precise to allow the appellant to determine what is required to comply with it. It is also clear from the description of the development and the address to which property the permission applies. I therefore consider this condition is not necessary.
33. The Planning Practice Guidance advises that for the purpose of clarity, decision notices for the grant of planning permission under section 73 should set out all of the conditions imposed on the new permission, and restate the conditions imposed on earlier permissions that continue to have effect.
34. I am advised that condition 5 of planning permission reference: 20/2503/FUL which required the submission of mitigation measures against internal and external noise has been discharged. Consequently, this condition is not required.
35. The original planning permission also contained a condition (Condition 4) requiring details of bin storage to be submitted and implemented, I have no information regarding whether this condition has been discharged, however, there is nothing in the evidence that would indicate that refuse storage is an issue. Neither the Council nor the appellant has suggested that this condition is required. I have, therefore, not included this condition.

Conclusion

36. For the reasons set out above, I conclude that, subject to a condition making the planning permission temporary for a period of 12 months, the appeal should be allowed.

John Dowsett

INSPECTOR

Schedule of conditions

- 1) The use hereby permitted shall not be open to members of the public between the hours of 02:00 to 08:00 on any day.
- 2) The use hereby permitted shall be for a limited period, being the period of 12 months from the date of this decision. Thereafter, the use shall cease, and the premises shall not be open to members of the public between midnight and 8am on any day and shall otherwise revert to operating under the terms of planning permission reference: 20/2503/FUL.
- 3) Prior to the commencement of the extended opening hours, a Management Plan shall be submitted to, and approved in writing by, the Local Planning Authority which sets out the measures to be taken to ensure there is no congregation of patrons outside the shop during the period of the extended hours. Thereafter the premises shall be operated in accordance with the measures set out in the approved Management Plan.