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# Appeal Decision

Site visit made on 9 March 2023

**by Rachel Hall BSc MSc MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 27 April 2023**

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**Appeal Ref: APP/C4615/W/22/3310017**

**8 Alexandra Road, Halesowen, West Midlands B63 4DJ**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
  - The appeal is made by Mr Faiz Ali against the decision of Dudley Metropolitan Borough Council.
  - The application Ref P22/0724, dated 12 April 2022, was approved on 8 August 2022 and planning permission was granted subject to conditions.
  - The development permitted is variation of condition 4 of planning approval 87/52180 to vary the opening hours to 10:00am to 12:00am.
  - The condition in dispute is No 2 which states that: *The premises shall not be used for any purpose before the hours of 1000 nor after 2230 hours Monday to Saturday and Public Holidays, or before the hours of 1000 nor after 2200 hours on Sundays. These temporary opening hours shall cease on or before 12 months from the decision date, and revert back to not be open before 0700 or after 2200 hours on Monday to Saturday inclusive, and before 1100 or after 1800 hours on a Sunday, in line with P08/1191.*
  - The reason given for the condition is: *To protect the amenities of the surrounding residents and enable the assessment of the extended opening hours upon residential amenities, in accordance with Borough Development Strategy 2017 Policy D5 Noise Pollution and Policy L1 Housing Development, extensions and alterations to existing dwellings Policy D2 Incompatible Land Uses (in part).*
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## Decision

1. The appeal is dismissed.

## Background and Main Issue

2. Planning permission was granted for the appeal site in February 1988 for a rear single storey extension and change of use from retail shop to betting office (Ref 87/52180) (the original permission). Condition 4 on that permission restricted the opening hours to between 0830 and 1830 Monday to Saturday and at no time on Sundays.
3. The Council granted planning permission for a variation to condition 4 of the original permission on 8 August 2022 (Ref P22/0724). The revised condition (No 2) amended the opening hours to 1000 to 2230 Monday to Saturday and public holidays, and 1000 to 2200 on Sundays. Those opening hours are described in the condition as being temporary. The condition specifies that on or before 12 months from the date of that decision, the opening hours shall revert to 0700 to 2200 Monday to Saturday, and 1100 to 1800 on Sundays, which is said to be in line with the terms of planning permission Ref P08/1191 (the 2008 permission). The temporary period was imposed to provide a period of up to 12 months in which the effects of longer opening hours could be tested.

4. The appellant is seeking a variation to condition 2 to enable the premises to open between 1000 to 0000 (midnight) Monday to Sunday. In their appeal statement the appellant also suggests an alternative variation to the condition. This proposes that the shop could open between 1000 to 2230 Monday to Saturday and public holidays, and 1000 to 2200 on Sundays, but would allow for customer deliveries only to continue until 0000. However, the appeal process should not be used to evolve a scheme<sup>1</sup>. Moreover, it is important to ensure that interested parties are given the opportunity to express their views on proposals considered at appeal. Therefore in the interests of clarity and fairness to all parties, in this appeal decision I only consider the variation to condition 2 to allow opening between 1000 to 0000 Monday to Sunday.
5. Therefore the main issue is the effect that the proposed variation to opening hours would have on the living conditions of neighbouring residents, with particular regard to noise and disturbance.

### **Reasons**

6. The appeal site is located at the end of a terrace of ground floor commercial premises with what appears to be residential accommodation at first floor level. Alexandra Road is otherwise residential in character, with houses opposite and adjacent on one side of the appeal site. The closest adjacent house is 10a Alexandra Road, separated only by the width of a driveway. It has windows on its front elevation at ground and first floor level, as well as at first floor level on the side adjoining the adjacent access drive. Consequently, the appeal site is in close proximity to housing.
7. The appeal site is near to the junction with Stourbridge Road (A458) which is a relatively busy road. Consequently I noticed on my site visit that there is a reasonable degree of background road traffic noise in the vicinity of the site. The appeal site has a small number of parking spaces on the forecourt. Pedestrians would also come and go from the shop frontage. Deliveries would also arrive at the front of the shop and there would be comings and goings associated with the delivery of goods to customers.
8. Currently any noise and disturbance associated with the operation of the appeal premises is restricted by the evening closing times specified in condition 2, with no trading permitted beyond 2230 on weekdays and Saturdays, and no trading beyond 2200 on Sundays. In contrast, the proposed increase in opening hours would mean the potential for disturbance to neighbouring occupiers, very late into the evening, every day of the week.
9. Such noise and disturbance would be likely to arise from customers coming and going, talking outside, returning to vehicles and shutting car doors, as well as deliveries to and from the site. I note that the appellant submits that they are responsible operators, however, customer behaviour and delivery movements need not be deliberately anti-social to cause disturbance given the proximity to neighbouring houses here.
10. The appellant states that most activity after 2230 would be home delivery vehicles that would be out delivering for the majority of the proposed remaining opening hours. However this could vary considerably and there would be no restriction on the number of comings and goings within the

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<sup>1</sup> Procedural Guide - Planning appeals – England (December 2022): Paragraph M2.1

planning permission. Moreover, the regular comings and goings of delivery vehicles, with engines running and car doors opening/closing would exacerbate the harm to the living conditions of neighbouring residents past 2230 hours (and 2200 hours on Sundays) due to noise and disturbance. This harmful effect is likely to be more pronounced in warmer weather when the neighbouring occupants are more likely to keep windows open.

11. 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. Nevertheless, local residents should reasonably be able to expect quieter times during late hours. After 2230, and 2200 on Sundays, background traffic noise is likely to be noticeably lower than during the daytime and earlier in the evening. The Planning Practice Guidance (PPG) advises that people tend to be more sensitive to noise at night as they are trying to sleep, and that the adverse impact of noise can be greater simply due to the fact that background noise levels will be much lower at that time (Ref ID 30-006-20190722). They are consequently likely to be particularly sensitive to increased noise and disturbance during the proposed later opening times.
12. The appellant references other local businesses that operate late into the evening. However these relate to premises that front on to Stourbridge Road where, aside from any residential accommodation at first floor level, there is greater separation between their forecourts and nearby housing. In any event, the presence of other late night opening hours does not justify allowing the appeal in circumstances where I find that the scheme before me would result in an unacceptable increase in noise and disturbance late into the evenings.
13. The PPG addresses circumstances where a temporary permission may be appropriate. This includes where a trial run is needed in order to assess the effect of the development on the area (Ref ID 21a-014-20140306). In the particular circumstances of this case I find that the temporary increase in opening hours permitted by condition 2 is appropriate to enable the effect of the proposal to be assessed during that time. Whilst the shop is said to have been operating under the condition 2 opening hours for several months already, a full 12 month period would provide greater certainty of the effects of operation of the shop, including during warmer weather.
14. Accordingly, the proposed variation to condition 2 opening hours would not provide sufficient control on the existing use so as to safeguard against residents suffering undue noise and disturbance. Therefore it would cause unacceptable disturbance to nearby residents with regard to noise and disturbance. In particular, for the occupants of No 10a. Furthermore, the existing condition 2 is reasonable and necessary in the interests of protecting the living conditions of the occupants of nearby houses, and to enable the effect of the opening hours to be tested.
15. Therefore, the proposed variation to condition 2 would be contrary to Policy D5 of the Dudley Borough Development Strategy (March 2017). This requires noise generating development to include measures to minimise noise intrusions. Furthermore, the proposal would be contrary to Policy D2 of the Development Strategy which seeks to avoid development that would result in undue harm to existing occupants of nearby houses, particularly with respect to noise and disturbance. I have not been provided with Policy L1 that was also

referenced in the Council's reason for the condition. However that relates to housing development and therefore is unlikely to be relevant here.

16. The proposal would also 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. I am also satisfied that condition 2 accords with the 6 tests set out in paragraph 56 of the Framework.

### **Other Matters**

17. 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. Moreover, the PPG advises that it is rarely appropriate for conditions to apply to a particular person or group of people (Ref ID 21a-015-20140306). Given the harm I have identified, restricting the extended opening hours to the appellant's business only would not be justified in this instance.
18. A petition was submitted in support of extending the opening hours beyond 2230, albeit no address details are provided for the signatories. Therefore it is not clear how many of those are people living in the locality or with direct knowledge of the appeal site and its surroundings. I note also the letters of support from some local businesses and a local resident. Furthermore it appears that residents living above the business have not objected to the proposal. Nevertheless, there are two objections from residents living close to the appeal site, which include reference to noise and disturbance from comings and goings associated with the appeal site.
19. Customer and staff parking for the appeal site is limited. Consequently there may be times when such parking is in a location that causes some inconvenience to nearby residents. However, it is likely that there would be more availability of parking spaces outside commercial premises later in the evening when some units would be closed. Therefore I find that the proposal would not result in an unacceptable increase in disturbance to neighbouring occupants as a result of inconsiderate parking. As such this is a neutral consideration.
20. I note the appellant's comments on the financial challenges of running and maintaining the business. There would be potential for antisocial behaviour to arise in the event that the appeal site were to become vacant for an extended period. Nonetheless, evidence that the survival of the business is dependent on the proposed later opening hours is not sufficiently persuasive. The appellant references other dessert shops in the locality that are said to be open until 0000 hours or later. However no further details are provided therefore it is unclear whether those premises are in similar proximity to residential uses and operating within any planning restrictions for those shops. In any event, I have determined the appeal fairly, on the basis of the information before me.
21. I accept that the proposal would have economic benefits to the appellant and staff through expansion of the business. The customer demand for extended opening hours is not disputed, there being no robust evidence before me to the contrary. However, the significant weight that the Framework affords to

proposals that deliver economic growth (paragraph 81), must be balanced against the need to ensure proposals achieve high standards of amenity for existing and future users (paragraph 130.f). Therefore, for the reasons I have set out, existing condition 2 strikes a necessary and reasonable balance between these interests and those relating to the living conditions of the occupiers of nearby dwellings.

### **Conclusion**

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

*Rachel Hall*

INSPECTOR