



Appeal Decision

Site visit made on 23 March 2023

by K Williams MTCP (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12th July 2023

Appeal Ref: APP/Y2003/W/22/3298316

Mowbrays 35 High Street, Haxey, Doncaster DN9 2HH

- 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 Ms Amanda Hind-Barton against the decision of North Lincolnshire Council.
 - The application Ref PA/2021/1373, dated 4 August 2021, was approved on 15 November 2021 and planning permission was granted subject to conditions.
 - The development permitted is described as "Planning permission to vary condition 1 attached to previously approved application PA/2011/0540 dated 11/05/2011, namely the opening hours be changed to 9am-5pm Monday to Saturday and 10am-3pm on a Sunday and to remove condition 4 to allow for outside seating at Mowbrays, 35 High Street, Haxey, DN9 2HH."
 - The conditions in dispute are No1 which states that: "The premises shall not be open outside the hours of - 9am to 5pm Monday to Friday, and - 10am to 2pm on Saturdays. No opening on Sundays or Public/Bank Holidays;" and No3 which states that "No tables and chairs shall be placed outside the building for use by customers of Mowbrays at any time."
 - The reasons given for condition 1 is: "To safeguard residential amenity in accordance with policy DS1 of the North Lincolnshire local Plan"; and condition 3 is "To safeguard residential amenity in accordance with policy DS1 of the North Lincolnshire local Plan."
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Decision

1. The appeal is allowed in part and planning permission is granted to vary condition 1 of PA/2021/1373 by allowing the opening hours to be changed to 09:00 - 17:00 Monday to Saturday. Otherwise, the appeal is dismissed in relation to the variation of condition 1 relating to opening on Sundays, Public Holidays and Bank Holidays (opening hours) and the deletion of condition 4 (outside seating). See Formal Decision below.

Preliminary Matters

2. The Appellant's application (PA/2021/1373) sought to vary conditions of the previous application (PA/2011/0540) relating to opening hours and outdoor seating. The Council granted planning permission but instead of allowing the variations as sought, only varied the change of opening hours from Monday to Friday instead of from Monday to Saturday. In addition, conditions were added to prohibit opening on Sundays and Bank Holidays and the use of outside seating. In effect the Council had issued a split decision by allowing only part of what had been applied for by the Appellant. I have, therefore, considered the appeal on the basis that the Appellant seeks to vary conditions 1 and 3 (the disputed conditions) of permission PA/2021/1373 by changing the overall

opening times and omitting condition 3 as set out in the development description in the Council's Decision Notice. In effect this is the same as what had been applied for with regard to the variation of permission (PA/2011/0540).

3. Although not originally applied for on the planning application form, the appellant has subsequently indicated that they wish to open on Bank or Public Holidays. Although the Council has indicated that restrictions in relation to Public or Bank Holidays could be removed it has not been clearly explained why. However, I must have regard to the 'Wheatcroft Principles¹.' if I were to determine the appeal on this additional basis, it would potentially prejudice the interests of other parties. I have therefore not considered the appeal on this basis.
4. Within the context of an appeal under section 78 of the Act it is not within my remit to formally determine whether the proposed development can lawfully operate by the appellant. However, I shall consider the evidence as to whether permission is required so far as it is material to this appeal. If the appellant wishes to ascertain whether the development would be lawful, they may make an application for a Certificate of Lawfulness of Existing Use or Development (CLEUD) or of Proposed Use or Development (CLOPUD) under s191 or s192 of the Act.
5. I have been made aware of the emerging North Lincolnshire Local Plan Submission (November 2022). In line with paragraph 48 of the Framework, which sets out guidance in relation to the weight to be given to policies in emerging plans, limited weight to the relevant policy referred to by the Council can be applied. In relation to this the Council confirmed the policy referred to in the emerging Local Plan should have read CSC10 rather than CS12.
6. I have been provided with Policies CS5, CS14 of the North Lincolnshire Core Strategy 2011 (the Core Strategy) and CSC10 of the Emerging Local Plan. Given the main issues identified below they do not appear to be relevant to the proposal before me.

Background

7. The appeal site comprises a detached building in use as a café, with a front forecourt, and enclosed rear yard. To clarify, the appeal relates to the approved application PA/2021/1373 (the 2021 Permission). The 2021 Permission sought to vary the conditions of the approved planning application PA/2011/0540² (the 2011 Permission). The appellants sought under the 2013 to vary the 2011 Permission to increase the Saturday opening hours in line with the 2013 Permission, open on Sundays and remove the condition preventing outside seating. The Council allowed the 2021 Permission but did not vary the conditions as required by the appellants.

¹ Bernard Wheatcroft Ltd v SSE [JPL 1982 P37] - "Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgement, and a judgement with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only criterion on which that judgement should be exercised is whether the development is so changed that to grant it would deprive those who should have been consulted on the changed development of the opportunity of such consultation."

² PA/2011/0540 "to retain a change of use from A1 to A1 (delicatessen) and A3 (café) at 35 High Street, Haxey, DN9 2HH."

8. The 2011 Permission was subject to four conditions. This included a condition (No1) which imposed opening hours of 9:00am to 4:30pm on Monday to Friday, and 10:00am to 2:00pm on Saturdays, with no opening on Sundays and Bank Holidays. A Condition, (No4) was also attached to prevent tables and chairs being placed outside the building for the use of customers.
9. The 2011 Permission was subsequently varied by PA/2013/0500³ (the 2013 Permission). This granted permission for opening hours to be 9:00am to 5:00pm on Monday to Saturday inclusive. At that time, the Council did not attach any conditions to reflect the opening hours, nor any conditions restricting opening on Sunday and Bank or Public Holidays. A Condition preventing outside seating was attached. Taken together, the reason for the conditions was to ensure that the development would not cause harm to the living conditions of the occupiers of neighbouring residential properties.

The Main Issue

10. Therefore, the main issue is whether the conditions in relation to opening hours and outside seating are necessary and reasonable having regard to the planning history of the site and the living conditions of occupiers of neighbouring residential properties, with particular regard to noise, disturbance and privacy.

Reasons

Sunday opening hours

11. The appeal site comprises a detached building in use as a café within a village. There were various community facilities and services along the main road running through the village (High Street), but these were dispersed throughout the village and the overwhelming character was residential. The appeal site is accessed directly from the High Street and is set back from the road by an open forecourt and driveway, with ramped and stepped access to the café. There is residential accommodation to both sides of the café at No's 33 and 37 High Street (No33 and No37).
12. The side elevation of the residential property at No37 abuts the driveway next to the forecourt. There is no intervening boundary treatment. No37 has a low ground floor window and first floor window on its side elevation facing it. It is approximately a driveway/car width away from the main forecourt to the café. This property also has garden space and windows at the rear in close proximity to the café entrance and rear yard. The property at No33 is set further back than the café and is separated by fencing, its driveway and garden.
13. There is no supporting information in respect of the current noise environment. There is no information before me regarding the number of covers/customers that normally frequent the business. From my observations, although the appeal site was located next to a road, and nearby community facilities, this was predominantly a quiet residential area. The main road did not appear to be heavily trafficked, and the area was quiet at the time of my site visit during a weekday morning.

³ Council Planning Reference: PA/2013/0500 "Variation of condition No 1 of planning permission 2011/0540 to allow the opening hours to be 9am – 5pm Monday – Saturday (inclusive) at Mowbrays, 35 High Street, Haxey, DN29 2HH."

14. Such uses as cafés have the potential to cause noise and disturbance from associated cooking and cleaning activities. Noise, disturbance and loss of privacy would also arise from the coming and going of patrons, including chatter and raised voices. Disturbance from those arriving by car and parking nearby the appeal site on the highway in close proximity to residential properties, and noise from car doors and engines would also arise.
15. As there was no boundary treatment at the front of the business, I could clearly see inside the lower ground floor side window of No37, and towards its associated garden areas. Therefore, patrons would also be able to do the same. Given the proximity of the appeal site the occupiers of No37 would be very aware of any activity and noise.
16. Sundays in particular would be a time when local residents are more likely to be at home or in their gardens and could reasonably expect a quieter environment. Notwithstanding that the appellant has explained the café has been open on Sunday and contends this is lawful, a matter which I return to, extending the opening hours on Sunday would have the potential to result in further noise, disturbance and loss of privacy.
17. Furthermore, the Council's Environmental Protection Team objected on the grounds of protecting neighbouring living conditions. They identified that activity such as the above are difficult to resolve and limited information was provided to support the change. The proposed extension of the hours of operation would lead to the potential for a greater impact on neighbouring occupiers which would be harmful to living conditions.

Saturday opening hours

18. The Council has indicated that the restriction to the Saturday opening hours was an error in paragraph 4.1 of their appeal statement. They have stated that this does not reflect the most recent 2013 Permission and they agree to the later opening time on Saturday. I find that undoubtedly there would be the same activity as I have referred to above. However, the proposed increase in time of 3 hours on Saturdays would be a minimal increase on a day when the café is already open.
19. In any event, there is also a fallback position whereby the Council has granted a separate planning permission to extend the opening hours on Mondays to Saturdays to 5:00pm. There is no evidence before me that the 2013 Permission has not been implemented. I therefore afford this fallback position significant weight.

Conclusion on opening hours

20. Taking all of the above matters into account I conclude that the extended opening hours would harm the living conditions of occupiers of neighbouring residential properties in respect of noise, disturbance and privacy. This would be contrary to Policies S9 and DS1 of the North Lincolnshire Local Plan 2003 (the Local Plan). Combined and insofar as these are relevant to the appeal these seek to ensure such uses have appropriate opening hours and prevent harm to neighbouring living conditions.
21. However, I find that the disputed condition restricting the opening hours below those of the fallback position on Saturday no longer necessary or reasonable. It is therefore necessary to vary the condition No1 of the 2021 Permission to

allow the use permitted to only be open to customers from 09:00 to 17:00 Monday to Saturday and not on Sundays or on Bank or Public Holidays.

Outdoor seating

22. The proposals do not indicate how many tables would be positioned within the forecourt area, nor how many people could be seated. Notwithstanding this, activity and disturbance associated with the use of the forecourt with tables and chairs would be from the people arriving and leaving, sound from general chatter, raised voices, serving of food, and associated food odours. It is likely to be attractive to customers, particularly in good weather, and would generate a busier atmosphere with increased levels of noise and disturbance.
23. Whether or not the side ground floor window is a kitchen or utility window, seating in the forecourt area would significantly impinge on the privacy of No37. Customers would be able to view into this window. As opposed to passing to enter the café, being seated within the forecourt would likely be for longer periods of time. This would significantly harm the privacy of the occupants of No37.
24. The appellant has referred to levelling the forecourt area and providing suitable screening to preserve neighbouring privacy. However, this detail is not before me, and it would alter the development that the Council based its decision on and was the subject of consultation with the interested parties. Hence, it would not be reasonable for this to be imposed by a condition through my decision.
25. I therefore conclude that condition No3 to be reasonable and necessary as the removal of the condition proposal would result in harm to the living conditions of neighbouring occupiers. Consequently, this would be contrary to Policy S9 and DS1 of the Local Plan particularly where they seek to avoid adverse effects of loss of privacy, noise and disturbance.

Other Matters

26. The 2013 Permission described the development as "variation of condition 1 of planning permission 2011/0540 to allow the opening hours to be 9am-5pm Monday-Saturday (inclusive) at ...". The Council did not attach any conditions to reflect the opening hours, nor any specific restrictions on Sunday and Public/Bank Holidays. A Condition restricting outside seating was attached.
27. The appellant has provided a copy of an email from the Council to a previous owner of the business. It seemingly suggests that the Council has stated there are no restrictive hours of operating the café on any day. Although I can see the email references to the 2013 Permission, it is not dated, nor is it clear who it is from. Whilst the Council has not provided any evidence to the contrary that this is not correspondence from them, I cannot be certain that this is the view of an individual officer as opposed to the formal or binding view of the Council. In addition to this there is not sufficient evidence to explain how long the café has been open or whether it has been continuously open on a Sunday, which could also have been sought through a CLEUD or CLOPUD.
28. In any event, the interpretation from the Council in respect of the 2013 Permission was that it was approving that for which was applied. Taking into

account recent Lambeth⁴ ruling there was nothing to indicate an intention to change or remove the condition in respect of Sunday and Bank Holiday opening hours. As such I agree with the Council that the 2013 did not remove the requirement for no opening on Sunday from the 2011 Permission.

29. I also acknowledge that the external seating area and additional opening forms part of plans to ensure the business survives. However, I am not provided with evidence of the business's trading performance. I am not convinced that this would be sufficient to outweigh the harm to neighbouring resident's living conditions.
30. On the basis of the evidence submitted by interested parties, it is suggested that elderly users would benefit from seven day opening hours as well as those who visit the area for recreational benefits such as walkers and cyclists. In respect of the elderly, I have had due regard to the need to eliminate unlawful discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it in accordance with the Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010 (as amended). Age is a relevant protected characteristic to which the PSED applies.
31. In reaching my decision, I have had due regard to the aims of the PSED. Although I appreciate Sundays may be more beneficial for some people, the business would be open on 6 other days allowing alternative arrangements. I do not therefore conclude that the impact of dismissing the appeal on persons with a protected characteristic would outweigh the potential impact on living conditions related to the potential for the effects noise, disturbance and loss of privacy which would be experienced by neighbouring occupiers.
32. The planning application was not refused on the basis of the effect on character and appearance of the area. Although concerns have been raised about conflicts with the forecourt and outdoor seating, nor did the Council refuse the application on highway safety. Notwithstanding the submissions of third parties on this matter, I have no substantive evidence to disagree with the Council. Nor did it appear to me that the internal parts of the premises were inaccessible to wheelchair users, or the elderly given that the business was accessible by a ramped access. However, the absence of harm in this respect is a neutral matter weighing neither for nor against the appeal.
33. The actions of the appellant, the Council and other interested parties have no bearing on my assessment of the planning merits of the appeal. It is not within my remit to investigate the records held by the Council.

Conditions

34. I have granted a new permission with the disputed condition varied to allow extended opening hours on Saturday only [1]. I have also reviewed the conditions imposed on the original permission and have amended them in the interests of precision in relation to the use of the building [2] and outside seating [3]. It is not clear why the Council's suggested condition for the

⁴ Lambeth LBC V SSCLG & Aberdeen Asset Management, Nottinghamshire CC & HHGL Ltd [2019] UKSC 33: 'the obvious, and...only natural, interpretation...is that the Council was approving what was applied for: that is, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is certainly nothing to indicate an intention to discharge the condition altogether...'

external litter bin, is necessary or relevant. Although such a condition was attached on the original consent, the proposal is not a takeaway and there would be no outside seating. I have therefore not imposed that condition.

Conclusion

35. I accept that an extension of opening hours at the appeal property could have an effect which would be of benefit to the community who use the premises. However, the variation of condition 1 to include Sunday opening and removal of condition 4 to allow outdoor seating would, on a permanent basis, allow a use which would unacceptably affect the living conditions of local residents. This would fail to accord with the development plan and there are no material indications that a decision should be taken otherwise than in accordance with it.
36. However, the wording of condition 1 as it stands is unreasonable in respect of Saturday opening. In order to allow the appeal, I have considered an alternative condition to allow extended opening hours on Saturday to match the requirements of those in the preceding 2013 Permission.
37. For the reasons given above I conclude that the appeal should therefore be allowed in part with regard to the variation of condition 1 allowing opening hours to be extended to Monday to Saturday from 09:00 to 17:00. Otherwise, I conclude that the appeal should be dismissed with regard to opening hours on Sunday and Public and Bank Holidays and the use of outside tabling.

Formal Decision

38. The appeal is allowed in part. Planning Permission Ref PA/2021/1373 (granted on 15 December 2021) - to vary part of condition 1 attached to previously approved application PA/2011/0540 (dated 11/05/2011), namely that the opening hours be changed to 9am-5pm Monday to Saturday - at Mowbrays, 35 High Street, Haxey DN9 2HH, is varied by deleting condition one and substituting the following conditions:
- 1) The premises shall only be open for customers between the following hours: 09:00 – 17:00 Monday to Saturday. The premises shall not be open for customers on Sundays or on Bank or Public Holidays.
 - 2) The premises shall be used for a delicatessen and café and for no other purpose (including any other purpose in Classes A1 and A3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) (or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification).
 - 3) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no outside seating areas for customers shall be provided within the site boundaries.
39. Otherwise, the appeal is dismissed and Planning Permission Ref PA/2021/1373 (granted on 15 December 2021) - to vary part of condition 1 (namely opening hours be changed to 10am-3pm on a Sunday and deletion of condition 4) attached to previously approved application PA/2011/0540, is not varied.

K Williams INSPECTOR