



Appeal Decision

Site visit made on 19 June 2024

by J Symmons BSc (Hons) CEng MICE

an Inspector appointed by the Secretary of State

Decision date: 11 July 2024

Appeal Ref: APP/X1355/W/24/3337840

Mixology, 93 Elvet Bridge, Durham City DH1 3AG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 (as amended) for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Reza Khorami against the decision of Durham County Council.
 - The application Ref is DM/23/00358/VOC.
 - The application sought planning permission for the 'Change of Use from Retail (E class) to Drinking Establishment (Sui Generis)' without complying with a condition attached to planning permission Ref DM/21/01282/FPA, dated 22 July 2021.
 - The condition in dispute is No 3 which states that: The premises shall only be open to customers between the hours of 07:00 to 00:00 Sunday-Thursdays and 07:00 to 1:00 on weekends Friday night into Saturday morning and Saturday night into Sunday morning.
 - The reason given for the condition is: In the interests of the residential amenity of surrounding properties in accordance with Policy 31 of the County Durham Plan and Part 15 of the National Planning Policy Framework.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. This appeal seeks to vary condition No 3 by extending the opening hours by 30 minutes on all days and rewording the condition to state: 'The premises shall only be open to customers between the hours of 07:00 to 00:30 Sunday to Thursday and 07:00 to 1:30 Friday to Saturday'.
3. An update to the National Planning Policy Framework (the Framework) was published on 19 December 2023. Other than changes to paragraph numbering, there are no material changes relevant to the substance of the appeal. The appellant has referred to the revised Framework in their appeal statements and the Council has seen this. I am satisfied that there is no requirement to seek further submissions on this matter.
4. The appellant contends that a condition restricting opening hours is not necessary because the matter is covered by the operating licence. It is argued that the condition fails to meet all of the six tests as set out in Paragraph 56 of the Framework and should be deleted or reworded to link it directly to the operating licence hours. However, the planning and licensing regimes involve consideration of different, albeit related, matters. As shown on the establishment's licence provided, the licensing regime seeks to secure statutory licensing objectives and does not take into account planning policies or

objectives. On this basis, I consider the condition would not replicate the operating licence and is necessary to make the development acceptable in planning terms.

Main Issue

5. The main issue is the effect of the proposed variation to condition No 3 on the living conditions of nearby residents, with respect to noise and disturbance.

Reasons

6. The appeal site is a drinking establishment which consists of a two-storey mid-terraced Grade II listed building located at the New Elvet end of Elvet Bridge. It is in the defined city centre and the surrounding area is typically both commercial and residential.
7. In relation to residential properties, the City of Durham Parish Council confirmed that there are in the order of 40 residential properties within approximately 100 metres (m) of the appeal site. A list of these is provided and this shows properties to be typically in the range of 7 to 92m from the appeal site with a large proportion shown to be in the order of 45 to 52m away. Although the appellant advises that there is nothing opposite the appeal establishment other than a public house and no residential properties adjoining or are behind it, no substantive evidence to dispute the residential list is provided.
8. The appellant details that the current permitted opening hours of the appeal site do not allow time for 'drinking up' and that it is unfairly disadvantaged compared to similar competitor establishments in the city centre which have longer opening hours. To address this, the appeal seeks to extend each day's opening hours by 30 minutes.
9. While I acknowledge the requested increase in opening hours is modest, it would extend customers' activity in and around the appeal establishment and area. This increased activity would occur in the very early hours of the morning, at a sensitive sleeping period for many residents. On the basis that evidence indicates residential properties are near the appeal establishment, and little evidence has been provided to show the residents of these properties would not be adversely affected by the increased activities both within the appeal establishment and on leaving, I cannot be sure that the proposed extended period of opening would not significantly and adversely affect the nearby residents' living conditions.
10. This view is also supported by the consultation responses from the Council's Environmental Health Nuisance Action Team and the Police Architectural Liaison Officer. I acknowledge the appellant's contention that there is little supporting evidence in the responses provided, however, the parties have a good local knowledge and understanding of the area and their views are valid. Their views also align with my concerns, and I have considered these accordingly. Furthermore, notwithstanding that these parties provide no evidence of any history of complaints regarding the appeal site, this does not mean the proposal would be acceptable.
11. It is argued that residents in the area will expect a degree of noise and disturbance from the various establishments and activities that occur in the area. In support of this, reference is made to appeals at 182-184 Whitley Road,

Whitley Bay (Appeal Ref: APP/W4515/A/07/2049120) and 195-197 Whitley Road, Whitley Bay (Appeal Ref: APP/W4515/A/08/2070997) where the Inspectors accepted that residents living in a town centre would expect some noise and disturbance in an evening. However, conversely, residents will have also become accustomed to the periods when there is less activity and where the area is typically quieter such as when the establishment is closed. It is this quieter period that would be affected and harmed by the proposal and evidence to the contrary is not provided. With respect to the appeal examples, their opening hours were restricted to no later than 23:00, the sites' use was different, and the sites were in different authorities under a different policy context. They are therefore not directly comparable to the appeal before me. As such, neither the appeal examples or the existing area's use justify the harm I have found.

12. Further to the above, the appellant also refers to six competitor establishments including Blue Eye, Jimmy Allens, Klute, Fabio's (La Spegiatta), The Library and Whisky River which have longer opening hours than the appeal site. However, notwithstanding that these establishments are within the defined city centre and are open longer, they are located towards the opposite end of Elvet Bridge compared to the appeal site and are reasonably distant. Other than the Blue Eye, little detail is provided showing that these establishments are directly comparable to the appeal site in terms of such things as activities, noise characteristics and distance to residential properties. As such these examples do not demonstrate that the proposal would not cause unacceptable noise and disturbance to nearby residents. In any event, I have considered the appeal on its own merits and found harm.
13. In the case of Blue Eye (25 Elvet Bridge, LPA Ref: DM/23/00759/VOC), a detailed noise impact assessment was undertaken to support the planning application for changes to the establishment's opening hours. This included detailed noise surveys, noise transmission tests, noise management plan and recommended noise mitigation. These assessments and mitigation demonstrated that changes to the Blue Eye's opening hours would not increase the existing ambient noise levels on and around the Elvet Bridge. For the appeal before me, no such evidence or detail has been presented and, due to the Blue Eye assessments and mitigation being site-specific, the details provided are not directly comparable. As a result, the example does not change my view regarding the proposal.
14. It is asserted that the increased opening hours would not have a significant effect on noise and disturbance as it would reduce pressure on the other nearby establishments by reducing queuing, keeping customers off the streets and ensuring customers are served and dissipated faster. It is further contended that the proposal would reduce the periods when the appeal establishment's roller shutters are down, improving the attractiveness of the area and would reflect the changing attitudes and habits of customers, provide more range and choice, flatten the demand curve and align more with the licensing legislation which allows longer opening hours. However, details to substantiate that these would be sufficient to prevent or justify the noise and disturbance have not been presented and I give these matters little weight.
15. The appellant indicates that customers would be discouraged from congregating on the outside pavement by its narrowness and by the operator and door staff. However, little evidence is provided to show the pavement

width would control customers congregating or that the operator and door staff would have any legal powers to move customers away from a public area. I am therefore not convinced these would mitigate the harm.

16. Although it is advised that the proposal supports the modern living needs of customers, this would not be the case for nearby residents where sleep disturbance could occur, and health and quality of life adversely affected. Limiting opening hours to protect residents from development noise and disturbance is not uncommon and is a recognised approach. Evidence to show this as being old-fashioned and outdated has not been provided. Overall, these matters do not change my view on the harm I have found.
17. It is cited that the proposal would support business and economic growth, provide competition and a more level trading playing field for the appeal establishment and maintain the vitality and viability of the town centre. However, these benefits have not been quantified, nor has it been demonstrated that the business would not be viable if the appeal should fail. It has therefore not been sufficiently demonstrated that these benefits outweigh the harm.
18. Reference is made to the proposal complying with various parts of Policy 6, 7, 9, 29, 31 and 44 of the County Durham Plan 2020 (Local Plan) in terms of such things as being on previously developed land; it would enhance visitor experience; it would support the evening economy and vitality and viability of the town centre; it would be a sustainable design by making extra use of the existing establishment; it would have licensing controls that would prevent adverse residential impacts and it would not harm the significance of nearby heritage assets.
19. However, due to the harm identified, it would not comply with, amongst other matters, being compatible with the existing use of adjacent land as required by Policy 6; it would not be appropriate for the site's location as detailed by Policy 7; it would not provide high standards of amenity or minimise the impact upon occupants of existing nearby properties as detailed in Policy 29 and it would lead to inappropriate noise which has not been mitigated as stated in Policy 31. It would also not comply with Policy E4 of the City of Durham Parish Council Durham City Neighbourhood Plan 2020 to 2035 (Neighbourhood Plan) which supports evening economy subject to, amongst other matters, the development having no significant adverse effect upon local amenity, including the amenity of local residents.
20. Furthermore, the proposal is identified as meeting and being supported by Part 2 (Paragraphs 7, 8, 9, 10 and 11), Part 4 (Paragraph 38) and Part 11 (Paragraphs 123, 124 and 128) of the Framework. These include such things as achieving sustainable development; considering decisions in a positive and creative way; ensuring effective and efficient use of land and applying a presumption in favour of sustainable development.
21. However, it is evident that the proposal also would conflict with amongst other matters the Framework's social objective of supporting communities' health (Part 2, Paragraph 8); it would not create a place that promotes health and well-being, with a high standard of amenity for existing users and would undermine quality of life and community cohesion (Part 12, Paragraph 135); it would not prevent the existing development from being adversely affected by unacceptable levels of noise pollution (Part 15, Paragraph 180) and it would not

avoid noise giving rise to significant adverse impacts on health and the quality of life (Part 15, Paragraph 191).

22. It is therefore clear from the above that when taken as a whole, the proposal would be contrary to the Framework and development plans, and on balance, the adverse impacts of allowing the proposal would significantly and demonstrably outweigh the benefits. As such, the proposal would not represent sustainable development.
23. In conclusion, the proposed variation to condition No 3 would have a significant adverse effect on the living conditions of nearby residents, with respect to noise and disturbance. It would conflict with Policy E4 of the Neighbourhood Plan, Policies 29 and 31 of the Local Plan and Parts 12 and 15 of the Framework.

Other Matters

24. While no objections have been raised by neighbours, this does not render the scheme acceptable. I must determine the appeal on its own planning merits and accordingly, I have given this matter little weight.
25. The appeal property is a Grade II Listed Building which sits in the Durham City Conservation Area (CA) and within the setting of the Durham Cathedral and Castle UNESCO World Heritage Site. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act) requires that special attention is paid to the desirability of preserving or enhancing the character or appearance of the area. Section 66 of the Act requires that in considering applications which affect Listed Buildings special regard is paid to the desirability of preserving the building or its setting.
26. There are no changes proposed to the external appearance of the building, the internal structure or the building's setting. Nor would there be a change in the use of the building. While it would nominally increase the building's usage, this would be modest and in a commercial area with a variety of cafes, restaurants and other drinking establishments that open late in the evening. Consequently, the impact on character, appearance, and significance would be neutral and would accord with the Act and the Framework in seeking to protect designated heritage assets. However, this does not carry weight in favour of the scheme.

Conclusion

27. The proposal conflicts with the development plan and the material considerations do not indicate that the appeal should be decided other than in accordance with it and I conclude that the appeal should be dismissed.

J Symmons

INSPECTOR