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# Appeal Decision

Site visit made on 29 July 2024

**by E Catcheside BA (Hons) MSc MRTPI**

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

**Decision date: 28 August 2024**

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**Appeal Ref: APP/N5090/W/24/3339159**

**48 Ballards Lane, Finchley, London N3 2BX**

- 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 Merkur Slots Ltd against the decision of the Barnet London Borough Council.
  - The application Ref is 23/4866/S73.
  - The application sought planning permission for change of use from Bank (A2) to Sui Generis (Adult Gaming Centre) (AGC) without complying with a condition attached to planning permission Ref APP/N5090/W/20/3260444, dated 23 February 2021.
  - The condition in dispute is No 3 which states that: *The use hereby permitted shall not be open to members of the public outside the hours of 07.00hrs to 0.00hrs on any day.*
  - The reasons given for the conditions is: *in the interests of ensuring no harmful effects to the amenity of nearby residents.*
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## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. The Council is currently preparing the Barnet Local Plan 2021 to 2036 (BLP). The BLP is undergoing Examination in Public, and the Council has recently consulted on main modifications to the BLP and has submitted their responses to the representations received to the examining Inspector for their consideration. The BLP is therefore at an advanced stage of preparation but has not yet been adopted by the Council.
3. I have been provided with a copy of Policy CDH01 of the BLP which, once adopted, will replace Policy DM01 of Barnet's Local Plan (Development Management Policies) Development Plan Document September 2012 (DMP), and Policy CS5 of Barnet's Local Plan (Core Strategy) Development Plan Document September 2012 (CS). Amongst other things, Policy CDH01 of the BLP seeks to ensure that the noise impacts of development are mitigated.
4. Given the stage of preparation of the BLP, Policy CDH01 carries significant weight. However, it is subject to main modifications, and its wording could change. Nevertheless, Policy CDH01 takes a similar approach to adopted policy in terms of protecting the amenity of neighbouring occupiers. I am therefore satisfied that the emerging policy does not seek to fundamentally change the policy approach set out in the adopted development plan. Therefore, whilst I have had regard to emerging policy, I have determined the appeal on the basis of the statutory development plan.

5. The appeal documents include a technical note regarding the noise survey, which was not before the Council when it determined the application. The Council has had the opportunity to comment on the technical note as part of the appeal process. Therefore, no prejudice is caused to either party in me taking the technical note into account in my consideration of the appeal.

### **Background and Main Issue**

6. Planning permission was granted at appeal in February 2021 for the change of use of the host property from a bank to an adult gaming centre (AGC). The permission included condition 3, which prevents the use of the AGC between midnight and 07.00hrs. The reason given for the condition is to ensure there are no harmful effects to the amenity of nearby residents. The change of use has commenced, and the appeal property is currently operating as an AGC.
7. This appeal seeks to remove condition 3 in order to allow the AGC to operate on a 24-hour basis.
8. The main issue is the effect of removing condition 3 on the living conditions of neighbouring residents, with particular regard to noise and disturbance from increased activity between 0.00hrs and 07.00hrs.

### **Reasons**

9. The appeal site is located on the corner of Ballards Lane and Redbourne Avenue in Finchley Church End town centre. Ballards Lane comprises a mix of uses, including retail, office, and residential. There is an apartment on the second floor of the appeal building. A Tesco supermarket and The Joiners public house lie on the other side of Ballards Lane, both of which close at midnight. Redbourne Avenue is predominantly a residential street.
10. I have been provided with a noise assessment (NA) which, amongst other things, investigated the background noise levels near to the appeal site, and the noise effects of the existing development during its operating hours. This shows that the ambient soundscape after 23.00hrs is dominated by noise from passing vehicles and people on the street. However, the prevailing character of the area during the existing operating hours reflects the night-time economy in this part of the town centre, with comings and goings to existing premises that are open until midnight. In this context, I have no reason to disagree with the conclusions of the NA that the host venue does not cause undue harm through noise and disturbance during its permitted operating hours. Furthermore, there is no substantive evidence of any formal noise complaints from local residents with regard to the existing operation.
11. The NA shows there continues to be some background noise during the early morning hours. However, I have not been directed to any other premises nearby that are open after midnight and in the early hours of the morning. Therefore, there is inevitably a reduction in human activity associated with the arrival and departure to local services and facilities after 0.00hrs. Consequently, the character of the area changes after midnight to reflect the absence of a night-time economy in the early morning hours.
12. The proposed extended opening hours would generate new comings and goings during the night when local residents are likely to be sleeping. I acknowledge that the number of visitors to the appeal premises during these times could be low, and that many could arrive alone or in pairs and on foot, as is the case at

other venues operated by the appellant and described in the NA. However, these are not factors that could be controlled through planning and, therefore, could not be guaranteed.

13. Furthermore, the evidence from the parties is inconsistent as to whether the appellant's other cited venues are similar to the appeal site and its surroundings. Therefore, I cannot be certain that the effects of this proposal would be directly comparable to other AGCs, including in terms of background noise levels, the character of the area and night-time economy, and the opening hours of other nearby premises.
14. Ultimately, it is entirely feasible that the AGC could be visited by individuals, pairs, and groups of people arriving and/or leaving the venue at frequent intervals, throughout the night. Consequently, the proposal would create the opportunity for additional activity between midnight and 07.00hrs, which would be uncharacteristic in this part of Finchley Church End town centre.
15. The NA sets out that, in the worst-case scenario, the noise levels arising from activity outside of the venue would not be of a significant volume. However, there is not a simple relationship between noise levels and the impact on those affected. Indeed, the Planning Practice Guidance (PPG) notes that some types and level of noise will cause a greater adverse effect at night than if they occurred during the day – this is because people tend to be more sensitive to noise at night as they are trying to sleep.
16. Even at the volumes described in the NA, there would be additional disturbance to residents during the early hours of the morning due to the intermittent and frequent nature of comings and goings to the appeal premises, which would occur throughout the night. Such disturbance would arise from verbal exchanges on arrival and departure and whilst spending time on the streets near to the venue, including whilst waiting for transport or to smoke. Further noise and disturbance would arise from the opening and closing of venue and vehicle doors, and the noise and lights of manoeuvring vehicles. The effect on the living conditions of neighbours would be particularly harmful during the summer months when residential windows are reasonably likely to be open at all hours. The disruption would cause undue disturbance to residents living above the appeal premises and nearby on Redbourne Avenue.
17. It is clearly the appellant's intention to reduce noise and disturbance as far as possible, including through preventative anti-social behaviour and dispersal measures. In that regard, I have taken account of the Operational Management Plan submitted with the appeal. However, the behaviour of individuals on the streets surrounding the site is not a matter that could be enforced through the planning system. Consequently, even if these measures were to be secured through a condition, I am not satisfied they would adequately safeguard local residents from undue noise and disturbance.
18. It has been put to me that condition 3 could be removed on a temporary basis, to allow a 12-month trial period. In that regard, I note the PPG advice that temporary permissions may be appropriate in such circumstances. I have been provided with examples of where such a condition has been used on other sites. However, I do not have sufficient information before me to be certain of the full details of those other sites and the circumstances that led to the temporary condition being imposed. Nonetheless, in the specific circumstances of this appeal proposal and the characteristics of the site and surroundings, 24-

hour operations would cause unacceptable harm to the living conditions of neighbouring residents, even at predicted noise levels. Therefore, a temporary condition would not be appropriate in this case.

19. No harm has been identified in respect of noise arising from inside the appeal premises. Based on the evidence, I have no reason to take a different view.
20. Overall, I conclude that condition 3 is reasonable and necessary in order to protect the living conditions of neighbouring residents from undue noise and disturbance. It follows that the proposed removal of condition 3 would be in conflict with the amenity aims of Policy DM01 of the DMP and the Framework, which seeks to secure a high standard of amenity for existing users.
21. The Council has referenced Policy CS5 of the CS in its reason for refusal. The policy refers to local character and design rather than living conditions. Therefore, I have not found Policy CS5 to be determinative to my consideration of the main issue.

### **Other Matters**

22. There would be some benefits arising from the appeal scheme. The Framework supports the expansion of businesses and takes a positive approach to proposals, such as the appeal scheme, that would support the vitality of town centres. The development would also expand the service offered to its users and would help to meet the recreational needs of specific groups, including shift workers. However, whilst these benefits carry weight in support of the proposal, they would not be sufficient to overcome the harm caused to living conditions which is the prevailing consideration in this appeal.
23. The site has a license to operate over 24-hours a day. However, the license has been issued under separate legislation and does not negate the need to secure planning permission for the proposed operating hours.
24. I note the appellant's frustration with the Council's communication during the application process, and that consultation responses were not made available. However, I am satisfied that the appellant has had the opportunity to respond to the consultation responses, including that of the Environmental Health Officer, as part of the appeal. Therefore, these matters fall beyond the scope of this appeal.

### **Conclusion**

25. 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. Therefore, for the reasons given above the appeal should be dismissed.

*E Catchside*

INSPECTOR

