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## Appeal Decision

Site visit made on 20 August 2024

**by J Moore BA (Hons) BPI MRTPI**

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

**Decision date: 4<sup>th</sup> October 2024**

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**Appeal Ref: APP/D5120/W/24/3340564**

**72-74 Bellegrove Road, Welling, Kent DA16 3PY**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for 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 (UK) against the Council of the London Borough of Bexley.
  - The application Ref is 23/01147/FUL.
  - The application sought planning permission for Change of use from betting shop (Sui Generis) to use as an adult gaming centre (Sui Generis) without complying with a condition attached to planning permission Ref 20/01385/FUL, dated 18 August 2020.
  - The condition in dispute is No 3 which states that: The use hereby permitted shall not be open to customers outside the following times: 09:00 until 23:00 - Monday to Sunday.
  - The reason given for the condition is: To ensure that the proposed development does not prejudice the amenities enjoyed by occupiers of properties in the vicinity.
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### Decision

1. The appeal is allowed and planning permission is granted for Change of use from betting shop (Sui Generis) to use as an adult gaming centre (Sui Generis) at 72-74 Bellegrove Road, Welling, Kent DA16 3PY in accordance with the application Ref 23/01147/FUL, without compliance with condition No 3 previously imposed on planning permission Ref 20/01385/FUL dated 18 August 2020 and subject to the following conditions:
  - 1) The use hereby permitted shall be open to customers for unrestricted hours each day for a limited period of one calendar year. Thereafter, the use shall not be open to customers outside the following times: 09:00 until 23:00 - Monday to Sunday. The limited period shall be commenced within three years of the date of this decision. The applicant shall provide the local planning authority with written notification of the start and end date of the limited period 10 days prior to its commencement.
  - 2) The development hereby permitted shall be carried out in accordance with the approved plans: Drawing Ref BGR/WG/03.
  - 3) The sound insulation recommendations of the Archo Consulting Noise Assessment (Ref: PR2001-08-FINAL dated 15/07/20) which have been implemented shall be maintained at all times.
  - 4) Amplified sound arising from the premises shall be restricted to a level that is inaudible within and/or at the façade of the nearest residential dwelling.

- 5) Notwithstanding the approved plans, the development shall be undertaken and maintained in accordance with the Merkur Slots Operational Management Plan and all other recommendations within the Archo Consulting Noise Assessment (Ref: PR2001\_139\_FINAL dated 16/05/2023).

### **Preliminary Matters**

2. The appeal is made against the failure of the Council to determine the application. The evidence before me indicates that a decision notice dated 13 September 2023 was issued in error by the Council, in conflict with the decision of the Council's Planning Committee. The decision notice was subsequently quashed on 11 March 2024 with the agreement of the main parties and the appeal was submitted the following day.
3. In light of these circumstances, and by virtue of Article 37 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended), the appeal has been accepted even though it was made outside of the customary six-month time limit, in the interests of natural justice and fairness. The Council raises no objection in this regard and has provided putative reasons for refusal to the appeal, which have informed the framing of my main issues.
4. The evidence before me indicates that following the issue of the decision notice that was subsequently quashed, the appellant commenced 24-hour operations, and this has informed the appellant's submissions to the appeal. I note the Council's concerns that this could be a breach of the original permission. For the avoidance of doubt, it is not the role of an Inspector dealing with a s78 appeal to determine whether the opening hours of the premises are or were lawfully undertaken. I have considered the application as submitted.
5. During my visit, I saw that the internal layout of the premises did not appear to fully accord with the submitted drawing BGR/WG/03 (Site Plan and Existing and Proposed Floor Plans). However, the differences are minor and not material to my consideration of the main issues in this case.

### **Background and Main Issues**

6. The appeal premises have been in use as an adult gaming centre (AGC) since October 2020. The development plan policies in place at the time the original permission was granted have since been superseded by policies of the Bexley Local Plan 2023 (BLP) and the London Plan 2021 (LP). The proposal would result in the premises being open to customers on a 24-hour basis, in contrast to the permitted hours of 9:00 to 23:00 each day.
7. The Planning Practice Guidance (PPG) makes it clear that a local planning authority (and by extension, an Inspector) shall consider only the question of the conditions subject to which planning permission should be granted. It is not a complete re-consideration of the original application for the use of the premises as an AGC. In this regard, my considerations are confined to the effects of a 24-hour operation, with regard to the current policies of the development plan.
8. Therefore, and having regard to all the evidence before me, the main issues are:

- whether the proposed 24-hour operation would be in an appropriate location; and
- the effects of the proposed 24-hour operation upon the amenities of nearby residential occupiers, with particular regard to levels of noise and disturbance.

## **Reasons**

### *Location*

9. The appeal property comprises the ground floor of a three-storey building at the end of a terrace with residential uses above. The appeal premises are within Welling town centre, which is classified as a District Centre in the retail hierarchy as set out in BLP Policy DP9. There is a wide passageway along the flank of the appeal building, which provides a pedestrian route between Bellegrove Road and the residential areas to the rear of the appeal site at Ruskin Drive. A night-time bus service runs past the appeal site with bus stops located directly opposite the site and about 100m east.
10. BLP Policy SP4 seeks to maintain and enhance the vitality and viability of the borough's hierarchy of town centres. Criterion f sets out that the Council will support an evening economy across the borough's town centres, and a night-time economy in Bexleyheath, with new development supporting the creation of a comfortable, safe, attractive and accessible day and evening environment. The supporting text identifies the night-time economy as establishments with late night licences that can run into the early hours of the morning, particularly at weekends; and the evening economy as town centre activities that tend to finish around 11pm. The proposal would comply with the BLP definition of the night-time economy.
11. The policy does not expressly state that proposals for a night-time economy outside of Bexleyheath will be refused or restricted. However, the policy is positively worded in favour of Bexleyheath, which is classified as a Major Centre in the retail hierarchy under BLP Policy DP9. It therefore seems to me that proposals for the night-time economy outside of Bexleyheath would not be supported. Consequently, the proposed 24-hour operation would not be in an appropriate location when assessed against criterion f of BLP Policy SP4. However, there is no substantive evidence before me to demonstrate the harm that would arise to the retail hierarchy as a result of the proposal.
12. Policy HC6 of the LP concerns the night-time economy. Although not referred to in the Council's putative reasons for refusal, it was referenced in the Council's Officer Report (OR) which considered the application. It sets out that boroughs should promote the night-time economy where appropriate, including in town centres and where public transport such as the Night Tube and Night Buses are available. The supporting text sets out that the night-time economy refers to all economic activity taking place between the hours of 6pm and 6am and includes evening uses. Furthermore, the supporting text sets out that 24-hour activities are not suitable for every part of London, and boroughs should balance the needs of local residents in all parts of London with the economic benefits of promoting a night-time economy. I shall address this balance later in my decision. In any event, as the appeal site is in a town centre, very close to a night bus route, and meets the LP definition of the night-time economy, it would be supported by LP Policy HC6.

13. The appellant draws my attention to two premises in Welling Town Centre which open for 24 hours, namely a petrol station and a gym; and the opening hours of a nearby drinking establishment and hot food takeaways until midnight. The appellant's Full Observation Report of the town centre undertaken in August 2023 identifies five late night premises selling alcohol, including a bar and grill open until 01:00. The circumstances which led to these developments and their permitted operating hours are not before me. A 24-hour petrol station is not an unusual feature in a town centre on a classified road. The 24-hour gym is located near a highway junction and did not appear to be in proximity to residential uses, and therefore I did not find it to be comparable to the appeal site. However, the appellant's evidence concludes that there is a modest night-time economy in Welling town centre, which is not disputed by the Council.
14. To conclude, the proposed 24-hour operation would conflict with BLP Policy SP4 and accord with LP Policy HC6. As the BLP is later than the LP, the policies of the BLP attract greater weight. However, material considerations, including the presence of a modest night-time economy in Welling Town Centre, and the presence of a night bus service, indicate that the proposed 24-hour operation would be in an appropriate location, and would accord with the provisions of the Framework, which seeks to ensure that planning policies and decisions support the role that town centres play at the heart of local communities, by taking a positive approach to their growth, management and adaptation. For these reasons, I conclude that the proposed 24-hour operation would be in an appropriate location.

#### *Living Conditions*

15. The proposal would result in the premises being open on a continuous basis, in contrast to the permitted hours of 9:00 to 23:00 each day. Consequently, there would be additional noise generated from customer movements within, to and from the premises overnight, including during the hours of darkness when nearby residents would have a reasonable expectation of a peaceful time.
16. The Noise Assessment submitted with the application demonstrates that the sound insulation performance of the premises is compliant; that internal noise impacts are highly unlikely to occur, and that the site is suitable for a 24-hour operation. Further, the assessment demonstrates with reference to other 24-hour sites operated by the appellant, including three with residential uses above, that even on a worst-case scenario, where patrons would be directly outside the building to smoke, predicted external noise levels would be acceptable. The report recommends the implementation of an operational management plan, which specifies various control measures, and this could be secured by a condition. Furthermore, the Full Observation Report indicates that the premises are well run and that a 24-hour operation would not increase any anti-social behaviour or negative impact on nearby residents.
17. An updated noise assessment for the appeal site has been submitted to the appeal which takes account of the enactment of a 24-hour operation at the appeal site. It concludes (among other things) that no noise impacts were observed and no sound from the venue was perceptible externally; no complaints were received, and the site is suitable for a 24-hour operation on a permanent basis. The updated assessment is not disputed by the Council. Notwithstanding this, and that the survey period of 01:00-02:00 is considered

in the assessment to be the most noise sensitive period of the night, the noise survey is a snapshot in time, conducted over a single hour on one weekday night. Although staff observations suggest that the number of customers was high at this time, there is little substantive evidence to demonstrate this and there is no evidence pertaining to the period after 02:00.

18. The appellant's submissions indicate that a 24-hour operation took place at the appeal site for a four-month period without complaint, and that this demonstrates the acceptability of the proposal. The evidence before me indicates an outstanding complaint to the Council which has yet to conclude. The appellant advises that they have dealt with the complaint directly with the complainant, and that the evidence indicates that noise and disturbance was not caused by their customers. However, as the appellant states they have not been approached by the Council in regard to the complaint, I cannot be certain that this is the same complaint. The nature of any complaint(s) and/or the time period to which any complaint relates is not before me.
19. For the reasons above, I am not satisfied that there is sufficient evidence to demonstrate that a 24-hour operation is proven to be acceptable at the appeal site, as the appellant suggests.
20. I note the concerns raised by third/interested parties regarding anti-social behaviour in the vicinity of the appeal site, particularly along the adjacent passageway, including loud and aggressive noisy behaviour, littering and loitering. Given the fact that the passageway can be used by any member of the public, it is by no means certain that any anti-social behaviour is by customers of the premises. It seems to me unlikely that customers of the premises would urinate outside given the presence of customer toilets inside the premises. There is no evidence before me to link the use of the premises with a very serious incident in 2023 which occurred in the passageway, nor that any anti-social behaviour or crime that may have occurred is committed by customers of the premises. Overall, the appellant's operational management plan would mitigate against anti-social behaviour.
21. Nonetheless, I must also be mindful that the Framework sets out that planning decisions should aim to achieve healthy, inclusive and safe places which are safe and accessible, so that crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion. The appellant has indicated a willingness at this appeal to accept a condition to install additional CCTV and lighting on the side elevation of the premises facing into the alleyway. No amended scheme is before me to indicate such measures, such that I could assess their likely effects, including any effects upon neighbouring occupiers.
22. Drawing all the above together, it is clear that internal noise would be sufficiently mitigated to prevent unacceptable levels of noise and disturbance to neighbouring occupiers. However, it is not clear that the proposed 24-hour operation would not result in unacceptable harm to the living conditions of nearby residents, such that permission should be refused. For these reasons, a 12-month trial would be appropriate in order to limit the duration of any unacceptable harm that may arise and allow a return to the opening hours of the original permission. This would accord with the advice in PPG<sup>1</sup> that a temporary permission may be appropriate where a trial run is needed in order

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<sup>1</sup> Paragraph: 014 Reference ID: 21a-014-20140306 Revision date: 06 03 2014

to assess the effect of the development on the area. The appellant was willing to accept such a trial period at the determination phase, and remains willing to do so at this appeal, notwithstanding that a permanent consent is sought.

23. I therefore conclude that subject to a 12-month limited period, the proposed 24-hour operation would not unacceptably harm the living conditions of neighbouring occupiers. In such circumstances, the proposal accords with BLP Policies SP4 and DP11, insofar as they seek to ensure that development in town centres does not harm the amenities of nearby residents.

### **Other Matters**

24. The proposal would result in economic benefits by extending the window for trade, and it would provide extended opportunities for social or leisure activity. These economic and social benefits would be limited, due to the scale of the operation.
25. The proposed opening hours are in accordance with those granted under the Licensing Act 2003. While this is a material consideration in the appeal before me, the licensing regime is separate from that for planning, with different considerations. Therefore, the granting of a licence does not of itself justify the grant of any planning permission. I note the concerns of the Metropolitan Police which were considered by the Council where relevant in the OR which initially considered the application. I have no reason to reach a different conclusion on these matters to that within the OR, whereby the use is an established one and the concerns raised are matters for consideration under the licensing regime. The protection of vulnerable people from being harmed or exploited by gambling falls within the purview of the licencing regime and is not a matter that has any bearing on the planning merits of the proposal.
26. Interested parties raise further concerns about a lack of public consultation on the proposal. The evidence before me indicates that the Council issued neighbour notification letters and that representations were made by neighbours and considered in the OR. I have no substantive evidence to demonstrate that any statutory publicity for the application has not been properly undertaken, nor that any public consultation on the proposal would be mandatory in this case. Matters pertaining to the effect of the proposal on property values/mortgages are private matters and do not have any bearing on my consideration of the appeal.

### **Conditions**

27. The PPG makes clear that decision notices for the grant of planning permission under section 73 should repeat the relevant conditions from the original permission unless they have already been discharged. I also have power to impose new conditions that I consider to be necessary. The conditions of the original permission and those suggested by the Council have been considered in light of advice within the PPG.
28. I have therefore granted a new permission, removed the disputed condition, and replaced it with one that permits unrestricted opening hours for a 12-month period, with the opening hours returning to those of the original permission thereafter. In the interests of clarity, this condition requires due notice to be given to the local planning authority. A condition specifying the approved plans is necessary in the interests of clarity and precision, even

though the original permission granting a change of use has been implemented.

29. The original permission required sound insulation measures to be implemented and maintained in situ thereafter. The evidence before me indicates that such measures have been implemented and are fit for purpose. I have imposed a condition to retain such measures and re-imposed the condition to control amplified sound. A further condition is imposed to secure the proposed operational management plan. These conditions are necessary to ensure the premises are managed in accordance with the terms of the application, and to protect the living conditions of nearby residents.

### **Planning Balance and Conclusion**

30. I have found that the proposed 24-hour operation would be in an appropriate location. In accordance with LP Policy HC6, I must balance the needs of local residents with the economic benefits of promoting a night-time economy. Although the Framework places significant weight on the need to support economic growth and productivity, such support is not unfettered and must be balanced against the need to ensure proposals achieve high standards of amenity for existing and future users.
31. In this case, I have found that a trial period is appropriate to ensure that the proposed 24-hour operation would not unacceptably harm the living conditions of neighbouring occupiers. Consequently, the limited social and economic benefits of the proposal would not outweigh the unacceptable harm that could occur if I were to grant permission without a trial period.
32. For the reasons above, the appeal should be allowed, subject to the conditions I have set out.

*J Moore*

INSPECTOR