



Appeal Decision

Site visit made on 31 July 2024

by M J Francis BA (Hons) MA MSc MCIfA

an Inspector appointed by the Secretary of State

Decision date: 11 November 2024

Appeal Ref: APP/N1350/W/24/3343677

55 Neasham Road, Darlington DL1 4AG

- 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 Abobaker Omar against the decision of Darlington Borough Council.
 - The application Ref is 23/01224/FUL.
 - The application sought planning permission for 'change of use from off-licence (Use Class E) to a hot food takeaway (Sui Generis) with installation of extraction equipment including external flue to north elevation (amendment to opening hours to 11.00 until 21.00 Monday to Sunday including Bank Holiday received 1 December 2020) at K & S Peacock 55 Neasham Road Darlington DL1 4AG without complying with a condition attached to planning permission Ref 20/00963/FUL, dated 18 February 2021.
 - The condition in dispute is No2 which states that: *The use hereby approved shall not operate outside the hours 11.00-21.00 Monday to Sunday including Bank Holidays only unless otherwise agreed in writing by the Local Planning Authority.*
 - The reason given for the condition is: *In the interests of residential amenity.*
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Decision

1. The appeal is dismissed.

Preliminary Matter

2. The Council's officer report refers to the appellant originally seeking opening hours of 11.00 – 23.00, which was later altered to 11.00 – 22.00 hours. The application and appeal forms confirm that opening hours from 11.00 – 22.00 hours was being applied for. This is the basis on which I have determined the appeal.

Procedural Matter

3. The appellant applied to vary condition 2 of the planning permission¹ to extend the opening hours of a hot food takeaway. The Council refused the application as they considered that this would increase noise and disturbance levels to the detriment of residential amenity.
4. The description of development in the original planning permission² is:

Change of use from off-licence (Use Class E) to a hot food takeaway (Sui Generis) with installation of extraction equipment including external flue to

¹ Ref 20/00963

² Ref 20/00963

north elevation (amendment to opening hours to 11.00 until 21.00 Monday to Sunday including Bank Holiday received 1 December 2020) at K & S Peacock 55 Neasham Road Darlington DL1 4AG.

5. Therefore, as the opening hours are stated within the description of development, any change to condition 2 would result in the opening hours conflicting with this description. The Courts have established in the 'Finney' judgment³ that a section 73⁴ application may not be used to obtain a permission which would vary the description for which the original permission was granted.
6. As this issue had not previously been raised, the views of the main parties have been sought. The appellant considers that the appeal has been accepted as valid; the alteration could be considered 'de minimis'; and that the proposed change is not comparable to the 'Finney' judgment. Alternatively, they state that a s96A application could be submitted to the Council removing the reference to the opening hours, at which time the appeal could be determined.
7. The Council, whilst agreeing that a description cannot be varied under s73, has clarified that when notifying neighbours of changes to a planning permission, they add the amendment, which in this case is the opening hours, within brackets at the end of the application description. As such, they do not consider that a s96A application is necessary, as the original description does not include the reference to the opening hours.
8. Although the appeal was validated, I can only consider the merits of the appeal if I consider that a valid planning application was submitted. Furthermore, and notwithstanding the explanation by the Council, the decision notice for the original permission⁵, issued by them on 18 February 2021, includes the opening hours within the description. Consequently, as I have found that the variation of condition 2 would result in conflict with the description of development, the amendment is beyond the powers under s73 and cannot be made.
9. Therefore, I must dismiss the appeal on this basis and the planning merits of the case cannot be considered.

Conclusion

10. For the reasons given above, I conclude that the appeal is dismissed.

M J Francis

INSPECTOR

³ John Leslie Finney v Welsh Ministers & Carmarthenshire County Council, Energiekontor (UK) Limited [2019] EWCA Civ 1868

⁴ Town and Country Planning Act 1990 (as amended)

⁵ Ref 20/00963