



## Appeal Decision

Site visit made on 24 May 2016

**by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 30 June 2016**

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**Appeal Ref: APP/W1850/W/16/3145601**

**Unit 3, 109-111 Belmont Road, Hereford, Herefordshire HR2 7JR**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
  - The appeal is made by Red Miracle Ltd against the decision of Herefordshire Council.
  - The application Ref 153000, dated 7 October 2015, was refused by notice dated 3 February 2016.
  - The application sought planning permission for a local centre (Class A1 and A3) with car parking and ancillary works without complying with a condition attached to planning permission Ref CW2002/3803/F, dated 16 October 2003.
  - The condition in dispute is no 7 which states that: *The use hereby permitted shall not be open to customers between the hours of 10.00 pm and 7.00 am daily.*
  - The reason given for the condition is: *In the interests of the amenities of existing residential properties in the locality.*
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### Decision

1. The appeal is allowed and planning permission is granted for a local centre (Class A1 and A3, A4 and A5) with car parking and ancillary works at Unit 3, 109-111 Belmont Road, Hereford, Herefordshire HR2 7JR in accordance with the application Ref 153000 dated, 7 October 2015 without compliance with condition number 7 previously imposed on planning permission Ref CW2002/3803/F dated 16 October 2003 but subject to the other conditions imposed therein, so far as the same are still subsisting and capable of taking effect and subject to the following new conditions:
    - 1) For 12 months from the date of this decision, the premises shall not be in use except between the hours of 07.00 and 01.00 Sunday to Thursday the following morning and Fridays and Saturdays 07.00 and 02.00 on the following morning. After the expiry of the 12 month period from the date of this decision, the premises shall not be in use except between the hours of 07.00 and 23.00 on any day. The premises shall not be in use at any other time.
    - 2) The premises shall not be open for walk-in sales and no customer shall be permitted to be on the premises on any day outside the following times: 07.00 hours until 24.00 hours.
    - 3) Prior to the commencement of the extended opening hours hereby permitted, details of the blinds (or other similar mechanism) and their installation shall be submitted to and agreed with the local planning authority. The blinds (or other similar mechanism) shall be installed
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within one month of the date that the details are approved in writing and once installed; these blinds shall be drawn shut/closed from 24.00 until 07.00 Monday to Sunday.

- 4) Prior to the commencement of the extended opening hours hereby permitted a plan showing a defined area for parking the delivery vehicles associated with the use shall be submitted to and agreed with the local planning authority. All delivery vehicles operating between 24.00 and 02.00 will be required to park within the defined area on the parking plan.

### **Preliminary Matters**

2. For the reason of clarity I have based the address in the banner heading on that used on the decision notice.
3. The application was made on the basis that the proposal had not taken place, i.e. that the permitted opening hours were being adhered to. However, the Council had served a breach of condition notice on the 2 October 2015 and in its submissions it states that complaints had been received in relation to the hours of opening since October 2014. I have set out that the appeal is made in relation to section 73 of the Act rather than section 73(A) on the basis of how the application was made. In effect there is no difference for my consideration of the appeal. Moreover, the proposed extended hours would not equate to the alleged hours of opening. The proposal seeks to extend the counter sales part of the pizza takeaway from 23.00 to 00.00 on all days and to extend the opening hours to allow pizza deliveries on Sunday to Thursday until 01.00 and on Friday and Saturday to 02.00. In contrast the neighbouring residents and the Council state that the premise is open until 01.00 and 02.00 for counter sales and deliveries.
4. Section S73 applications are commonly said to be seeking to vary or remove conditions to which an existing permission is subject. However, that is not strictly the case. If such applications (or appeals against their refusal or non-determination) succeed, a completely new permission is created that stands alongside the original and the applicant or appellant is able to choose which is implemented. The 2004 permission<sup>1</sup> extended the opening hours, as controlled by condition 7 of the original consent<sup>2</sup>, until 23.00. However, as the decision notice on the appeal scheme cites both I consider that my decision should relate to the original permission. As such, in this case, it is necessary for the new permission granted pursuant to this appeal to be for a different description of development than that utilised for the 2003 permission.
5. When the latter was granted, Class A3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 encompassed use for the sale of food or drink for consumption on the premises or hot food for consumption off the premises. However, amendments to the legislation that came into force in 2005 restricted Class A3 to use for the sale of food and drink for consumption on the premises. The other elements it formerly included are now covered by Class A4 (use as a public house, wine-bar or other drinking establishment) and Class A5 (use for the sale of hot food for consumption off the premises).

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<sup>1</sup> DCCW2003/3853/F

<sup>2</sup> CW2003/3853/F

6. It would not be appropriate in allowing this appeal to grant permission for a more restricted use than originally permitted, particularly given the Class A5 nature of the appellants' business. Accordingly, I have used the alternative description of development set out above in the formal decision. There is no prejudice to the interests of any party in doing so.

### **Main Issue**

7. The main issue is the effect of the proposal on the living conditions of the occupants of neighbouring properties, with particular regard to noise and disturbance.

### **Reasons**

8. The appeal site is located on Belmont Road which, I noted at my site visit, is a busy road. The premises occupy a unit within a modern retail parade with a communal car park sited between the parade and Belmont Road. The surrounding area is predominantly residential in character. There is a convenience store/ off licence on the opposite side of Belmont Road and a sign within its shop front states that it is open until 23.00 each night. There is a row of four terraced dwellings adjacent to the parade of shops and their rear elevations face the car park and the side elevation of the parade.
9. The appeal site benefits from a Premises Licence that includes the sought extended opening hours. Whilst I concur with the Council that there is a clear distinction between licensing considerations and those of planning, the Premises Licence does however form a material planning consideration that weighs in favour of the proposal. However, for the avoidance of doubt, I have considered the proposal's effect on the living conditions of local residents on the individual merits of the case that are before me.
10. There were several objections to the application from the residents of the terraced dwellings. They indicate that the appellant has been opening in breach of the condition and that this has caused noise disturbance within the car park from car doors opening and closing, the playing of radios, people talking and the honking of car horns. The Council's statement of case includes the findings of a report by the Council's Principal Environmental Health Officer. There is no date associated with the report and it does state that the investigation did not identify a statutory nuisance but it did highlight concerns over the impact of noise generated by the business.
11. The appellant has submitted a noise assessment which took background noise readings from two positions, one adjacent to the boundary with the rear elevation of the terraced dwellings and the other to the side elevation of the parade. It was carried out on one evening and includes readings when there was no activity from the Dominos store. However, it only assesses the impact of extended opening hours between 01.00 and 02.00 and not from 23.00 until 02.00. It concludes that the additional vehicle movements are considered to be negligible in comparison with the existing noise climate and that the noise from the operational plant would be no different in the extended opening hours. The report does take into account noise from customers inside the building but it does not mention noise from customers outside of the building or the noise from any music from car radios or music systems.

12. For these reasons, therefore, while the report is of some value it is limited such that the information before me does not offer sufficient clarity and robustness to be able to conclude that the living conditions of neighbouring occupiers would not be unacceptably harmed by noise.
13. I consider that the issues raised by the occupiers of the terraced dwellings show that opening to counter customers until 02.00 daily has in the past caused an unacceptable level of noise and disturbance to these local residents, due to the associated level of comings and goings that it generated. However, the appellant has applied for counter sales to cease at 00.00 daily, with delivery sales only between the hours of 00.00 and 01.00 Sunday to Thursday and until 02.00 on Fridays and Saturdays. This would result in the premises opening to counter customers one hour later than the current permission allows and would reduce the possibility of disturbance from customers for the later hours between 24.00 and 02.00. The appellants have submitted an operational statement that they state would apply to this site and they have agreed to insert blinds on the shop window and door to screen the internal lights so that potential customers would not consider that they are open. Furthermore, they have also agreed to a condition to allocate an area for parking for delivery drivers to ensure they do not park in close proximity to the boundary with the terraced dwellings after 24.00.
14. The Council and the neighbouring residents have reservations that these measures would not stop customers arriving at the site trying to get served and that more noise may be generated by the arguments between staff and customers. The implementation of the proposal and the operational statement would be reliant on management practices and updated advertising in relation to the amended opening hours. Consequently, as the likelihood that disturbance would not occur has not been demonstrated I do not consider that a permanent permission can be granted.
15. However, I note that the appellant and the Council are prepared to accept a 12 month temporary period condition. This being so, I find a trial period during which the restrictions referred to above are in place and a proper assessment can be made by both main parties to be the most appropriate way forward.
16. In conclusion on this matter, I consider that with the imposition of necessary planning conditions, that there is a realistic probability that further assessment would demonstrate that there would not be adverse impacts from noise on the living conditions of the occupants of neighbouring properties as a result of the extended opening hours. However, to allow the Council to fully assess the effect of the proposal on the living conditions of local residents, I consider that it is necessary to restrict the extended opening hours to a temporary one year period. I consider that with these measures in place, the proposal complies with Policy SD1 of the Herefordshire Local Plan Core Strategy (the CS) which, amongst other things, requires development to ensure that it does not contribute to, or suffer from, adverse impacts arising from noise.

### **Other Matters**

17. The appellant has cited a number of other appeal decisions for extended opening hours at various developments across the country. However, I do not have the full details of each case and as such I cannot be certain that they are comparable to this case. In any case I am required to determine the appeal on its merits.

### **Conditions**

18. I have considered the conditions put forward by the Council against the requirements of the Planning Practice Guidance and the National Planning Policy Framework. In the interests of conciseness and enforceability the wording of some of the Council's suggested conditions have been amended.
19. I consider it necessary in the interests of the living conditions of local residents to impose conditions for the opening times 07.00 to 01.00 Sunday to Thursday and 07.00 to 02.00 on Fridays and Saturdays with counter sales to cease at 24.00 daily. Notwithstanding that the appellant submitted details of a blind with the appeal it does include sufficient site specific detail to ensure that the light emitted by the use of the store is screened to minimise disruption from potential customers at the store. Consequently, a condition is required to provide that additional detail. The parking area plan is required to define the parking area for delivery drivers to minimise disruption to the adjacent occupiers.
20. In addition, to allow the Council to fully assess the effect of the proposal on the living conditions of local residents condition 1 requires the extended opening hours to cease after one year from the date of this decision and to revert to the current arrangement thereafter.

### **Conclusion**

21. For the reasons given above and having regard to all other matters raised but only in accordance with the terms explained above, I conclude that the appeal should succeed. I will therefore grant a new planning permission omitting the disputed condition 7 and imposing the necessary new conditions.

*D. Boffin*

INSPECTOR