

## Appeal Decision

Hearing held on 10 November 2016

Site visit made on 10 November 2016

**by David Reed BSc DipTP DMS MRTPI**

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

**Decision date: 14 December 2016**

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**Appeal Ref: APP/Q1445/W/16/3145987**

**Aldi Store, 7 Carlton Terrace, Portslade, Brighton BN41 1XF**

- 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 Aldi Stores Ltd against the decision of Brighton & Hove City Council.
  - The application Ref BH2014/03715, dated 4 November 2014, was refused by notice dated 28 January 2016.
  - The application sought planning permission for mixed use development comprising food retail unit and residential units without complying with a condition attached to planning permission Ref BH/2010/01684 (as amended by planning permission BH2011/02857 dated 7 December 2011).
  - The condition in dispute is No 1 which states that: The store shall not be open for trading to the public except between the hours of 08.00 and 20.00 on Monday to Saturday, and 10.00 and 16.00 on Sundays and Bank Holidays. Staff may be within the premises between the hours of 07.00 and 21.30 hours on Mondays to Saturdays, and 09.30 to 17.30 on Sundays and Bank Holidays.
  - The reason given for the condition is: To allow satisfactory operation of the store and to protect the residential amenities of the occupiers of the flats above the store and to comply with policy QD27 of the Brighton and Hove Local Plan.
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### Decision

1. The appeal is dismissed.

### Application for costs

2. At the Hearing an application for costs was made by Aldi Stores Ltd against Brighton & Hove City Council. This application is the subject of a separate Decision.

### Preliminary matter

3. In addition to the formal site visit on the afternoon of 10 November an unaccompanied site visit was carried out on 22 August from 19.15 to 20.30 hours to observe the store and its car park during the close down period.

### Main Issue

4. The main issue is the effect of the proposed extended hours on the living conditions of nearby residents in relation to noise and disturbance.

## Reasons

### *Background*

5. The Aldi Store at Portslade is situated beyond the railway at the northern end of the district shopping centre. The purpose built store lies on the western side of Boundary Road, a busy thoroughfare, with its surface car park behind a row of three storey buildings which have commercial uses on the ground floor and flats above. There are also twelve flats on the first floor immediately above the store which are known as Ronuk House.
6. The original planning permission in 2006 set the opening hours of the store as 08.00 to 20.00 hours Monday to Saturdays and 10.00 to 16.00 on Sundays and Bank Holidays. Vehicular movements and deliveries to the store were confined to the period between 07.30 and 20.30 Mondays to Saturdays with none on Sundays or Bank Holidays.
7. Subsequently, in 2011, these conditions were varied on appeal<sup>1</sup> to allow staff to be within the building to carry out ancillary activities between 07.00 and 21.30 Monday to Saturdays and 09.30 and 17.30 on Sundays and Bank Holidays. In conjunction with this a new condition was attached restricting use of the refuse compactor to the opening hours of the store. One main delivery and one milk delivery were also allowed on Sundays and Bank Holidays.
8. The current proposal is to extend the opening hours of the store on Monday to Saturday evenings to 22.00 (two hours later than now) with cleaning and restocking to be allowed in the building until 23.00 hours (one and a half hours later than now). No changes are proposed on Sundays or to delivery times, and the hours of operation of the refuse compactor would remain as now.

### *Noise and disturbance*

9. The Aldi Store is a popular shopping facility which due to its layout and use causes noise and disturbance to the occupiers of nearby residential properties. Designed from the outset as a mixed use building, there are twelve flats immediately above the store, five of which have living rooms and/or bedrooms directly overlooking the surface car park and the passage where customers collect and push trolleys to and from the store entrance. The surface car park also occupies a backland position behind a row of buildings which have several residential flats at first and second floor level directly overlooking the car park and a small number overlooking the passage.
10. During trading hours the car park generates noise and disturbance with residents reporting a constant turnover of cars manoeuvring, engines starting, doors slamming, car alarms, car radios, trolleys rattling and people talking/shouting. Delivery lorries also back up to the loading bay through the car park several times a day. Customers with their trollies pass through the passage to and from the store entrance and the trolleys are stacked in this space, immediately below Ronuk House flats 4-6 and the flat(s) above 9 Carlton Terrace. In addition, opening and closing the security shutters at the beginning/end of the day, moving pallets of goods for sale and staff arrivals/departures all occur in this area. The residents also report incidents of anti-social behaviour near the entrance to the store.

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<sup>1</sup> APP/Q1445/A/11/2145260 following a split decision by the Council

11. In order to assess noise from the car park the appellant undertook a survey one evening in September 2012. From this it was calculated that the noise from the car park during the last hour of trading was about 43 dB  $L_{Aeq}$ , and when added to the background noise (about 48-50 dB  $L_{Aeq}$ ), it would add only about 1 dB  $L_{Aeq}$ , an imperceptible amount. However, dB  $L_{Aeq}$  is an average noise measure and as such does not accurately reflect the disturbance from car park noises which are individual events, not continuous. Loud noise events up to 71.8 dB  $L_{Amax}$  were measured in the car park during the last hour of trading, although the source is not noted. The survey did show that background noise in the area steadily reduces as the evening progresses and this was also my impression on 22 August.
12. The appellant argues that the noise from the car park is well within the World Health Organisation (WHO) Guidelines<sup>2</sup> of 55 dB  $L_{Aeq}$  for a good level of amenity during the day<sup>3</sup> and that an extra 1 dB  $L_{Aeq}$  would be imperceptible. However, the WHO guideline and 1 dB  $L_{Aeq}$  figure relate to steady, continuous noise which does not correspond to the noise arising from a car park. Noise incidents from the car park are both noticeable and disruptive to those living nearby and it was noted at the hearing that a car door slam at 10 m would be about 68 dB, well above the WHO guideline for a noise liable to cause sleep disturbance outside an open bedroom window<sup>4</sup>.
13. The adjacent residential flats are just a few metres away from the nearest car park spaces and there is no intervening screening. The rooms concerned are single aspect living rooms and bedrooms where the occupiers would expect to be able to leave windows open for ventilation, especially in summer. In this context the noise and disturbance arising from the activity in the car park is a significant cause of annoyance for surrounding residents during trading hours and an additional two hours of activity each evening, twelve hours each week, would add materially to this annoyance.
14. The twelve flats in Ronuk House are also liable to noise and disturbance arising from within the store itself. The residents state in their representations that they can hear various noises depending on their position above the store and the time of day. It is said that the tills can be heard together with internal doors banging, staff voices, the public address system and stock movements across the floor. The most serious issues however relate to the rear of the store where flats 8-12 extend over the storage/delivery bay; the living room and bedroom of flat 8 look out over the delivery bay itself.
15. Several deliveries are made each day when the unloading bay shutter is raised, a lorry backs in, goods are unloaded by lift and then moved and stacked by truck until needed in the store. This process happens immediately below the windows of flat 8 and is noisy and disruptive. Whilst the proposal would not change the times when deliveries are permitted an increase in trading hours may marginally increase the number required to service the store.
16. Residents state they can hear goods being moved around by truck within the storage/delivery bay throughout the period when staff are in the store. In addition, the refuse compactor in the bay, which compresses waste boxes, can

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<sup>2</sup> World Health Organisation Guidelines for Community Noise

<sup>3</sup> Although the WHO state that the guideline value for evenings should be 5 – 10 dB lower than the daytime

<sup>4</sup> 60 dB  $L_{Amax}$  outside a bedroom with the window open, equivalent to 45 dB  $L_{Amax}$  inside the bedroom

- clearly be heard<sup>5</sup>. This machine, sited immediately below flats 9-10, is operated intermittently throughout the day as required.
17. The appellant's second acoustic report attempts to assess the level of noise and disturbance within the flats from these sources. The Council's Environmental Health Officer (EHO) requested noise measurements be taken within the flats themselves, but due to the level of ongoing conflict between Aldi and the residents this was not possible. Instead, noise measurements were taken below the store ceiling and assumptions made about the noise reduction of the building structure based on the construction plans of the intervening floor.
  18. Noise levels within the store when open were up to 62.8 dB LAeq, 82.2 dB LAmax, with the noise above the compactor significantly greater at 82.0 dB LAeq, 94.3 dB LAmax. During the closed period the store is quieter except when the floor cleaner is used which measured 66.8 dB LAeq, 75.7 dB LAmax. After the assumed noise reduction of the building is taken into account the noise levels within the flats are estimated to be up to 10 dB LAeq, 26 dB LAmax above the store, 23 dB LAeq, 34 dB LAmax above the compactor and 10 dB LAeq, 21 dB LAmax when the cleaner is in use. These estimated noise levels are said to be well below the BS8233<sup>6</sup> and WHO guidelines which are 35 dB LAeq during the day, 30 dB LAeq during the night and for peak noise 45 dB LAmax.
  19. On this basis, the appellant claims that the noise from internal activity within the store does not cause a significant adverse impact to the residents and that the extended operating hours are therefore acceptable. The Council's EHO agrees with this view, but it is strongly disputed by the residents themselves.
  20. It is deeply regrettable that actual measurements from within the flats are not available because the findings of the acoustic report are only based on a purely theoretical calculation. Noise levels within the store and particularly when the compactor is being used are high, well above BS8233 and WHO guidelines, so the sound insulation performance of the intervening floor is critical. If there are weaknesses in the construction of the building or the architectural plans are inaccurate actual noise levels would be higher. Indeed, the Council's EHO suggests a 5 dB adjustment should be made which illustrates the uncertainty surrounding this methodology.
  21. The report is based on the noise guidelines in BS8233, but subclause 7.7.1 makes clear that these relate to noise sources without a specific character, otherwise known as 'anonymous' noise. BS8233 guideline figures are for steady noise sources, whereas most noises from the store are intermittent and irregular, and thereby attract attention. As the document observes, occupiers are usually more tolerant of noise without a specific character than, for example, that from neighbours which can trigger complex emotional reactions. The disturbance from living above or adjacent to the Aldi store and its car park should be considered neighbour noise, and thus an assessment against the guidelines in BS8233 has only limited value.
  22. Noise policy in paragraph 123 of the National Planning Policy Framework, Planning Practice Guidance and the Noise Policy Statement for England (NPSE) seeks to promote a good quality of life as well as good health. Quality of life is a subjective measure of wellbeing, whilst the WHO guidelines are based on the

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<sup>5</sup> Established by the Council's Environmental Health Department following complaint Ref 2015/01859/NOF/EH

<sup>6</sup> British Standard BS 8233:2014: Guidance on sound insulation and noise reduction for buildings.

- lowest levels of noise that affect health. Reflecting this complexity, the NPSE states it is not possible to have a single objective noise-based measure that is mandatory and applicable to all sources of noise in all situations, and it does not endorse any specific standards.
23. It is evident that many of the residents living above and adjacent to the Aldi store and its car park find the activity generated by the operation of the store noticeable and disruptive. However, the store is located on a busy road and forms part of a district centre where some disturbance is inevitable and to be expected during the daytime. In this case the issue is whether the noise and disturbance which arises should be allowed to continue into the late evening.
  24. The residents complain that the existing conditions relating to the store are regularly breached. In particular, deliveries arrive before and after permitted times, staff arrive early and leave late (when the shutters are operated) and the compactor is used outside trading hours. In addition, maintenance/building work is sometimes carried out during the night, albeit with prior warning being given. Due to the close proximity of the residents, breaches which occur in the early morning and evening are both obvious and annoying. The evidence is that they occur from time to time, indeed the compactor seems to have been used outside permitted hours in the lead up to the hearing<sup>7</sup>. The conditions are precise and enforceable in theory, but to be observed each and every day they rely on a level of management control that may be unrealistic in practice given the pressures of running a successful, busy store in a congested built up area.
  25. The practicality of stopping the use of the compactor at 20.00 if the store is trading until 22.00 and staff are restocking until 23.00 and from 07.00 next morning is not clear. There appear to be breaches of this condition at present and there is limited space to store uncompressed boxes awaiting compaction.
  26. Portslade District Centre lies mostly to the south of the railway and few other businesses in this part of Boundary Road are open into the evening. As a result, in the evenings the car park is used primarily by Aldi customers and on 22 August the last few cars left soon after 20.00. In addition, as pointed out by the Council, the traffic on Boundary Road reduces in the evenings and as the noise readings confirm the whole area becomes successively quieter. In this context, extended trading hours to 22.00 would become increasingly noticeable to local residents with noise and activity in the car park at 22.00 being significantly more disruptive than at 20.00. In addition, staff would leave and the shutters come down at 23.00 instead of 21.30 when quiet is expected and it would be more intrusive to nearby occupiers trying to sleep.
  27. In relation to noise generated within the store, as well as two hours extra trading, staff would be in the building until 23.00 six nights a week. Whilst many noises would be relatively low level, there is potential for the compactor to be used and other loud noises for as long as staff are in the building. This would also be increasingly disturbing to occupiers of the flats above, which include children and shift workers, the later it goes on into the evening.
  28. Government policy in relation to noise is to avoid significant adverse impacts on health and quality of life and to minimise other adverse impacts on health and quality of life, including through the use of conditions. The appellant's view is that the operation of the store does not have an adverse impact and

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<sup>7</sup> Diary of events log submitted at the hearing

hence extended hours are acceptable, but I do not agree. The noise standards that have been quoted are not as applicable to this case as has been suggested albeit there do not appear to be any agreed standards for neighbour noise.

29. There is no clear evidence of adverse impacts on health, but considerable evidence of the impact of the store on the quality of life of nearby residents. Residents report having to keep windows closed in summer and turn up the TV or radio to avoid distraction. Even if not a significant impact which should be avoided, this amounts to an adverse impact which should be mitigated and reduced to a minimum by the use of conditions. The hours of operation are one such condition, and my conclusion is that the impact of extended hours six evenings a week would have an unacceptable effect on the living conditions of nearby residents. This would be contrary to Policies QD27 and SU10 of the Brighton & Hove Local Plan 2005 (BHLP) which preclude development which would cause material nuisance and loss of amenity to adjacent residents and require the impact of noise on the occupiers of neighbouring properties to be minimised by the imposition of planning conditions.

### **Planning Balance and Conclusions**

30. Noise and disturbance should not be considered in isolation. The store is well located at one end of the district shopping centre and, particularly during the day when other shops are open, the store adds to the vitality and viability of the centre and encourages linked trips. Policy SR5 of the BHLP, which aims to enhance shopping areas, supports the proposal. Aldi has grown as a business in recent years and the store trades well. Longer opening hours are needed to respond to modern shopping trends, serve the public more effectively, help ease pressure on the store at peak times, bring the operation in line with other Aldi stores and enable it to compete on an even footing with its competitors. Extended opening would therefore have significant social and economic benefits for the local community, increasing competition and providing more jobs.
31. These are important benefits but they need to be weighed against the additional noise and disturbance that would result for adjacent occupiers. It was agreed at the hearing that some conflict between the operation of the store and nearby residents is inevitable given the mixed use nature and location of the development. In the light of the evidence my conclusion is that the current balance between these conflicting interests, as reflected in the conditions attached to the planning permission, strikes the right balance and should be retained unchanged.
32. Having regard to the above the appeal should be dismissed.

*David Reed*

INSPECTOR

## **APPEARANCES**

### FOR THE APPELLANT:

Alistair Close MRTPI, Planning Potential

Grace Mollart MRTPI, Planning Potential

Gary King MIOA, Sharps Redmore

### FOR THE LOCAL PLANNING AUTHORITY:

Councillor Les Hamilton, South Portslade Ward

Jonathan Puplett MRTPI, Principal Planning Officer

### INTERESTED PERSONS:

Angie Ross, Local resident, Ronuk House

Hugh Corley, Local resident, Ronuk House

## **DOCUMENTS SUBMITTED AT THE HEARING**

Diary of Events Log and letters from Aldi Stores Ltd (submitted by Angie Ross)

