

5b 3/11/0249/FO - Variation of Condition A of The Planning Inspectorate's decision of planning permission 3/10/0704/FO to read 'The use of the restaurant by customers shall be restricted to the hours of 08.00 to 01.00 on the following day on Mondays to Saturdays and to the hours of 10.00 to 22.00 on Sundays and Bank Holidays. Notwithstanding those restrictions, the restaurant may be used by customers on New Year's Eve on whatever day that falls until 01.00 on the following day' at The Riverside Garden Centre, Lower Hatfield Road, Bayford, Hertford, Herts, SG13 8XX for Riverside Garden Centre

Date of Receipt: 14.02.2011

Type: Variation of Condition - Major

Parish: BAYFORD, HERTFORD

Ward: HERTFORD – CASTLE, HERTFORD – RURAL SOUTH

RECOMMENDATION:

That planning permission be **GRANTED** subject to the following conditions:

1. No external lighting (2E26)
2. The previously approved external extractor vents, condenser units, heater flues and meter boxes shall be retained and maintained unless otherwise agreed in writing by the Local Planning Authority.

Reason: In the interests of the appearance of the development and in accordance with Policy ENV1 of the East Herts Local Plan Second Review April 2007.

3. The permission hereby granted relates to the provision of 428sq.m. floorspace for the restaurant use. The creation of any additional restaurant floorspace within the building shall not be undertaken without the prior written consent of the Local Planning Authority.

Reason: In order to control any intensification of the restaurant use and subsequent impact on the Green Belt.

4. The use of the restaurant by customers shall be restricted to the hours of 08.00 to 01.00 on the following day on Mondays to Saturdays and to the hours of 10.00 to 22.00 on Sundays and Bank Holidays. Notwithstanding those restrictions, the restaurant may be used by customers on New Year's Eve on whatever day that falls until 01.00 on the following day.

Reason: In the interests of the amenities of neighbouring occupants.

5. The doors and windows between the restaurant and the riverside terrace on the northern elevation of the building shall be kept closed after 22.00 on any day on which the restaurant is in use.

Reason: In the interests of the amenities of neighbouring occupants.

6. The doors and windows to the restaurant kitchen on the eastern elevation of the building shall be kept closed after 22.00 on any day on which the restaurant is in use.

Reason: In the interests of the amenities of neighbouring occupants.

_____ (024911FO.HI)

1.0 Background:

- 1.1 The application site is shown on the attached OS extract and comprises an established garden centre located on the edge of the River Lea within the Metropolitan Green Belt. A new garden centre and restaurant building was approved in September 2009 and completed soon thereafter, following flood damage to the previous building. The site is accessed from Lower Hatfield Road with a parking area to the front of the building. The surrounding area is predominantly rural in character, with the only immediate neighbour being Burrowfield to the east, separated by mature tree screening.
- 1.2 Members may recall that this site has been the subject of a number of applications recently with regards to the opening hour restriction originally applied to the permission for the new building. An appeal to extend the opening hours was recently allowed, but the applicant now proposes to vary the wording applied by the Planning Inspector, to state that “use of the restaurant by customers shall be restricted to the hours of 08.00 to 01.00 on the following day on Mondays to Saturdays and to the hours of 10.00 to 22.00 on Sundays and Bank Holidays. Notwithstanding those restrictions, the restaurant may be used by customers on New Year's Eve on whatever day that falls until 01.00 on the following day.” The planning history is discussed in more detail below, and a table is attached at the end of this report detailing the recent changes to the opening hours.

2.0 Site History:

- 2.1 The site was previously known as Kingfisher Nurseries, and started out only selling produce grown on site. A number of new buildings were granted permission in the 1970s and 80s, including a new farm shop.

3/11/0249/FO

Then in 1996, permission was granted to remove an earlier condition that prevented the sale of produce not originating from the nursery (3/96/1641/FO). The garden centre has since continued to expand.

- 2.2 In December 2005, retrospective permission was granted for a part change of use of the land to a bistro, with a new covered outdoor seating area (reference 3/05/2129/FP).
- 2.3 Retrospective permission was then refused in November 2006 for the retention of a caravan on site (3/06/1735/FP) and an appeal was subsequently dismissed. An earlier outline application for a dwelling on site was refused in 2001 (3/01/1762/OP) given the location of the site within the Green Belt and within a floodplain.
- 2.4 Permission was then granted in September 2009 for a new garden centre and restaurant building under reference 3/09/0939/FP, following flood damage to the previous building. This consent was subject to a number of conditions, including condition 9 which restricted the opening hours of the premises to 08.00-23.00 Monday - Saturday, and 10.00-22.00 on Sundays and Bank Holidays.
- 2.5 The applicant then applied to vary this condition to allow the restaurant to open from 08.00-01.00 any day of the week (reference 3/10/0704/FO). This was refused on the grounds of impact on the amenities of the residents of nearby properties by reason of noise nuisance and disturbance. An appeal was lodged against this refusal.
- 2.6 Prior to determination of the appeal, the applicant submitted two further applications to amend the wording and opening hours, which were both approved by Committee in September 2010. Application 3/10/1226/FO was approved with the hours of 08.00-23.00 Monday - Wednesday, 08.00-00.00 (midnight) Thursday - Saturday, and 10.00-22.00 on Sunday and Bank Holidays with an allowance for up to 6 amendments to be made within any calendar year.
- 2.7 Application 3/10/1227/FO was approved with the hours of 08.00-23.00 Monday - Saturday, and 10.00-22.00 on Sunday and Bank Holidays, unless otherwise agreed in writing by the Local Planning Authority. Both applications included an amendment to the wording to refer to the 'use of the restaurant by customers' rather than the 'premises'.
- 2.8 The appeal against refusal of 3/10/0704/FO was subsequently allowed on 28th January 2011, subject to a restriction of the hours of 08.00-23.30 Monday - Wednesday, 08.00-00.30 Thursday - Saturday, and 10.00-22.00 on Sundays and Bank Holidays, along with an allowance to 01.00 for 15 occasions in each calendar year subject to giving 7 days

notice to the Local Planning Authority. The Inspector also added on two further conditions restricting the opening of windows and doors on the riverside terrace after 22.00 each day, and the opening of windows and doors on the eastern elevation of the building after 22.00 each day.

- 2.9 The Inspector also awarded full costs against the Council on the grounds that there was no credible evidence to support the necessity or reasonableness of the condition, and that it should not have been necessary for the applicant to make further applications for variation of the disputed condition. The wording of the condition could have been amended during the course of determining the application.

3.0 Consultation Responses:

- 3.1 Environmental Health do not wish to restrict the grant of permission.

4.0 Town/Parish Council Representations:

- 4.1 Bayford Parish Council comment that “this site has been the subject of numerous planning applications in recent months, in particular a number seeking to vary the hours of opening of the restaurant. The present application seeks to extend the hours still further to 08.00-01.00 Monday-Saturday throughout the year instead of the fifteen occasions allowed under the current conditions. We are puzzled why a business such as this would need to be open until 01.00 everyday of the year including a Monday. In reaching a decision, the Local Planning Authority should consider carefully the consequences of allowing this application. It should be remembered that any permission granted is attached to the premises not to the present restaurant business.”
- 4.2 At the time of writing this report, no response had been received from Hertford Town Council.

5.0 Other Representations:

- 5.1 The applications have been advertised by way of press notice, site notice and neighbour notification.
- 5.2 2 no. letter of representation has been received from Burrowfields, and 1 Waterhall Cottages which can be summarised as follows:
- Object on the grounds of over-development of the site in the Green Belt;
 - Restaurant causes serious adverse impact on the amenities and health of the occupier of Burrowfields;
 - Unpleasant smells from cooking and the sewage treatment plant –

3/11/0249/FO

- the Inspector's decision notice is silent on this issue;
- Serious concerns over the capacity of the sewage treatment plant given the increased hours of use. Sewage has now been confirmed in Bayford Brook – the tank is obviously not adequate for the level of usage;
 - Noise from sewage treatment plant would become more prevalent;
 - Music is clearly audible from Burrowfield when the large rear patio doors are open. The Inspector requires these doors to be closed by 22.00 but there will be disturbance before 22.00, and concern over enforceability of this condition;
 - Query whether an application has been made to vary the licence which currently cuts off at 00.30, and if not then why apply to 01.00?

6.0 Policy:

6.1 The relevant saved Local Plan policies in this application include the following:

ENV1 Design and Environmental Quality
ENV24 Noise Generating Development

6.2 In addition to the above it is considered that Planning Policy Statement 1, (Delivering Sustainable Development), and Planning Policy Guidance 24 (Planning and Noise) are considerations within this application.

7.0 Considerations:

7.1 This application proposes to vary the opening hours condition applied by the Planning Inspector in the recent allowed appeal (3/10/0704/FO) to allow for an extra hour and a half Monday - Wednesday evenings (from approved 23.30 to 01.00), and an extra half hour Thursday - Saturday (from approved 00.30 to 01.00). No change is proposed to Sunday or Bank Holiday opening times, but an allowance is proposed to allow the restaurant to remain open until 01.00 on New Years Eve on whatever day it falls, which Officers consider to be a reasonable request.

7.2 The main issue in this case relates to the justification for the opening hour restriction, having regard to the previous Inspector's decision, and the evidence available, in accordance with the tests set out in Circular 11/95.

7.3 In allowing the previous appeal, and awarding full costs against the Council, the Inspector made it very clear that in his opinion the Council

had no evidence to justify applying the opening hours restriction. He states that “While I understand the need for care in setting the permitted hours of use of the restaurant, however, I have heard no evidence which persuades me that the current form of condition 9 (as amended by the Council in September 2010) is necessary and reasonable, two of the tests required by Circular 11/95 to be met for a condition on a planning permission to be acceptable.” The applicant has again submitted a Noise Survey to which no objection has been raised by Environmental Health. This carries significant weight in indicating that noise and disturbance to Burrowfield would not be significant or harmful. There is no other evidence available to the Council, or likely to be available, to suggest otherwise.

- 7.4 The Inspector stated that “All the evidence placed before the hearing to which I could attach any weight... led to the conclusion that no noise or disturbance arising from the restaurant use had any adverse impact on the living conditions of the adjoining occupier.” He commented that “the perception of noise and disturbance from the operation of the restaurant is more apparent than real.” There has been no change in this respect since the appeal was allowed.
- 7.5 Finally, in his costs decision, the Inspector states “While I have allowed the appeal with different hours of operation from those sought in the appeal application and with additional conditions, that decision was reached on the basis of the variation in hours sought by the Applicant at the appeal hearing. I consider that there was no justifiable basis on which the original appeal application could be rejected.” The original appeal application was for the hours of 08.00 to 01.00, similar to that now proposed. The Inspector’s decision carries significant weight, and Officers therefore have no justifiable reason to resist this application.
- 7.6 It is noted that the current Premises Licence allows for the opening of the premises until 00.30 Monday to Sunday, whereas the applicant is now proposing for planning approval to stay open to customers until 01.00. This has been questioned by neighbours; however it is not a material planning consideration. The applicant may wish to apply to extend the Licenced hours, but this would be assessed under separate legislation.
- 7.7 Concerns raised on behalf of the neighbour at Burrowfield are duly noted. They suggest that the additional conditions imposed by the Inspector requiring the closure of certain doors by 22.00 are insufficient and unenforceable. However, Officers afford significant weight to the Inspector’s determination, and have no evidence to justify amending these conditions.

7.8 A number of concerns have also been raised regarding cooking smells from the kitchen and sewage smells from the approved sewage treatment plant. These issues were not afforded a mention by the Inspector, and again, no objection has been raised by Environmental Health. Should statutory noise or pollution issues arise then these shall be dealt with under Environmental Health legislation. The discharge licence for the sewage treatment plant is not a planning consideration.

8.0 Conclusion:

8.1 Overall, it is your Officers' opinion that there is again no evidence to justify a refusal of the proposed extended opening hours. The Inspector's decision and costs decision make it very clear that there was no justifiable basis on which the appeal application could have been rejected, and this current application proposes very similar hours (reduced hours on Sundays and Bank Holidays) to that appeal application. Significant weight is given to the Inspector's determination and there has been no change in the circumstances of the case.

8.2 The application is therefore recommended for approval subject to conditions as appropriate from original permission 3/09/0939/FP, and including the two additional conditions imposed by the Inspector.

SUMMARY TABLE OF OPENING HOUR RESTRICTIONS

Planning Reference	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sundays / Bank Hols	Special Allowances
3/09/0939/FP GRANTED 23-Sep-2009	08.00-23.00	08.00-23.00	08.00-23.00	08.00-23.00	08.00-23.00	08.00-23.00	10.00-22.00	None
3/10/0704/FO REFUSED 30-Jun-2010	08.00-01.00	08.00-01.00	08.00-01.00	08.00-01.00	08.00-01.00	08.00-01.00	08.00-01.00	None
3/10/1226/FO GRANTED 22-Sep-2010	08.00-23.00	08.00-23.00	08.00-23.00	08.00-00.00	08.00-00.00	08.00-00.00	10.00-22.00	Up to 6 amendments per calendar year
3/10/1227/FO GRANTED 22-Sep-2010	08.00-23.00	08.00-23.00	08.00-23.00	08.00-23.00	08.00-23.00	08.00-23.00	10.00-22.00	Unless otherwise agreed in writing
3/10/0704/FO ALLOWED ON APPEAL 28-Jan-2011	08.00-23.30	08.00-23.30	08.00-23.30	08.00-00.30	08.00-00.30	08.00-00.30	10.00-22.00	Up to 15 extensions to 01.00 per calendar year
3/11/0249/FO PROPOSED	08.00-01.00	08.00-01.00	08.00-01.00	08.00-01.00	08.00-01.00	08.00-01.00	10.00-22.00	New Years Eve to 01.00 on whatever day it falls