

CO/1524/2015

Neutral Citation Number: [2015] EWHC 2516 (Admin)  
IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
THE ADMINISTRATIVE COURT

Royal Courts of Justice  
Strand  
London WC2A 2LL

Tuesday, 4 August 2015

**B e f o r e:**

**MR JUSTICE CRANSTON**

**Between:**

**GOLD KEBAB LIMITED\_**

**Applicant**

v

**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT\_**

**First Defendant**

**LONDON BOROUGH OF BRENT**

**Second Defendant**

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**Ian Stebbings** (instructed by Oakfields Solicitors LLP) appeared on behalf of the **Applicant**

**Hugh Flanagan** (instructed by Government Legal Department) appeared on behalf of the **First Defendant**

**The Second Defendant did not appear and was not represented**

J U D G M E N T  
(Approved by the Court)

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1. MR JUSTICE CRANSTON: This is an application to quash a decision under section 288 of the Town and Country Planning Act 1990. The claimant, Gold Kebab Limited trading as Woody Grill, challenges the inspector's decision of 17 February 2015 dismissing its appeal against a refusal to vary a condition of planning permission. That variation would have allowed an extension of opening hours for Woody Grill at Willesden from 7 o'clock in the morning until 5am seven days a week. The claimant also appealed to the inspector against an enforcement notice which the inspector also dismissed, but that decision is not challenged before me.
2. The background is this. Mr Cengiz Erpolat and his brother jointly own some five restaurants around London trading under the name "Woody Grill". The Willesden Woody Grill is at 44 High Road, London NW10. It is situated in a three-story building with residential accommodation above. The site is within the Willesden Conservation Area and is in the primary shopping area of the town centre.
3. In 1988 Brent London Borough Council ("the Council") granted planning permission for a single story rear extension at the address and a change of use to a takeaway and restaurant. Since then the premises have been used for those purposes. Mr Erpolat and his brother acquired the lease in 2008. In his statement he says that they employ some seven to eight persons there and that the premises are well-known in the area.
4. When planning permission was granted in 1988 it was subject to a condition (condition 5), which restricted the opening hours to 8am to 11pm Sunday to Thursday and 8am to midnight Friday to Saturday. There were applications in 1993, 1995 and 1997 for an extension to the opening hours, which were refused. There was a further application in 2010 by Mr Erpolat for an extension of opening hours from 11am to 2am Monday to Sunday. That application was refused.

5. It is apparent that Woody Grill in Willesden has regularly opened until 5am. Clearly Mr Erpolat has known that he has been doing this in breach of the planning condition, given his application in 2010, and Mr Stebbings, who represents him today before me, accepts that. I shall return to the evidence of complaints in a moment, but it seems that there were complaints in the past to both planning and environmental health in the Council about the extended opening hours of this branch of Woody Grill.
6. Since 2008 the separate licensing conditions for the premises extend until 5 o'clock in the morning.
7. In September 2013 the claimant's agent made a fresh planning application for an extension of opening hours between 7am and 5am Monday to Sunday. The Council refused consent on 6 February 2014. The delegated report by the planning officer about that application noted that:
  - i. "Saved Unitary Development Plan Policies
  - ii. SH10 Food and Drink uses - A3 uses should not adversely affect the amenity of residential occupiers, and particular regard will be had for whether or not the proposed hours of operation would result in residential disturbance."
8. And:
  - i. E2 Noise and Vibration - Noise generating development will not be permitted where they would harm existing or proposed noise sensitive development (eg: housing..."
9. The officer's report stated that 53 neighbouring owner occupiers had been consulted about the application and that at the time of the report six objections had been received. The main points raised were, given the proximity of adjoining residential developments, the extended hours were inappropriate and disturbances were likely in the terms of the comings and goings in the night when people were trying to sleep. In addition the report set out that there had been internal consultation:

- i. "Environmental Health Officers consulted and report that there are no existing noise complaints arising from the premises. Licensing colleagues consulted and state that the current Licence allows the premises to operate Monday - Sunday 9am - 5am. Licence was reviewed last year in 2013 although this review was with regard to the extract flue. Highways colleagues consulted and have no objections in highways terms to the extension."

10. Under the heading "REMARKS" the officer's report stated that the premises were situated in the town centre on the high street. The arch comprised predominantly commercial uses on the ground floor with residential units above. The premises were located adjacent to a recently converted public house development, Metropolitan Court: a mixed use scheme containing 37 residential units. In addition, the premises were located within 100 metres of Willesden Green library, which was at that point undergoing a redevelopment to provide a significant number of new residential units:

- i. "As such the site has a mixed use character which is becoming increasingly residential."

11. Finally, the officer's report noted that the Council had suggested a temporary extension of opening hours, in line with those of an adjacent bar, until 1am on Thursday and 2am on Friday and Saturdays, but no reply had been received.

12. On 17 March 2014, the Council served an enforcement notice alleging breach of condition. The notice stated that:

- i. "The breach of condition is detrimental to the amenity of nearby properties due to noise disturbances and comings and goings from the premises late at night..."

13. The claimant appealed both the refusal by the Council to vary condition 5 and the enforcement notice. Mr Graham Self was appointed as the Planning Inspector. Apart from a minor variation in the enforcement notice, he dismissed both appeals. In his decision letter he observed that the appeal site was on the north side of the High Road, a busy road lined on both sides with buildings which had commercial premises at street

level, but with upper floors of many of the buildings, including some close to the appeal site on both sides of the road, appearing to be used as flats. He then explained that the essence of Woody Grill's case was that there were other hot food outlets in the vicinity with late opening hours and his business needed to compete with them. Woody Grill put the case that the proposed opening hours would have minimal impact on distant neighbouring residential units, which were located in an ordinary noisy environment. Moreover, the premises had been granted a refreshment licence until 5am and the proposal would cater for shift workers and others looking for late night food and drink.

14. The inspector then said this at paragraphs 6 and 7:

- i. "The effect of late-night opening on what the appellant calls 'distant neighbouring residential units' may well be minimal. But the same does not apply to those dwellings close to the appeal premises, such as the flats in the building known as Metropolitan Court, which is adjacent to the Woody Grill. There is evidence that residents in this building have suffered noise and disturbance during the night, when the area is otherwise reasonably quiet. As far as I can tell from the presence of bell-pushes in doorways, there are also flats on the opposite side of the road. Given the closeness of the appeal premises to some dwellings, disturbance from noise caused by activities such as the slamming of car doors as customers go to and from the Woody Grill is likely to occur, especially during periods of warm weather when residents would want to open their windows.
- ii. 7. The fact that a licence has been issued under non-planning legislation for the premises to operate during the night until 0500 does not mean that planning permission should be granted. Granting permission would also conflict with policies in the development plan for this area which aim to protect living conditions for local residents whilst not hindering sustainable business practices. It is necessary to strike a balance, and I judge that the need to safeguard residential amenity outweighs the commercial benefit sought by the appellant. I do not see any good reason to change the conditioned opening hours ending at 2300 on Sundays to Thursdays and midnight on Fridays and Saturdays."

15. In his submissions to me Mr Stebbings made two points. First, he submitted that the

inspector's decision is flawed by a lack of evidence. He pointed out that the delegated report did not contain evidence of complaints having been made. In as much as there was a reference to complaints in relation to the 2009 application for an extension of hours, that was dated. It was plain that the Council's environmental health department, which would be an obvious place for complainants to turn to, had not received complaints. In as much as there were letters before the inspector from individuals, those did not offer definite evidence about the conditions caused by the extended opening hours which Woody Grill operates at the present time. The inspector had proceeded on pure assumption and there was simply no evidence of complaints since 2008.

16. In my view this submission, however attractively put, goes nowhere. The inspector had letters from residents, albeit that one of those letters was anonymous and albeit that the expression, as might be expected from lay people, was not as precise as a lawyer might wish. But the letters were clear objections to the extended opening hours. The anonymous letter read, for example, that the residents who owned a flat overlooking the site believed that the extension would negatively affect their quality of life and the value of their property. Another letter stated that the late opening hours of Woody Grill was having a negative impact on the peace and tranquility of the neighbourhood, and that he (the writer) was frequently awakened in the early morning by noise from its customers and staff long after other restaurants in the area had closed. A yet further letter referred to the noise, smell and traffic and unsociable hours in the middle of the night from what was an existing flagrant disregard of opening hours restrictions. It may be that on a forensic analysis there were flaws in those letters and the other letters I have not referred to, but there clearly was evidence of complaints before the inspector. I simply cannot accept Mr Stebbings's submission in this regard.

17. Mr Stebbings then raised the clear evidence of the extended licensing hours. He accepted the distinction between the licensing and planning regimes, but one underlined that of the four licensing objects is the prevention of a public nuisance. In this regard there was, as he put it, a massive overlap between the two regulatory regimes. The licensing statement of Brent London Borough Council provides that the planning department must be consulted. Given that the planning department had not raised objections to the extended licensing hours, then it was clear that the attitude of the licensing authority was a material consideration which should have been given proper consideration by the inspector. He had failed to consider that the licensing authority is a panel of local councillors who are local people with local knowledge and who would be aware of any concerns about noise nuisance, more so than the inspector. Moreover, the inspector had not, it appeared, made a site visit in the early hours of the morning.
18. Again I cannot accept Mr Stebbings' submission. As he quite rightly recognised, the planning and licensing regimes are separate. The legal considerations driving them are different, although there may be some overlap. The crucial point, however, is that the inspector in this case was quite obviously aware, given paragraph 7 of his letter which I have quoted earlier, of the attitude of the licensing authority. He clearly took that into account. His decision letter cannot be attacked on the basis that he has failed to take into account a material consideration.
19. In all I find that the inspector's decision letter is unimpeachable. He considered the evidence, he applied the relevant planning policies and, as in all such cases, it was up to him to apply planning judgment. This court will not interfere with matters of planning judgment. I refuse to quash the inspector's decision.
20. MR JUSTICE CRANSTON: Thank you. Is there anything more?

21. MR FLANAGAN: There is an application for costs from the Secretary of State. A costs schedule hopefully made its way to yourself yesterday and to my learned friend. I have a spare copy.
22. MR STEBBINGS: I have not seen the costs schedule, my Lord.
23. MR JUSTICE CRANSTON: I do not think I have it.
24. MR STEBBINGS: I do not know if my Lord has a copy of the costs schedule.
25. MR JUSTICE CRANSTON: (same handed) I have the total number, which is £5,560. Is that right?
26. MR FLANAGAN: It is. I will hand over the redacted version to my learned friend.
27. MR JUSTICE CRANSTON: Mr Stebbings?
28. MR STEBBINGS: My Lord, the only comment I would have at first glance is the grades are not set out on the costs schedule as they should be. The rates obviously go with the grades and unless we know the grades we cannot say whether the rates are correct. It is a local council obviously and their rates are slightly different to the solicitors' guideline rates, as set out by the Supreme Courts Costs Office.
29. The only other thing I would say, my Lord, and perhaps it should be clarified further, is that attendance at hearing is six hours. We certainly have not been here six hours. Other than that, my Lord, I do not seek to go behind work done on the documents. They seem fairly reasonable in the round. They are the only two issues I would raise, my Lord.
30. MR FLANAGAN: For the six hours of attendance at hearing, I certainly accept that that can go down to one and a half hours. Therefore, £960 is reduced then, on an hour and a half's basis, to £240, which means that £720 comes off the total. It is £5,560 reduced to £4,840.



31. Regarding the other point raised, in defence of the grades I am instructed that the two solicitors on the £200 rate are both managers and therefore qualify as grade A solicitors, and the other two are not and therefore would be grade B solicitors. Again I say £160 an hour is reasonable.
32. MR STEBBINGS: I do not take issue with that.
33. MR JUSTICE CRANSTON: You can have those costs. Thank you, Mr Stebbings, you did your best.