

AAH PHARMACEUTICALS, WEST AVENUE, BUTT LANE
AAH PHARMACEUTICALS. 12/00652/FUL & 13/00013/207C2

The Application is for full planning permission to retain the use of the site as an industrial warehouse and distribution centre without complying with condition 16 of planning permission 05/00313/FUL which granted full planning permission for an industrial warehouse and distribution centre. Condition 16 places restrictions on the hours that delivery and collection vehicles can access and leave the site and is worded as follows:-

Delivery and collection vehicles shall not access or leave the site between the hours of 2300 and 0700 hours other than for a period of 3 months from the commencement of operations at the premises, a date which shall be agreed with the Local Planning Authority beforehand, during which period no more than 12 HGV movements per hour shall take place between the hours of 0500 and 0700 hours.

The site lies within the urban area as defined on the Local Development Framework Proposals Map.

The statutory determination period for this application expires on 14 February 2013.

RECOMMENDATION

PERMIT subject to the following conditions:-

- (i) The impact of noise associated with operations from the site shall be controlled in accordance with procedures contained in the approved Environmental Noise Management and Control Scheme, prepared by Advance Environmental and dated 18 December 2009, for a temporary period of 6 months from the date of this decision. At the end of the above 6 month period no delivery and collection vehicles shall access or leave the site between 2300 hours and 0700 hours on any day, unless consent has been obtained in the interim for continued access to and from the site by delivery and collection vehicles during these hours.
- (ii) Within one month of the date of this permission the method of assessing noise impact, should be submitted for approval, and that the agreed assessment should then be undertaken and submitted to the LPA within five months from the date of this permission.

Reason for Recommendation

The site is located close to residential properties and there is the potential that delivery and collection vehicles in the night-time period would result in loss of amenity due to noise disturbance associated with activities on site and vehicle movements at the Linley Road/West Avenue junction. In the absence of a Noise Assessment that demonstrates that the HGV movements do or do not cause an unacceptable loss of residential amenity it is not considered that either a recommendation of refusal or open ended approval can be advanced. As such it is recommended that a further temporary consent be granted that allows the business to operate between 2300 and 0700 hrs to enable a Noise Impact Assessment to be undertaken.

Proposed Statement as to How the Local Planning Authority Has Worked With the Applicant in a Positive and Proactive Manner in Dealing With This Application

The applicant's agent has been advised of the issues of concern arising from the application and given the opportunity to provide evidence in the form of a Noise Impact Assessment during the consideration of the application, but such evidence has not been provided. The temporary consent provides the opportunity for the applicant to demonstrate that HGV movements during the night-time period would not result in an unacceptable loss of residential amenity in recognition of the support that the National Planning Policy Framework gives to existing businesses.

Policies and Proposals in the Approved Development Plan Relevant to This Decision:-

West Midlands Regional Spatial Strategy 2008 (WMRSS)

Policy QE3: Creating a high quality built environment for all

Staffordshire and Stoke-on-Trent Structure Plan 1996 – 2011 (SSSP)

Policy D2: The design and environmental quality of development
Policy E7: Existing industries

Newcastle-under-Lyme and Stoke-on-Trent Core Spatial Strategy 2006-2026 (adopted 2009) (CSS)

Policy SP2 – Spatial Principles of Economic Development

Policy ASP5 – Newcastle and Kidsgrove Urban Neighbourhoods Area Spatial Policy

Newcastle-under-Lyme Local Plan 2011

Nil

Other Material Considerations include:

National Planning Policy

National Planning Policy Framework (March 2012)

Planning for Growth – Ministerial Statement March 2011

Circular 11/95 The use of conditions in planning permissions

Relevant Planning History

The planning permission to which this application relates was issued in 2007 (05/00313/FUL). A subsequent application (10/00012/FUL) for the variation of condition 16 of that permission which allowed delivery and collection vehicles to access the site at all times was permitted for a temporary period of 12 months from the date of the permission, 19 March 2010, after which time no delivery and collection vehicles should access or leave the site between 2300 hours and 0700 hours on any day.

Views of Consultees

Kidsgrove Town Council have been consulted and having not responded by the due date must be assumed to have no observations to make on this proposal.

The **Environmental Health Division** objects to the application indicating that a noise impact assessment is required to assess the likely impact of HGV movements during the night on the residents of Linley Road and Linley Hall and that noise mitigation measures/management measures are identified in order to safeguard existing residential amenity.

Representations

Nine letters of objection, including letters from Joan Walley MP, Cllr Kyle Robinson and Cllr Silvia Burgess, have been received raising the following concerns:-

- The reasons for placing the condition on the application still stand. Safeguards, in the form of the strict time restrictions are required to avoid disturbance to residents.
- Noise, vibration and headlights from lorries exiting from West Avenue result in sleep disturbance.
- The company is currently breaching the condition.
- Concern that vehicle movements could increase.
- Assessment required of the impact of this proposal on the existing highway conditions and the risks posed in light of extra traffic on the road from the new housing estate.

Applicant/Agent's Submission

A supporting letter has been submitted the main points of which are summarised below:

- The site is within an established employment area and the use is entirely appropriate. The applicant employs a number of local people and is wholly sustainable.
- The assessment during the period when condition 16 was varied (as approved by application 10/00012/FUL) concluded that the Noise Management and Control Scheme was entirely successful and accordingly it is wholly appropriate that the application is granted. To require an additional Noise Impact Report is entirely disproportionate.

In addition a report entitled "Assessment of the Potential Environmental Noise Impact from the Operation of a Warehouse and Distribution Centre by AAH Pharmaceuticals Ltd" has been submitted which was prepared in connection with application 10/00012/FUL.

Further correspondence has been received which confirms the following;

- Since opening in 2006 the site has had vehicle movements in the period 2300 -0700hrs
- Typically there are around 10 delivery vehicles arriving between 0500-0700hrs.
- Typically nine vehicles depart between 0500- 0715 hrs and 14 returning between 2300-0700hrs.
- The vehicle movements up until six months ago were greater.
- 24hr operation to service the company's current customers is essential, as order and supply patterns force them to dispatch mostly during the evening. This is not likely to reduce in future, more likely traffic movements would increase.
- They are unaware of any complaints made directly to site or otherwise and therefore no local monitoring has been found to be essential.
- Approximately 3 years ago the site had an unannounced visit from an Environmental Health Officer who indicated that some noise monitoring would be undertaken and they would be advised if there was a problem, no further contact was made.
- Linley Road has always been a main arterial link between A34, A50 and A500 the main routes through Stoke. The company is located on a busy industrial estate with many vehicle movements outside of their own. Linley Road is also the most popular "escape" route in the event of a problem on the M6 between J15, 16 and 17 which arise frequently.

All documents are available to view at the Guildhall, Kidsgrove Service Centre and on www.newcastle-staffs.gov.uk/planning/aahpharmaceutical

Key Issues

This is an application to remove a condition of planning permission 05/00313/FUL. The Authority has a number of options. If it considers that the original condition should remain it should refuse the application, and if it considers that an amended condition is appropriate then it should approve the application subject to the amended condition, or permit without a replacement condition.

At the time that planning permission for the proposed AAH warehouse and distribution centre was considered the issue of residential amenity was addressed. Particular consideration was given to night time activities associated with the development and an Acoustic Survey was requested. The submitted information provided calculations of the likely noise levels during the night at the nearest residential properties and this report concluded that without the introduction of appropriate mitigation the proposal was likely to result in complaints from the occupiers of these dwellings. These conclusions, however, were based upon noise prediction modelling and no noise monitoring had been undertaken.

In view of this, condition 16 was imposed to enable the company to operate at in the early morning for a three month period to allow monitoring to take place. At the end of the three month period the condition prohibited delivery and collection vehicles accessing and leaving the site between 2300 and 0700 hours.

The effect of a refusal of this application would therefore be that no delivery and collection vehicles could access or leave the site between the hours of 2300 and 0700 hours without being in breach of planning control.

In 2010 an application (10/00012/FUL) was received which sought to vary condition 16 by removing the hours restrictions and replacing them with a requirement that the operations from the site should be controlled in accordance with procedures contained in an Environmental Noise Management and Control Scheme submitted with that application, which set out procedures to be followed in the event of complaint. The

application was also supported by a Noise Impact Assessment with measured noise levels from two properties and concluded that there was a marginal likelihood of complaints due to noise from the activities at the site.

The variation to the condition sought by the applicant at that time was accepted by the Local Planning Authority but only for a temporary 12 month period (19 March 2010 to 18 March 2011) after which no delivery and collection vehicles should be accessing or leaving the site between 2300 hours and 0700 hours on any day.

It is now known that the company has not operated in accordance with condition 16 since the site opened (which the applicant indicates was 2006). Notwithstanding this the Council had not received any complaint about operations at the site or in relation to disturbance from vehicles movements associated with the company on the highway network before the application was submitted. In addition the applicant has indicated that they have no record of complaints being received at the site either.

However the representations received from residents of Linley Road indicate that the delivery and collection vehicles associated with the business and using the West Avenue/ Linley Road junction are causing sleep disturbance. Such concerns have been expressed by residents to the Environmental Health Division when they have been investigating noise from other activities and sources in the locality and for this reason a Noise Impact Assessment has been requested to enable the impact of the noise from vehicles at the West Avenue/Linley Road junction to enable a proper consideration of this issue. The applicant, however, has not been in a position to provide the Assessment as requested but has stressed the importance of a 24 hour operation to the business. Your officer is therefore not able to recommend removal of the condition.

Whilst the concerns of the residents are noted, in the absence of an Assessment that demonstrates that noise arising from the vehicle movements directly associated with the business is causing unacceptable loss of amenity there is insufficient evidence to support a refusal of the application on the grounds of impact on residential amenity, or indeed the taking of enforcement action. In addition the importance of supporting existing business in the interests of the economy as set out of the national and local policy must be recognised. For these reasons it is considered that a further temporary consent that enables the business to receive and make deliveries between 2300 and 0700 hrs is recommended for a six month period.

In an attempt to avoid the same situation arising again a condition is recommended that requires the applicant to submit for approval the method of assessing noise impact, within one month of the date of the permission, and that the agreed assessment should then be undertaken within five months of the date of the decision. This would enable a further application to remove or vary condition 16 of planning permission 05/00313/FUL to be submitted with the assessment results before the temporary consent expires.

Representations received express concern about the impact of the proposal on occupiers of the new residential development off West Avenue. The concern expressed by the Environmental Health Division relates to the use of the junction of West Avenue and Linley Road by HGVs, as set out above. This is a considerable distance from these properties and as such will not give rise to disturbance to the occupiers. The delivery and collection vehicles from AAH are prevented from travelling along Old Butt Lane to Congleton Road by a Traffic Regulation Order and as such they will not pass the new development. It is therefore considered that no material disturbance would arise as a consequence of early morning vehicle movements as proposed. In addition it is not considered that the proposal will give rise to highway safety concerns for the occupiers of this residential development as the development in question involved the construction of a new roundabout which was designed to provide a turning facility for traffic generated by the employment uses on West Avenue and as such has the capacity to accommodate any additional traffic associated with this application.

If members resolve, contrary to the recommendation given, to refuse the application the question then arises as to whether or not it would be expedient to take enforcement action with respect to the current breach of planning control, and the Committee may wish to consider that issue at the same meeting. This is addressed below.

The issue of whether it is expedient to take enforcement action, and the nature of that action

Firstly the LPA must be satisfied that it has sufficient evidence of the breach so that the expediency of serving a notice can be explored. The evidence available is the indication from the applicant that vehicles movements have been taking place in the period 2300-0700 hrs since 2006 and they give an indication of the number of

vehicle movements involved. In addition the representations received on the planning application indicate movements in the night-time period. Finally an officer has observed vehicle movements before 0700 hours on one day. It is considered that is sufficient evidence to enable the LPA to consider the issue of expediency.

Whilst there is evidence that the condition is not being complied with, there is no substantive scientific evidence to demonstrate that the vehicle movements associated with this development are causing sleep disturbance (in the context of other "background" noise) such as to justify the taking of enforcement action. If the Council takes enforcement action it will have to demonstrate such harm, but it cannot do so at present. Your Officer's first recommendation accordingly would be to defer any decision on enforcement to allow an assessment to be undertaken.

In deciding whether it is expedient to take enforcement action, the Local Planning Authority (LPA) is required to have regard to the provisions of the approved development plan for the area and to any other material considerations. Guidance on the process to be followed is provided within Circular 10/97. The report above refers to all the relevant provisions of the development plan and to other material considerations.

If the Committee's decision were to refuse the application and also to resolve to take enforcement action, the Committee could specify if it wishes the form of enforcement action, what 'steps' are required by the Company to be taken and critically by when.

With respect to the **type of enforcement action** the normal position in such resolutions is to leave that decision to the Head of Central Services, but given the potential implications of taking action in this case – with respect to the jobs of the employees of the firm involved - your officers would ask that members make clear their wishes in this respect.

There are essentially two choices – the service of either a Breach of Condition Notice or alternatively of an Enforcement Notice with respect to the failure to comply with condition. An Enforcement Notice is subject to a right of appeal to the Planning Inspectorate and in the course of such an appeal the appellant can advance a number of different grounds of appeal, as well as asking for the merits of the matter to be considered. Members should note that prosecution for non-compliance with an Enforcement Notice is a fine in the Magistrates Court of up to £20,000 and a much larger fine in the Crown Court. In determining the level of the fine the Court will have regard to the financial benefit accrued from the offence.

There is no right of appeal to the Secretary of State against a Breach of Condition Notice, but the validity of such a Notice, or the validity of the LPA's decision to serve it, may be challenged by application to the High Court for judicial review. Members should note that the potential fine for failure to comply with a Breach of Condition Notice is up to £1,000 – a much lower figure.

Whilst in no way seeking to minimise the importance of residential amenity (the issue in this case) your Officer has to observe that the breach of planning control here has, it would now appear, been quite a longstanding one (the firm indicating that there has been a breach of the condition since 2006) and there is no immediate public safety or similar matter which requires urgent action to be taken by the Local Planning Authority.

The applicants will it should be noted have a right to appeal against the refusal of their planning application. If they exercise this right of appeal there is then the potentially overlapping jurisdiction of the courts in dealing with prosecutions of a contravention of a Breach of Condition Notice and that of the Secretary of State in determining an appeal to discharge the same condition.

On the basis of the above your officers' view is that the Council should proceed, if the Committee agrees to take enforcement action, to use an Enforcement Notice, rather than a Breach of Condition Notice.

Insofar as the **required steps** are concerned, the Local Planning Authority can only at most require the condition to be complied with. It can however choose to 'underenforce' if it so wishes. If for example the Committee were of the view that vehicle movements at some part of the period between 2300 hrs and 0700 hrs would be acceptable, or perhaps that there is no objection to vehicles entering the site as opposed to leaving it, the Committee would need to indicate this now, as this could still be taken into account in the framing of the Notice.

The most critical decision is what **period for compliance** is to be sought. There is little doubt that complying with this condition would appear to have significant implications for the Company concerned. As indicated in

the applicant's/agent's submission above the Company have indicated that 24hr operation to service the Company's current customers is essential, as order and supply patterns force them to pick and dispatch most of their volumes during the evening. The Company have not to date indicated what they consider the consequences of an Enforcement Notice would be, and their comments are being sought. Given the potentially significant implications for the Company of this restriction, a significant period of time – say 12 months – would in your Officer's view be appropriate, so that the Company could make appropriate alternative arrangements.

Members should note that a period of not less than 28 days beginning with the date of service of the Notice can be specified as the compliance period within a Breach of Condition Notice although there the discretion to extend that by whatever further period the LPA may consider appropriate. An Enforcement Notice does not take effect until after 28 days from the date it is served (within which period an appeal can be lodged and the Notice is then held in abeyance until that appeal is determined).

Any decision to take enforcement action would need to be justified and this justification or reason for action would in turn need to appear on the face of the Enforcement Notice. Any resolution to take enforcement action would need to make this reason clear.

Background Papers

Planning file

Planning documents referred to

Date Report Prepared

24 January 2013