

## Economy, Environment and Communities, Development Management

### Planning Committee

Report of Head of Planning and Building Control on 26 May 2022

**Plans List Item Number: 3**

### Reason for bringing to committee

The Head of Planning and Building Control considers that this application raises matters that should be considered by Committee on the basis of an officer recommendation to approve a variation to a planning condition imposed on permission granted at appeal by a Planning Inspector. The appeal related to the Planning Committee's previous authorisation to serve an enforcement notice in relation to the site.

### Application Details

**Location:** BRUSH GARAGE, 86, LICHFIELD ROAD, WALSALL, WS4 1PY

**Proposal:** SECTION 73A: APPLICATION TO VARY CONDITION 2 (NOISE) OF ALLOWED APPEAL DECISION APP/V4630/C/18/3197762 DATED 12.07.2019 FOLLOWING ENFORCEMENT NOTICE E09/0717 ISSUED 05.02.2018.

**Application Number:** 22/0127

**Case Officer:** Sally Wagstaff

**Applicant:** Spooner Architects

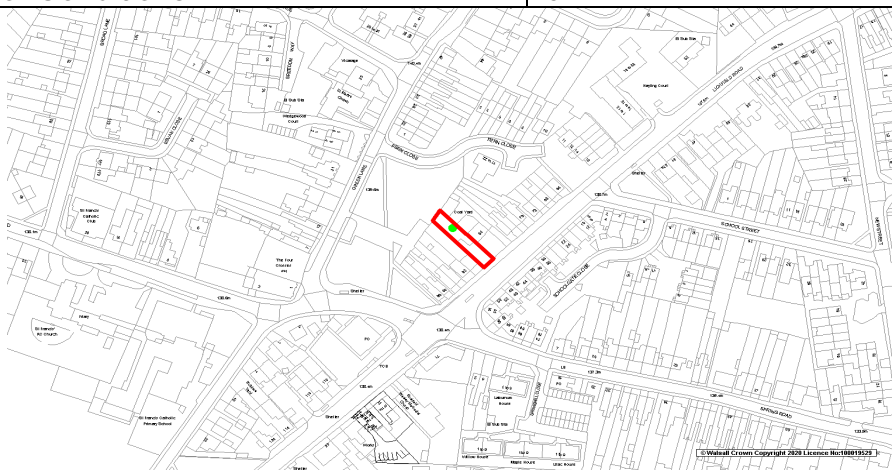
**Ward:** Rushall-Shelfield

**Agent:** Spooner Architects

**Expired Date:** 19-Apr-2022

**Application Type:** Section 73: Removal or Variation of Conditions

**Time Extension Expiry:** 11-May-2022



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### Recommendation:

1. Planning Committee resolve to Delegate to the Head of Planning & Building Control to Grant Planning Permission Subject to Conditions

## Proposal

This Section 73a application seeks to vary condition No.2 of the planning permission granted at appeal on 12th July 2019 under reference APP/V4630/C/18/3197762 in relation to noise.

The applicant states that a '5 dB limit' set out in condition 2 of the Inspector's decisions cannot be achieved for the permitted operations on the site. Consequently, the applicant has carried out acoustic measures to the workshop in the form of proprietary sound absorbent panels applied internally to the roof area. This is detailed and assessed in a supporting report prepared by an acoustic consultant, and constitutes alternative means to address potential noise impacts.

Rockfon Eclipse absorbent panels have been installed on 500mm hangers to the underside of the pitched composite roof with a total 28.8m<sup>2</sup> roof area coverage:

- 4no @ 2360mm x 1160mm
- 9no @ 1706mm x 1160mm

## Site and Surroundings

The site is situated on the north western side of Lichfield Road (A461 Strategic Highway Network) just to the north of the traffic light junction with Mill Road and Spring Road.

The site includes premises formerly known as Brush Garage, accessed from Lichfield Road and bordered to the north of the site by a modern residential property set back from the road with a large detached garage set to the rear. To the south it is bordered by a two storey premises with a retail shop at ground floor on the frontage and residential accommodation at first floor and to rear at ground floor.

Immediately to the rear of the site (west) is an area of open space owned by the Council. This was previously the site of a neighbourhood office building and includes an area used for public parking.

Whilst the site lies adjacent to predominantly residential properties on either side, it also lies just outside of Shelfield local centre (10m away), which sits around the traffic light junction and is therefore located in a mixed residential-commercial area, with a convenience shop, veterinary practise, takeaways, barbers and hairdressers in close proximity along with modern flats on the opposite side of Lichfield Road to the south.

## Relevant Planning History

10/0211/FL - Re-roofing, repair and alterations to rear element of existing garage building; minor extensions to front of the building, formation of car parking area fronting Lichfield Road and formation of hard standing and access at rear.

Granted Subject to Conditions 23rd August 2010.

E09/0717 – Without planning permission use of the site as a tyre sales and fitting premises including wheel balancing and alignment, tyre storage facility, tyre jetting/washing facility, office and customer sales area. Enforcement Notice served on 5th February 2018 and came into effect on 13th March 2018. The notice was subsequently quashed, and planning permission granted at appeal on 12th July 2019 under reference APP/V4630/C/18/3197762. This appeal decision included the following noise condition the subject of this current application:

*“2. The use of the land hereby permitted shall not take place on the land until a noise survey has been undertaken and a noise report prepared, in accordance with a methodology set out in BS 4142:1997, and both the noise survey and the noise report have been submitted to the Local Planning Authority for their written approval. The noise report shall detail all findings and shall provide details of recommendations for mitigation measures to ensure that noise from commercial activities on the land shall not at any time exceed 5 dB above background noise levels at nearby noise sensitive locations. The use of the land hereby permitted shall not take place until the noise report, noise survey and mitigation measures required by condition two have been approved in writing by the Local Planning Authority. The mitigation measures shall be carried out before the use hereby permitted commences and shall thereafter be retained.*

*Reason: To safeguard the amenities of local residents.”*

20/0415 - Section 73 Application: Variation of condition 2 (Appeal reference APP/V4630/C/18/3197762) regarding noise. Refused 23rd June 2020 on the following grounds (summarised):

- 1. Failed to provide an appropriate assessment to be made of the noise or associated noise impacts of the consented use.*
- 2. Failed to provide appropriate evidence to demonstrate that the proposal would not result in significant additional detrimental harm to neighbours' amenity.*

## **Discharge of Conditions**

Conditions 3 (refuse) and 5 (parking) have been discharged by the Local Planning Authority on 22nd December 2021 following the receipt of satisfactory details required.

## **Relevant Policies**

### **National Planning Policy Framework (NPPF)**

**[www.gov.uk/guidance/national-planning-policy-framework](https://www.gov.uk/guidance/national-planning-policy-framework)**

The NPPF sets out the Government's position on the role of the planning system in both plan-making and decision-taking. It states that the purpose of the planning system is to contribute to the achievement of sustainable development, in

economic, social and environmental terms, and it emphasises a “*presumption in favour of sustainable development*”.

**Key provisions** of the NPPF relevant in this case:

- **NPPF 2 – Achieving sustainable development**
- **NPPF 6 – Building a strong, competitive economy**

On **planning conditions** the NPPF (para 56) says:

Planning conditions should be kept to a minimum and only imposed where they are

necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early

is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is a clear justification.

On **decision-making** the NPPF sets out the view that local planning authorities should approach decisions in a positive and creative way. They should use the full range of planning tools available and work proactively with applications to secure developments that will improve the economic, social and environmental conditions of the area. Pre-application engagement is encouraged.

### **National Planning Policy Guidance**

On **material planning consideration** the NPPG confirms- planning is concerned with land use in the public interest, so that the protection of purely private interests... could not be material considerations

### **Reducing Inequalities**

The Equality Act 2010 (the ‘2010 Act ’) sets out 9 protected characteristics which should be taken into account in all decision making. The **characteristics** that are protected by the Equality Act 2010 are:

- age
- disability
- gender reassignment
- marriage or civil partnership (in employment only)
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

Of these protected characteristics, disability and age are perhaps where planning and development have the most impact.

In addition, the 2010 Act imposes a Public Sector Equality Duty “PSED” on public bodies to have due regard to the need to eliminate discrimination, harassment and victimisation, to advance equality and to foster good relations. This includes removing or minimising disadvantages, taking steps to meet needs and encouraging participation in public life.

Section 149(6) of the 2010 Act confirms that compliance with the duties may involve treating some people more favourably than others. The word favourably does not mean ‘preferentially’. For example, where a difference in ground levels exists, it may be perfectly sensible to install some steps. However, this would discriminate against those unable to climb steps due to a protected characteristic. We therefore look upon those with a disability more favourably, in that we take into account their circumstances more than those of a person without such a protected characteristic and we think about a ramp instead. They are not treated preferentially, because the ramp does not give them an advantage; it merely puts them on a level playing field with someone without the protected characteristic. As such the decision makers should consider the needs of those with protected characteristics in each circumstance in order to ensure they are not disadvantaged by a scheme or proposal.

### **Development Plan**

[www.go.walsall.gov.uk/planning\\_policy](http://www.go.walsall.gov.uk/planning_policy)

### **Saved Policies of Walsall Unitary Development Plan**

- GP2: Environmental Protection
- ENV10: Pollution
- JP8: Bad Neighbour Industrial Uses

### **Black Country Core Strategy**

- EMP1: Providing for Economic Growth

## **Consultation Replies**

**Environmental Protection** – No objection subject to conditions to secure additional acoustic absorption to the building, along with further controls on the use of equipment and operations taking place internally and external to the application building in order to safeguard amenity.

## **Representations (*Officer comments in italics*)**

### **9 x objections from nearby occupiers on the following grounds:**

- Unclear whether internal insulation has been installed (*sound absorbing panels have been installed*);
- Has right of way to their own property (*this is a civil matter*);
- BS4142 assessment required;

- Applicant should adhere to the 5dB limit;
- Impacts to amenity from noise arising;
- Object to condition No.5 and highway safety (*this condition has already been discharged*);
- Former Brush Garage and TV repair shop 17 years ago resulted in highways issues (*noted*);
- Will lead to parking on double yellow lines (*Condition No.5 has already been discharged and this would be a matter for highway enforcement*);
- Decreased house values (*this is not a material planning consideration*);
- Tyre storage and space in workshop;
- Concerns over Council handling of this application (*this application has been assessed by professional and suitably qualified and experienced Council officers against local and national planning policy and guidance, and judged on its own merits. This application has been put before Members of the Planning Committee to seek their resolution in line with the Council's constitution*);
- Involvement of Councillors and previous Local Government Ombudsman decision (*Any Members affected by the Ombudsman decision will be reminded of the outcome of the LGO decision along with any resulting need to not have any dealings with the application, and to leave the room and not participate in that item at Planning Committee*);
- Does not deal with noise breakout including when workshop doors left open;
- Contrary to Planning Policy;
- On-site assessment from neighbours garden has not taken place (*the proposed variation of condition does not require this to be carried out*);
- Not in spirit of Inspectors decision;
- Submitted report cannot be relied upon (*the report has been carried out and signed off by a suitably qualified person*);
- Previously proposed variation of condition was refused (*noted*);
- Permitted use as small garage workshop lost 10 years ago;
- Sound-absorbing panels have not been independently checked and verified by a qualified person;
- Reference to Human Rights Act;
- Site now under different ownership (*this does not prevent the determination of this current application*);
- Two independent reviews of the submitted survey carried out on behalf of neighbour;
- Provides a history of the site (*noted*);
- Recognises the incorrect reference to the 1997 standard and explains the purpose of BS4142:2014 (*noted*);
- Refers to Birmingham City Council noise guidance (*this relates to another Council's guidance which cannot be taken into account in the determination of this application*); and
- A noise impact assessment would identify whether noise level too high and explains that it would recommend any necessary noise mitigation or to identify an alternative site location for the operation.

#### **Councillor Worrall (Ward Member):**

- Cannot restrict noise levels to the 5 dB maximum specified by the inspector given the limitations of the current building;
- Unacceptable to seek increase in permitted levels of noise in absence of



- necessary noise survey;
- Does not deal with noise break out;
- Mitigation unlikely to avoid noise through open front entrance open; and
- 5 dB limit set by Inspector is not negotiable.

## Determining Issues

- Whether the variation of Condition No.2 is acceptable
- Updating of Conditions
- Other Matters

## Assessment of the Proposal

### Whether the variation of Condition No.2 is acceptable

The Council's Environmental Protection Team confirm that the version of British Standard BS 4142 referred to in condition No.2 attached to the permission had already been rescinded and superseded at the time of its application at appeal in 2019. Furthermore, the application of British Standard BS 4142 within the current condition does not in itself provide for the detail of mitigation measures to be undertaken. This is pertinent on the basis that the standard does not provide for any fixed sound level to be achieved. Its underlying approach is formed on using exceedances over background noise which is inevitably variable, and giving important weight to context considerations. It cannot therefore simply provide for a correct and robust planning condition. This is said to be recognised by practitioners as part of modern convention. Even if a defined Background Noise Level could nonetheless be settled, the limitations set in the current condition are tantamount to prohibiting operation of the business; this is in conflict with the spirit of the Inspector's decision and the required tests of the NPPF.

The applicant's acoustic consultant who acted in relation to the previously refused application reference 20/0415 also expressed that "*.. the noise 'level' set was so low that it meant the permission could never be implemented.*" Notwithstanding the shortcomings of the previously refused application, this position helps to demonstrate an agreement between the Council and applicant's experts on the issues around the application of the current condition.

It should also be set out here as a context consideration that residential occupiers in the immediate vicinity are already subject to a relatively high level of noise and possible associated disturbance compared to what would be expected on a residential estate for example, due to their proximity to Lichfield Road (the A461 Strategic Highway Network). Furthermore, the application site has itself been in some form of commercial use for between 17 to 30 years based on details contained within representations and based on anecdotal evidence of Council officers. The Inspector also agreed that the site had operated as a garage business (which was not subject to restrictions) and shop/storage use as at 2008.

Safeguarding local amenity should therefore be proportionate. It is understood that the assessment of this proposal must also be carried out in the spirit of the

Inspector's decision, which essentially concluded that commercial operations on this site are acceptable, subject to the inclusion of conditions to protect the amenity of local residents.

Notwithstanding the details agreed by parties at the time of the appeal, given the above position, it is considered reasonable to explore an alternative approach to protect neighbours amenity as proposed by the applicant in this current application. It is argued that there are a number of methods and controls that can be secured by way of planning conditions to safeguard residents' amenity. The Local Planning Authority (LPA) has a duty to consider an application lodged before them. The inclusion of conditions attached to a decision made by the Planning Inspector does not prevent the LPA from considering alternative approaches put forward by an applicant to aim to secure an acceptable level of amenity for nearby occupiers. This current application must therefore be judged on its own merits, and has also been considered, and assessed, in the spirit of the appeal decision.

The applicant's reverberation assessment submitted in support of this current application has been carried out, and signed off, by a suitably qualified person, and explains that an assessment has been made following the installation of proprietary sound-absorbent panels to the roof area of the workshop by the applicant, and compared against initial results prior to their installation.

It also concludes that the presence of tyres within the workshop helps to provide additional sound absorption. Comments made by nearby occupiers on the number of tyres stored within the building are noted, but there is no evidence to demonstrate that this level is not required to facilitate the permitted use or that sufficient space does not remain to operate the permitted use.

The applicant's submitted assessment demonstrates a notable improvement in the measured reverberation time in the workshop when stocked with a notional quantity of tyres and taking account of the installed absorbent panels of RT 0.6s, from the original measured RT 1.03. It also discusses the installation of a further 50m<sup>2</sup> of Class C absorbent panels to the workshop area that could be accommodated in order to achieve a reduced reverberation time of at least 0.5s, which is equivalent to a standardised living room.

The Council's Environmental Protection team agrees with the findings of the applicant's submitted survey including the option for additional absorbent panels within the building as part of best practice in terms of noise control and has suggested the inclusion of planning conditions to reflect this.

Turning to the comments made by two independent experts instructed by a local resident, they conclude (summarised):

- Assessment should be carried out to establish background noise level;
- Consider internal partitions and localised sound absorption;



- Consider use of quieter tools; and
- Proposed reliance on the submitted reverberation assessment not acceptable.

These opinions have been duly considered, along with other documents that have been submitted in response to this current application, and responses in short are provided as follows:

1. Neither Opinion makes mention that the version of British Standard BS 4142 had already been rescinded and superseded at the time of its application in 2019.
2. Acoustic assessments were carried out prior to submission of the current planning application to assess compliance with the planning condition. Understandably, Blue Acoustics and TGS Acoustics Ltd. who have provided opinion on behalf of an objector may not be privy to this work as it does not form part of this application.
3. Blue Acoustics and TGS Acoustics Ltd. were apparently not aware of the overt intentions underlying the assessment that is now provided in support of this application by Messrs Soundtesting.co.uk Ltd. Frankly this is not well expounded in the planning application. On a point of note and fact, neither Blue Acoustics nor TGS Acoustics Ltd. have consulted Environmental Protection concerning this application.
4. There is seemingly an inherent over-sight, or else failure to recognise, the manner in which tyre-fitting facilities in practice are operated. Attention is drawn to references on the acoustic modelling of the building. A reference to noise control measures is made by Blue Acoustics as follows: *"application of suitable cavity ceiling and independent stud wall systems designed to reduce the noise breakout and the noise impact at the nearby dwellings"*. This is a fruitless endeavour given the 'drive-in, drive-out' nature of activities and the open-door format of this type of commercial business, along with the limitations of the building size, and the practicalities of its operation. The opinion does however note that *"Should it be deemed impossible to attenuate the noise sufficiently through building insulation alone then internal partitions and localised sound absorption may be considered"*. [The size and nature of the premises does not lend itself to internal partitioning as this cannot have meaningful effects without compromising the working area in terms of access, siting of equipment, storage of goods and potential safety considerations.]
5. As already highlighted, the reverberation assessment was supported by the Council's Environmental Protection team for the intended purposes and involved discussions with the applicant's acoustic consultant prior to and after site work was commissioned, and reporting finalised.
6. There is no consideration or recognition that the extant noise condition fails to meet required planning tests or whether it could in practice be achieved.

On balance, taking account of the Council's expert advice, the representations received and the material planning considerations of this proposal, it is considered

acceptable to vary condition No.2 along with the above mentioned further changes to conditions / additional conditions to secure an acceptable level of amenity to nearby occupiers. This is considered to be in the spirit of the Inspector's decision and would not therefore undermine the outcome of the 2019 appeal.

## **Updating of Conditions**

Under the provisions of a Section 73a application, which is essentially a replacement planning permission, it is possible to update conditions where necessary and the following sets out a summary of the changes considered necessary in this instance:

*Condition 1 (Permission Time Limit)* - use to begin with 3 years of 12th July 2019. Permission expires on 11th July 2022.

*Condition 2 (Noise Survey)* – this condition has been updated taking account of consultation comments as set out in the report.

*Condition 3 (Refuse Collection)* – agreed details show bins to be stored in the building and returned after collection. This condition was discharged on 22nd December 2021. This condition has therefore been updated to reflect the agreed details.

*Condition 4 (Roller Shutter)* – No details required to be submitted and the approved plan shows it to be filled in. Condition remains unchanged.

*Condition 5 (Parking)* - 2 x parking spaces on north-east boundary with remainder of forecourt offering manoeuvring area. This condition was discharged on 22nd December 2021 taking account of comments provided by the Local Highway Authority (LHA), as Council experts in this matter. The LHA considered that the constraints of the site limited the opportunity for more than two parking spaces, and that on balance, whilst some reverse manoeuvring may occur at times the likely infrequent movements and close proximity to the signal junction would allow breaks in traffic flows on the main road to facilitate this. This condition has therefore been updated to reflect the agreed details.

*Condition 6 (Hours of operation)* – Condition remains unchanged.

*Condition 7 (Outdoor restrictions)* - this condition has been updated taking account of consultation comments as set out in the report.

Proposed additional conditions:

*Condition 8 (Equipment)* – this additional condition has been included to provide further control of the equipment associated with the permitted use taking account of consultation comments as set out in the report.

## Other Matters

In terms of the comments made in relation to Human Rights, the proposals set out in the report are considered to be compatible with the Human Rights Act 1998. The proposals may interfere with neighbour's rights under Article 8 of Schedule 1 to the Human Rights Act, which provides that everyone has the right to respect for their private and family life, home and correspondence. Interference with this right can only be justified if it is in accordance with the law and is necessary in a democratic society. The potential interference here has been fully considered within the report and on balance is justified and proportionate in relation to the provisions of the policies of the Development Plan and the NPPF.

## Conclusions and Reasons for Decision

There are no material planning reasons to warrant a refusal of this application and taking into account the above factors it is considered that the application should be recommended for approval.

## Positive and Proactive Working with the Applicant

Officers have confirmed to the applicant's agent that the submitted details are acceptable and no further changes have been requested.

## Recommendation

1. Planning Committee resolve to Delegate to the Head of Planning & Building Control to Grant Planning Permission Subject to Conditions

## Conditions and Reasons

### Original and updated conditions:

1. The use of the land hereby permitted shall begin no later than three years from the date of the Inspector's decision of 12th July 2019.

Reason: To comply with the requirements of Section 91 of the Act.

2a. Notwithstanding the details submitted, prior to the use of the land hereby permitted first coming into use, an additional scheme of acoustic absorption, over and above the existing acoustic absorption scheme, shall be installed to include Class C sound absorbent panels to reduce reverberation time as detailed within the submitted Sound Testing.co.uk Ltd. report (reference 15486 Version 2 Wednesday 3rd November 2021). A validation report of the completed work shall be submitted to and approved in writing by the Local Planning Authority.

2b. The acoustic absorption scheme shall thereafter be maintained, and retained in its entirety for the lifetime of the development. **See note to applicant 1.**

Reason: To safeguard the amenities of local residents.

3. The approved scheme of refuse storage as shown on 'General Arrangement Plan' reference 0919-1 Revision J, received on 21st December 2021, approved by discharge of condition on 22nd December 2021 shall be implemented, before the use of the land hereby permitted commences, and shall be maintained throughout the lifetime of the development.

Reason: To ensure that refuse is properly stored.

4. The use of the land hereby permitted shall not take place until the rear roller shutter door has been removed and the opening infilled with facing materials to match surrounding materials.

Reason: To ensure a satisfactory appearance for the development.

5. The approved car parking and manoeuvring scheme as shown on 'General Arrangement Plan' reference 0919-1 Revision J, received on 21st December 2021, approved by discharge of condition on 22nd December 2021 including demarcation of parking bays, shall be implemented before the use of the land hereby permitted commences, and the parking and manoeuvring area shall not be used for any other purpose at any time, and shall be maintained throughout the lifetime of the development.

Reason: To ensure satisfactory parking and manoeuvring is provided.

6. The use of the land hereby permitted, including collections and despatches from and deliveries to the premises, shall not take place outside the hours of 0800 to 1800 on Mondays to Fridays and 0800 to 1600 on Saturdays, and shall not take place on Sundays and Bank and Public Holidays. **See note to applicant 2.**

Reason: To protect the amenities of neighbouring residents.

7. No jet washing of tyres or vehicles shall take place at any time. No activities or operations associated with motor vehicle tyre fitting, wheel balancing and alignment, and any associated and ancillary work, repairs and operations involving the use of any equipment, plant, machinery and hand-tools powered by compressed air, electricity and any other fuel shall take place external to the tyre-fitting building at any time.

Reason: To protect the amenities of neighbouring residents in accordance with Saved UDP Policy GP2 and the NPPF.

#### **New additional conditions:**

8. Notwithstanding the details submitted, prior to the use of the land hereby permitted first coming into use, details of all plant, machinery and equipment to be used for the purposes of providing compressed air and electricity contained in the tyre fitting building, along with acoustic enclosures, shall be submitted to and approved in writing by the Local Planning Authority. The approved scheme shall be implemented prior to the use of the land hereby permitted first coming into use and shall thereafter be retained as such for the lifetime of the development.

Reason: To protect the amenities of neighbouring residents in accordance with Saved UDP Policy GP2 and the NPPF.

### **Notes for Applicant**

1. The additional installation of acoustic absorption required in condition No.2 should include the covering of the tyre fitting centre floor space with resilient matting so far as is practicable, along with the addition of further internal acoustic absorbent panels to the ceiling, or alternatively provision of suspended space absorbers to the roof space, and application of internal sound absorbent cladding the gables of the building.
2. Bank Holidays and Public Holidays shall be taken to mean: Christmas Day; Boxing Day; New Year's Day; Easter Monday; May Bank Holiday; Spring Bank Holiday; and Summer Bank Holiday.
3. The applicant is required to comply with the requirements of the additional condition No.8 along with all other updated and re-attached conditions originally imposed by the Inspector.

**END OF OFFICERS REPORT**