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Item No: 7.1

Application: 171279

Applicant: BP

Agent: Chloe Ballantine, Rapleys LLP

Proposal: Application for variation of condition 9 (illumination) following grant of planning permission 160608.

Location: BP Eastwood, Eastwood Service Station, Ipswich Road, Colchester, CO4 0EX

Ward: Highwoods (Also affects St. John's)

Officer: James Ryan

Recommendation: Approval

1.0 Reason for Referral to the Planning Committee

- 1.1 This application is referred to the Planning Committee by officers because of the detailed planning and enforcement history attached to the site, and subsequently in the interests of complete transparency in the planning process as planning and enforcement officers have negotiated the compromises that are now proposed herein, but have not resolved all objections; therefore believing that they should be subject to democratic scrutiny via the Planning Committee.

2.0 Synopsis

- 2.1 The key issue for consideration is the impact the variation of condition 9 will have on neighbouring amenity. The situation has been ongoing for some time, but many changes have taken place in this time, following the involvement of our enforcement team.
- 2.2 The current situation, following negotiations, as set out in the proposals now being considered, are considered to be acceptable on their own merits. The application is subsequently recommended for approval.

3.0 Site Description and Context

- 3.1 The site previously had an Esso petrol station on it, but now homes a recently constructed BP petrol station on Ipswich Road. Residential dwellings are located to the North and West. Ipswich Road is located to the eastern boundary and runs broadly north-south. There are residential dwellings located on the opposite site of Ipswich Road facing the site. Myland Hall chase is located directly to the south and a former Police Station is located beyond that.

4.0 Description of the Proposal

- 4.1 The application proposes the variation of condition of condition 9 of 160608 to allow some required lighting on site outside of approved hours. See section 6 for the full wording of condition 9.

5.0 Land Use Allocation

- 5.1 The site is located within the defined settlement limits.

6.0 Relevant Planning History

- 6.1 The application with the most relevance is 160608 which granted planning permission for the redevelopment of the petrol station including a new canopy, car wash, sale building and associated site layout.

6.2 Condition 9 of 160608 states:

The development (including ATM) permitted by this planning permission shall only be illuminated during the opening hours of the premises.

Reason: This is an area where illumination is not common and where unlimited or excessive use of lighting could be detrimental.

- 6.3 It is worth highlighting the reason for the condition. Sometimes it is misinterpreted that conditions set out exactly what is allowed, and that no other alternative would be permitted. This is not the case, conditions are usually used when an issue would need to be carefully considered if it changed. The key words in the reason for this are that it is "...where unlimited or excessive lighting could be detrimental". This does not mean that any lighting will be harmful, just that it needs to be carefully considered and controlled.

7.0 Principal Policies

- 7.1 Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The National Planning Policy Framework (NPPF) must be taken into account in planning decisions and is a material consideration, setting out national planning policy. Colchester's Development Plan is in accordance with these national policies and is made up of several documents as follows below.

- 7.2 The adopted Colchester Borough Core Strategy (adopted 2008, reviewed 2014) contains local strategic policies. Particular to this application, the key policy is "ENV1 – Environment", whilst some regard may be given to "SD1 - Sustainable Development Locations".

- 7.3 The adopted Colchester Borough Development Policies (adopted 2010, reviewed 2014) sets out policies that apply to developments. Specific to this application the central policy is "DP1 Design and Amenity". Reference should also be made to:

DP4 Community Facilities

DP5 Appropriate Employment Uses and Protection of Employment Land and Existing Businesses

DP7 Local Centres and Individual Shops

- 7.4 Relevant Policies from the Emerging Local Plan (2017-2033) include:

SP1 Presumption in Favour of Sustainable Development

ENV1 Environment

8.0 Consultations

- 8.1 The stakeholders who have been consulted and who have given consultation responses are as set out below. More information may be set out on our website.
- 8.2 Environmental Protection - Following the submission of the BP Eastwood Lighting Plan and Protocol submitted 19/12/17 Environmental Protection does not object to the variation. The lighting shall be installed and maintained thereafter in accordance with the BP EASTWOOD SF CONNECT Lighting plan and protocol for access to and egress from the sales building outside of site opening hours.
- 8.3 Highway Authority – No objection to the scheme.
- 8.4 Natural England – No comment.

9.0 Parish Council Response

- 9.1 Non-parished.

10.0 Representations

- 10.1 The application originally included other proposed changes that BP desired, but that have since been negotiated away by planning and enforcement officers as they were deemed unacceptable. The original proposals, including those requests (such as earlier deliveries), resulted in a number of notifications to interested third parties including all neighbouring properties. The Council received 19 representations prior to the application being amended to remove the proposed variation to change to delivery times for newspapers.
- 10.2 Following the applicant amending the application (so that deliveries remain as previously approved), the amount of lighting was reduced, and the proposals now deal solely with condition 9 (lighting), 11 more representations were received. A number of addresses sent more than one representation.
- 10.3 The full text of all of the representations received is available to view on the Council's website and Members are advised to read them prior to the meeting. However, a summary of the material considerations is given below.
- The scheme is harmful to neighbouring amenity and therefore the conditions should not be varied.
 - The conditions were imposed to protect neighbouring amenity so should be retained as imposed.
 - This is a residential area not a commercial area.
 - The staff are noisy as they arrive early and when they leave.
 - The early arrival and late leaving causes significant disturbance to neighbours.
 - The staff arrive way before the other conditions allow – often at 5.30am or earlier and this causes disturbance.

- The lights make the petrol station appear as if it is open and this causes vehicles to pull up to the cones and then turn around when they realize its closed.
- CBC have not enforced the conditions imposed on 160608 and the residents expect CBC to do this.
- Residents deserve their 8 hours of peace.
- The applicants often let the alarm ring causing further disturbance.
- The applicants cannot be trusted to run the site in a manner that is respectful of the residents.
- The opening hours should not be changed.
- The site seems to run ok.
- I have no objection to the light on a timer to allow staff to exit the shop in safety.
- I support the service and the employment it generates but it must not be run to detriment of public amenity.

10.4 Representations were also received from the Highwoods Ward Member Councillor Oxford, and from two Ward Members of St Johns (which is directly opposite on the other side of Ipswich Road), Councillor Smith and Councillor Hogg. Cllr Oxford commented on the 29th of May 2017, stating at that time:

"I strongly oppose any suggestion of removal of the conditions I think they are reasonable given this station is in a dense housing area. The conditions were I stated recently to offer so protection from noise and disturbance etc."

Cllr Hogg said, on the 15th of June 2017, that:

"It is my belief that alterations to the existing conditions with regard to usage, lighting, and delivery times will be further detrimental to the residential amenity of those St John's residents living opposite the service station that I represent. I therefore ask that the views of my residents be respected, and the applications be denied"

On the same day Cllr Smith emailed in to confirm that:

"I support Cllr Hogg's comments".

10.5 It is noted that in addition to the items mentioned above, a number of the representations related to details of what the neighbours perceived to be breaches of planning control by the applicant. All of these were sent to the Enforcement Manager and were investigated at the time.

11.0 Parking Provision

11.1 This variation of condition application has no impact on the parking provision.

12.0 Open Space Provisions

12.1 This variation of condition application has no impact on the open space.

13.0 Air Quality

- 13.1 The site is outside of any Air Quality Management Area and will not generate significant impacts upon the zones.

14.0 Planning Obligations

- 14.1 No Planning Obligations should be sought via Section 106 (s.106) of the Town and Country Planning Act 1990, due to this variation of condition.

15.0 Report

- 15.1 The main issues in this case is whether or not the proposed changes to light are acceptable on their own merits, or if they cause harm to amenity that warrants a refusal of planning permission. The changes relate solely to lighting levels, as everything else remains as previously approved (and beyond the scope of this application).

- 15.2 As background context, it is worth clarifying that the original submission was for more changes than is now being considered. It also originally expanded the conditions being varied to include condition 7, and sought earlier deliveries of newspapers. BP wanted us to allow newspapers to be delivered to the shop from 6.30am onwards (and not from 7am as with the other deliveries). They were doing this without consent once they opened. During this application period the applicants managed the delivery situation, on instruction from CBC, to ensure compliance with the condition. As condition 7 could clearly be complied with, officers negotiated this out of the application. The variation of Condition 7 is not part of this application now. However, it is referenced in some representations, and may be mentioned at the meeting. Members should be clear that this issue is now resolved and is not under consideration herein.

- 15.3 The sole change proposed is that under condition 9 of the planning permission 160608. This requires the following:

“The development (including ATM) permitted by this planning permission shall only be illuminated during the opening hours of the premises.

Reason: This is an area where illumination is not common and where unlimited or excessive use of lighting could be detrimental.”

- 15.4 The applicants wish to vary this condition to allow some illumination outside of the opening hours (7am to 11pm every day). The petrol station is being run in this manner currently, and has been for a month or two now; so the application is to regularise the recent situation. Prior to that, BP did have more lights on, and they were illuminated for longer. They were reduced over time following ongoing dialogue with enforcement, and therefore comments made much earlier will not be with regard to later reductions. It is now the case that a lighting protocol has been provided and the applicants have requested the condition is reworded to require compliance with it. This involves allowing some internal and external illumination as is set out below.

- 15.5 The applicants have fitted a small bulkhead light to the rear fenced area to allow the staff to have some light to get to their cars when they leave the shop after closing. This is linked to 5 downlights that sit within the underneath of the overhanging fascia at the front of the shop. These are on a timer which gives the staff ten minutes to exit the building, lock the door shutter, lock the ATM shutter, get in their cars and exit the site.
- 15.6 The locking up process has been witnessed by the case officer and by the Enforcement Manager and it is a reasonable requirement. It is not held to be demonstrably harmful to residential amenity and is welcomed in the interest of the safety of the staff. The visit to observe was unannounced in order to get a true reflection of what occurs.
- 15.7 It is also requested that the ATM is left illuminated for technical reasons. As it is behind a (solid) non-perforated roller shutter and, as the lighting plan and protocol states that all shutters apart from the main shop door will be down outside of opening hours, this is also considered to be acceptable. The roller shutter blocks these lights from view when the petrol station is shut.
- 15.8 Further to this it is also proposed to leave the digital displays on the petrol pumps on. The lights on the numbering dims after use and the level of light they emit is so low it cannot reasonably be held to be materially harmful to amenity.
- 15.9 The variation also proposed some low level internal lighting. As will be set out in detail in the following section of the report, the staff arrive an hour and a half (and sometimes more) prior to opening in order to stock shelves, but primarily to warm the oven and put pastries on to bake. This means the 'Wild Bean Café' has fresh baked goods ready for sale at 7am for opening. The Wild Bean Café use is one that is ancillary to the main petrol station use.
- 15.10 The applicants request that they have some lighting so the staff can do this in safety. They have fitted infrared PID (motion) sensors on two ceiling lights. One is located over the main shop floor and one is located over the oven, close to the cash desk. These light up when activated by movement and then go off when there is no movement detected. There is also a light in the windowless back office, but being windowless this has no impacts outside of the building. The lights on the chiller cabinets have had timers fitted so they go off once the shop has closed, again following enforcement officer negotiations.
- 15.11 There are a number of items inside the shop which can be seen at night if one looks very closely. For example, the 'emergency exit' sign, the fly killing machine and some LCD monitors. These may indirectly emit light but they are not lights in their own right and the light they emit is not close to being harmful to neighbouring amenity. However, there is a clear distinction between the appearance of the site when it is open, and that when it is shut. They are quite unmistakable when compared.

15.12 The lights on site have been witnessed (during another unannounced visit) in operation at 5.30am in the morning by the case officer and by the Enforcement Manager. Apart from the front door shutter, which is a separate section of shutter, the shutters also remain down. The situation was not considered to cause light spill that is close to being harmful to neighbouring amenity, nor was it held that the very limited light visible resulted in situation where the reasonable person would think the petrol station is open when it is closed. Drivers who turn into the station site must do so because they expect the petrol station to be open at this time because of other petrol stations being open, rather than the visual appearance of this site as they pass by. They appear to turn in having decided to do so before seeing the site, and realise once turned in that it is shut.

15.13 When making this assessment officers have been mindful of the reason for Condition 9. This stated that the condition was imposed as:

“This is an area where illumination is not common and where unlimited or excessive use of lighting could be detrimental”.

It is not held that the very modest lighting proposed is ‘unlimited or excessive’. The reason for the condition does not specify what unlimited or excessive lighting would be detrimental to; but it is not at a level that could be considered ‘detrimental’ to either neighbouring or visual amenity. The reasons is also clear that it “could” be detrimental, but that means that it could also not be detrimental; it does not mean that any additional lighting will be harmful.

15.14 It is noted that Ipswich Road is one of the main roads into the north of Colchester and has always been a key link road to the A12 and A120. It has traffic moving along it at all hours, even early in the morning and late at night, although the level does vary as expected. The road also benefits from streetlights which means the wider area is rarely in complete darkness. Indeed, the streetlights appear to be brighter than the BP since the reduction in on site lighting at the times the shop is shut. The variation of condition 9 is therefore held to be acceptable.

15.15 Other conditions attached to 160608 were subject to many of the objections. These relate to the earlier arrival of the staff on site. The objectors consider that this is controlled by condition 6 of 160608 which reads:

The use (including ATM) hereby permitted shall not OPERATE/BE OPEN TO CUSTOMERS outside of the following times:

Weekdays: 7am to 11pm

Saturdays: 7am to 11pm

Sundays and Public Holidays: 7am to 11pm

Reason: To ensure that the development hereby permitted is not detrimental to the amenity of the area and/or nearby residents by reason of undue noise including from people entering or leaving the site, as there is insufficient information within the submitted application, and for the avoidance of doubt as to the scope of this permission.

- 15.16 Whilst accepting that this condition restricts the opening hours of the site, the applicant's planning agents did not consider that this condition prevented staff from being on site doing preparatory work such as shelf stacking, cleaning and baking. Your officers did not agree with this assessment and requested that the applicant's commission an independent Legal Opinion on the matter. BP agreed to do this and the full legal opinion can be read on line. It is detailed and assesses the wording of the condition as part of the permission as a whole. In summary however, Robert Walton of Landmark Chambers stated:

First, if the restriction on operation means there can be no staff on site then the words "[or] be open to customers" would be otiose because the service station cannot be open to customers unless there are staff on site.

Second, the word "operate" relates to the use "hereby permitted" which must in my view relate to the use of the service station as a service station (notwithstanding that the 2016 Permission in fact permits operational development, not a use). The question is therefore whether the presence of staff on site performing tasks that are ancillary to the use of the service station as a service station could be said to be operating that use. Although that it is not clear cut, in my view the answer to this is "No". To take a few examples: could someone cleaning the toilet facilities at midnight really be said to be operating the service station use? What about a security guard checking the premises or a member of staff stocking the shelves or getting the tills ready for the day's trade? In my view it would be stretching the word "operate" too far to suggest that it prevents activities of this nature. Using "operate" according to its ordinary meaning, anyone asked whether the service station was being operated in any of the above scenarios would surely answer "No, it is closed"...

..."In conclusion, my view is that the 2016 Permission, read as a whole, does not prevent staff being on site before 7am or after 11am. I should make plain that I would reach this conclusion even without reference to the Officer's Report."

- 15.17 Your officers sought our own Legal Opinion. Nina Pindham of No.5 Chambers provided this, and concurred with Mr Walton. The full Legal Opinion is available on the website however in summary Ms Pindham noted:

"It follows that I do not consider that it would be considered reasonable to a member of the public to expect the site to be opened to the public / accepting deliveries without the need for a staff member to be on the site prior to and after these activities have taken place"...

..."One cannot read condition 6 in isolation. It is clear that the permission contemplates the site being open to the public and accepting deliveries from 7am and until 11pm. It would therefore be reasonable to interpret the condition as permitting staff onsite for a reasonable period outside of those hours in order to prepare the site for the arrival of customers and deliveries and clean up after the site has closed to the public for the day."

- 15.18 On that basis it is held that the Council could not serve a Breach of Condition Notice requiring the current operational situation to stop. This is not a decision that has been taken lightly. It is also not a decision that is covered by Condition 9, and is therefore not part of the application being considered. However, it is mentioned for completeness, transparency, and because it is a source of objection for some residents who do not agree with this legal standpoint. They state that the lighting condition that is the subject of this application prevents staff from being on site outside of the opening hours and that should be enough. It is held that BP could operate for much of the year via daylight from the windows as there is no condition requiring the shutters to be down presently. The staff could potentially use torches for the rest of the time which would not fall under the control of the condition. This is not a situation that is particularly satisfactory or safe for the staff who work in the shop however and is not a route the Council want to pursue; particularly as BP have formally required the variation of this condition and officers have secured a proposal that they deemed to be acceptable on objective planning merits.
- 15.19 This has been discussed at length with the Enforcement Manager and the Planning Manager. It is considered that to proceed to serve a Breach of Condition Notice when in possession of two independent Legal Opinions that say the applicants are not in breach of a condition would be wholly unreasonable and would not be defensible in Court. We understand the views of residents, but the facts of the matter post-legal opinion do not support enforcement action on this point.
- 15.20 Fundamentally it is held that the situation as it is operating today is acceptable in planning terms. As noted above, the early staff movements (and the locking up process) have been witnessed by your officers and they are not held to be materially harmful to neighbouring amenity or to visual amenity. To pursue it through the Courts would therefore be unreasonable, costly and unwarranted. That said, the matter under consideration herein is whether or not condition can be varied to allow different lighting to that previously approved, and not some of the previous or wider issues.

16.0 Conclusion

- 16.1 To summarise, the variation to condition 9 is not held to be materially harmful to neighbour amenity. Whilst it means the site does emit some light outside of opening hours the levels are so low they cannot reasonably be held to be harmful to neighbouring amenity, nor would the reasonable person conclude the petrol station was open because of them.

17.0 Recommendation to the Committee

17.1 The Officer recommendation to the Committee is for:

APPROVAL of planning permission subject to the following condition:

1. ZAW - *Removal/Variation of Condition(s) Approval*

With the exception of condition 9 of Planning Permission 160608 which is hereby varied, the requirements of all other conditions imposed upon planning permission 160608 remain in force and shall continue to apply to this permission, including the details and provisions of any approved matters discharging any condition(s) of that permission.

Reason: To avoid any doubt that this application only applies for the variation of the stated condition(s) of the previous planning permission as referenced and does not seek the review of other conditions, in the interests of proper planning and so that the applicant is clear on the requirements they need to comply with.

2. Z00- Bespoke Lighting Condition

There shall be no illumination whatsoever on site, including inside the shop building, outside of operational hours, except in complete accordance with the document titled "BP EASTWOOD SF CONNECT Lighting plan and protocol for access to and egress from the sales building outside of site opening hours" as hereby approved.

Reason: To provide adequate planning controls to prevent excessive light spill that has the potential to cause harm to neighbouring amenity and to ensure that the petrol station does not appear as being open to customers when it is closed, in the interests of neighbouring amenity.

3. Z00 – Bespoke Shutters Condition

Apart from the section of the main front door shutter, all shutters (including all of the window shutters and the ATM shutter) shall be fully closed and in the down position from 11pm on any one day and 7am on the following day, every day.

Reason: To ensure the operation of the site complies with the "BP EASTWOOD SF CONNECT Lighting plan and protocol for access to and egress from the sales building" document outside of site opening hours, to reduce the impact of any light spill from the PID activated internal lights, to prevent light emanating from the ATM and to ensure the petrol station appears as closed to the public outside of opening hours.

18.1 **Informatives**

18.1 The following informatives are also recommended:

INS – Non-Standard Informative (Neighbour Respect)

PLEASE NOTE that it is strongly advised that all new staff should be instructed on the opening and closing procedures, made aware of the planning conditions, and told that they need to be considerate to neighbours when they arrive at, or leave, the site; doing so as quickly and quietly as possible.