The Planning Inspectorate

Appeal Decision

Site visit made on 15 December 2015

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 09 March 2016

Appeal Ref: APP/K2420/C/15/3131877
23, Station Road, Ratby, Leicester, Leicestershire LE6 0JQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Tuhal Miah against an enforcement notice issued by Hinckley & Bosworth Borough Council.
- The notice was issued on 18 June 2015.
- The breach of planning control as alleged in the notice is without planning permission the change of use from the use within Class A3 of the Use Classes Order 1987 (as amended) ("the Order") for the sale of food or drink for the consumption on the premises to a mixed use for the sale of food and drink for consumption on the premises and for the sale of food and drink for consumption off the premises Class A5 of the Use Classes Order 1987 (as amended) ("the Order").
- The requirements of the notice are (to) cease the use of the premises for the sale of food for consumption off the premises.
- The period for compliance with the requirement is two (2) months after this notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(a) of the Town and Country Planning Act 1990 as amended.

Summary of Decision

1. The appeal is allowed following correction of the enforcement notice in the terms set out below in the Formal Decision.

Preliminary Matter

2. In order to render the allegation in the notice more readable, and as I am satisfied that to do so would not cause injustice to either party, I will correct the notice so as to insert "within" before the words "Class A5", and substitute the word "Order" for the words "Use Classes Order 1987 (as amended) ("the Order")" where they appear for the second time.

3. The appellant suggests that the sale of take away food is incidental to the primary use of the premises as a restaurant. This is a matter relevant to ground (b) (which is that the matters alleged to constitute a breach of planning control have not taken place) rather than ground (a). To be a Class A3 restaurant the dominant use of the premises should be to sell food for consumption on the premises, with any takeaway service remaining ancillary.

4. Although the appellant states this is a low level activity it appears from all the evidence including the numbers of take away sales, to be a significant use in its own right. I am satisfied that as a matter of fact and degree a material change

of use has taken place to a mixed use involving both Class A5 and Class A3 and that therefore an appeal under ground (b) would fail.

The Appeal on Ground (a) and the Deemed Planning Application

Background and Main Issues

5. The appeal premises are in a built up area on a main road into the settlement. Housing lies on both sides of the road in the vicinity of No 23, however the locality has a mix of uses typical of a main thoroughfare of an active village such as small commercial units, a supermarket and a sports and social club. The premises have traded as a restaurant since August 2014. The hours of operation were extended to allow for a change in activity from café use, and the take away element of the business commenced on or around this time.

6. The premises are inside the southern boundary of the Ratby Conservation Area. The Council has no concerns in relation to the effect of the development on the preservation or enhancement of the conservation area. I would concur with this view. The main issues are the effects of the mixed use on:

   a. highway safety; and

   b. the living conditions of local residents by reason of any noise, disturbance or odour.

Reasons

Highway Safety

7. Designated on street parking exists close to the restaurant on Station Road. This is shared with local residents and thus limits the numbers of other vehicles that can park on the street, particularly during evening hours. However there are several such places on the same side as the restaurant, from my observations totalling about 15 spaces down to the supermarket on this side of Station Road (which I saw closes at 2200) a short walk from the appeal site.

8. In addition public parking exists nearby at the sports club during daytime hours. Further opportunities exist for on street parking on Station Road to the south east where there are no designated places outside the main carriageway but would allow two-way traffic. Chapel Lane is a one-way street where parking is restricted outside the restaurant. Bollards are placed on the footway of Station Road immediately outside the restaurant.

9. The local highway authority considers the take-away use encourages indiscriminate on-street car parking outside residential properties and close to the junction with Chapel Lane and could impede the free flow of traffic and increasing dangers to road users.

10. The Council however has not provided any statistical or other evidence to demonstrate the effect of customer numbers on the area, nor does it dispute the appellant's evidence that between 50 to 60 take away meals are sold in an average week about half of which are delivered to customers' homes. The appellant calculates vehicle movements to be 1 to 2 per hour at most but in reality less due to some customers walking to the premises. As an average this is a reasonable extrapolation but from experience there are likely to be proportionately more movements the later the hour in a takeaway operation, particularly at weekends. Station Road has a sizeable residential hinterland

and is reasonably accessible on foot and bicycle as well via bus stops nearby. It is reasonable to infer that customers arrive at the restaurant other than by private car, as well as availing themselves of the home delivery service. I acknowledge that the use could increase over time but this does not mean as the Council suggests, that the appellant's evidence of the throughput of takeaway meals is not a material consideration. On the contrary, it is some indication of the likely future level of activity, based as it is on a historic analysis of actual trading.

11. Photographs submitted by a local resident show cars on the pavement opposite the restaurant. I sympathise with the problems that could be caused by inconsiderate parking in front of residential accesses opposite the premises. but these can only be a snapshot of the position. The appellant points out that cars are parked in this way when events at the sports club result in overspills from their car park. I cannot verify this assertion from the evidence but in any event the photographs do not show that vehicles parked on the highway are referable to take away as opposed to restaurant customers, or for that matter to the appeal premises.

12. I have been provided with the parking targets and the highway authority's design standards, referred to in the Hinckley and Bosworth Local Plan 2001 (LP) saved Policy T5, which are relied on to support the Council's case. I note from the reasoned justification to the policy that the parking targets are to be regarded as guidelines only, key criteria being whether parking is adequate with no detrimental effects on road safety or local amenity, considerations that are especially relevant where there is a realistic choice of transport. Other than that, despite being invited to do so, the Council does not point to any part of the design standards that it considers relevant to its reason for refusal.

13. Overall, taking into account the level of additional vehicle movements generated by the use and the general availability of on street parking, there is no compelling evidence that vehicles would need to park inconsiderately and responsible use of the available parking would not compromise highway safety.

14. The owner of No 15 Station Road objects on his own behalf and on behalf of tenants of properties on Station Road adjacent to the restaurant, referring to accidents involving vehicles outside those houses. The appellant says these took place outside opening hours of the restaurant but in any event, while regrettable, this does not demonstrate a significant highway problem in the locality, or that such incidents are connected to the take away use.

15. I conclude on this issue that the number of increased movements due to the mixed use would not be such as to result in adverse highway conditions. The Council has not demonstrated by means of any compelling evidence that the use would conflict with LP saved Policy T5 in terms of any clear conflict with highway design or vehicle parking standards. The development would accord with the National Planning Policy Framework in that it would provide for safe and suitable access to the site for all people, and the residual cumulative impacts of development on highway safety would not be severe.

Living Conditions: ventilation system

16. Complaints have been made to the Council relating to noise and odour from the extraction flue. Ventilation for the café business was considered acceptable but the Council states that the takeaway facility has intensified activity and

introduced a wider range of goods being cooked. It seems to me however that problems with the extraction flue could well have been caused by preparing food for the authorised restaurant use as much for take away meals.

17. I acknowledge the existing ventilation system may be inadequate, however there is no evidence to suggest that the installation of an effective extraction system for the restaurant would not also suffice for the mixed use as alleged in the Notice. The premises can continue to operate lawfully as a restaurant. It would be a matter for the Council to balance the benefits of an effective system for the restaurant with the visual impact of a flue in the CA.

18. Taking all these factors into account I see no reason why in principle a suitably designed and properly maintained extraction and filtration system with sound absorbers in the ventilation duct and appropriate level of carbon filters could not effectively reduce the noise and odour to acceptable levels.

Living Conditions: noise and disturbance

19. The Council's objection is a generalised concern as to the increased noise and disturbance from the take away use. The evidence does not persuade me that as the Council puts it there would be a "constant movement of people" in close proximity to houses. The premises are closed to the public by 2230 Monday to Thursday, 2300 Friday and Saturday and 2130 on Sunday. These hours of operation reduce the potential for noise or antisocial behaviour and mean they are not classified as late night take away outlets subject to the licensing regime. Police enforcement of the general law concerning disorder and anti-social behaviour is available to deal with unacceptable noise and disturbance.

20. Establishments offering a take away service vary considerably in terms of their own character and appearance and whether they attract anti-social activity. The restaurant does not appear to me to be one that would invite or encourage such behaviour. I recognise that spells of increased activity at the premises are not appreciated by residents living immediately adjacent to or opposite the premises; there is however no compelling evidence that its cumulative effect unacceptably interferes with the peaceful enjoyment of their homes overall. With the level of additional vehicle movements estimated, I am not persuaded that there would be an unacceptably adverse effect on the amenities of the neighbouring residential properties.

21. I conclude that the mixed use of the premises would not result in any unacceptable noise or disturbance to local residents thereby harming their reasonable living conditions. I consider that the use complies with the aims of LP saved Policy BE1 in that it does not adversely affect the occupiers of neighbouring properties.

Other Matters

22. The appellant submits that the take away use is essential to the viability of his business and I read that a petition of 350 plus signatures was received by the Council in support of the application Ref 14/01283/COU. The Council has not supplied this or any details of what it contains. These factors are of limited importance against the two main issues which are determinative of the appeal.

23. I have considered the extracts from several appeal decisions submitted with the Council's statement. I do not disagree with the broad principle that the Council seeks to infer from one such decision, that the pattern of parking for a

take away would tend to differ from normal retail use. However such decisions cannot set down generalised precedents as it seems to me the Council is attempting to do elsewhere, for example in pronouncing a minimum height of a flue to ensure adequate dispersal of odours. In any event there is insufficient detail in the decisions to enable me to make a meaningful comparison with the circumstances of this appeal which I have considered on its own merits.

24. In addition to the reasons for issuing the notice the Council cites in support of its case Draft Policies DM10 and DM17 of the emerging Site Allocations and Development Management Policies DPD (DPD). Although the DPD is at an advanced stage the Council has not provided copies or explained why the policies are relevant to the appeal except that they are envisaged to replace LP Policies BE1 and T5. The emerging policies therefore have limited weight in the context of this appeal which I have determined against the relevant policies of the development plan and national policy. In the case of LP BE1 I find it to be consistent with the Framework, as is the case with LP T5 insofar as the main aim derived from the text of the policy reflects the aim of the Framework to ensure that parking for development is convenient, safe and secure.

Overall Conclusion and Conditions

25. While I sympathise with the concerns and fears raised by some local residents, the Council has not provided any substantive or technical evidence in support of their case that the take away facility by itself or cumulatively with the restaurant use causes unacceptably adverse effects on living conditions of local residents or highway safety conditions.

26. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should succeed on ground (a) and planning permission will be granted.

27. I have amended the Council's suggested conditions having regard to the model conditions and the National Planning Practice Guidance. Thus a condition to control odour is appropriate in the interests of living conditions of residents. Control over opening hours commensurate with the authorised use is necessary for similar reasons. The existing condition does not control the operation of delivery sales. This should be clarified so there are no associated vehicular movements outside the permitted hours. For the avoidance of doubt and to ensure a satisfactory development in the interests of good planning, I shall impose a condition requiring the development to be carried out in accordance with the details of the previous application submitted to the Council.

Formal Decision

28. It is directed that the enforcement notice be corrected by the insertion of "within" before the words "Class A5", and the substitution of "Order" for the words "Use Classes Order 1987 (as amended) ("the Order")" where they appear for the second time. Subject to these corrections the appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act for the development already carried out namely the change of use from the use within Class A3 of the Use Classes Order 1987 (as amended) ("the Order") for the sale of food or drink for the consumption on the premises to a mixed use for the sale of food and drink for consumption on the premises and for the sale of food and drink for consumption off the premises within Class A5 of the

Order, as shown on the plan attached to the notice subject to the following conditions:

1. The development hereby permitted shall not be carried out otherwise than in complete accordance with the submitted application details as follows: Proposed Plan received by the local planning authority on 17 July 2015.

2. Unless within three months of the date of this decision a scheme to install equipment to control the emission of fumes and smell from the premises including the means to control noise from the equipment is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within two months of the local planning authority's approval, the use of the site shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed until such time as a scheme is approved and implemented.

3. If no scheme in accordance with condition 2 is approved within six months of the date of this decision, the use of the site shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed until such time as a scheme approved by the local planning authority is implemented.

4. Upon implementation of the approved scheme that scheme shall thereafter be retained and maintained regularly in accordance with the manufacturers' specifications and instructions.

5. In the event of a legal challenge to this decision, or to a decision made pursuant to the procedures set out in this condition and conditions 2 to 4, the operation of the time limits specified in conditions 2 and 3 will be suspended until that legal challenge has been finally determined.

6. The premises shall not be open to the public nor shall any collection or deliveries of meals from the premises take place outside the hours of 0700 to 2230 Monday to Thursday, 0700 to 2300 Friday and Saturday and 1000 to 2130 on Sunday and Bank Holidays.

Grahame Kean

INSPECTOR