
Appeal Decisions

Site visit made on 20 September 2016

by Elizabeth Jones BSc (Hons) MCTP MRTPI

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

Decision date: 21 October 2016

Appeal A Ref: APP/P4605/C/16/3149154

120 Elkington Street, Aston, Birmingham B6 4SR

- 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 Robert Pokora against an enforcement notice issued by Birmingham City Council.
- The notice was issued on 15 April 2016.
- The breach of planning control as alleged in the notice is without planning permission, the making of a material change of use of the first floor of the premises to use as a gymnasium.
- The requirements of the notice are cease the use of the first floor of the premises as a gymnasium.
- The period for compliance with the requirements is 2 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is allowed, the enforcement notice is quashed and planning permission is granted in the terms set out below in the Formal Decision.

Appeal B Ref: APP/P4605/W/16/31497408

Tarmac Building, 120 Elkington Street, Aston, Birmingham B6 4SR

- The appeal is made under section 78 of the 1990 Act against a refusal to grant planning permission.
- The appeal is made by Mr Robert Pokora against the decision of Birmingham City Council.
- The application Ref: 2015/10233/PA, dated 14 December 2015 was refused by notice dated 17 March 2016.
- The development proposed is change of use of first floor from office associated with a general industrial use (Use Class B2) to a gymnasium (Use Class D).

Summary of Decision: The appeal is allowed and planning permission granted.

Preliminary Matters

1. The postcode on the planning application form is different to the one used elsewhere in the appeal documentation. I have therefore used the postcode as indicated by the Council in its decision notice.
 2. The Council's reasons for refusal and its reasons for issuing the enforcement notice refer to a number of policies in the Draft Birmingham Development Plan (DBDP). The Council indicate that the DBDP is at an advanced stage and should be afforded substantial weight. Although this plan has been subject to examination it has yet to be adopted having been placed under a Holding
-

Direction by the Secretary of State in May 2016. Thus, this limits the weight that I can attach to the DBDP policies despite the advice in Paragraph 216 of the National Planning Policy Framework (the Framework) regarding the weight to be given to policies contained within an emerging plan.

Appeal A on ground (a) and Appeal B (s78 appeal)

3. The main issue is whether the development prejudices the availability of employment property within a Core Employment Area (CEA).
4. The appeal site is the first floor of a two storey industrial building on the corner of Elkington Street at its junction with Phillips Street. The ground floor of the building is vacant at present. The appeal site is bounded at the rear by the Royal Mail Sorting Depot. There are commercial units to the south west of the site in Phillips Street. To the north of the appeal site on the opposite side of Phillips Street are a number of residential properties.
5. The Council identifies the appeal site as part of a CEA in the Aston, Newtown and Lozells Area Action Plan adopted in July 2012 (AAP). Policy CEA of the AAP recognises that manufacturing in the area has been in decline over the last few decades and this has affected the area's economic prosperity. Policy CEA seeks to focus opportunities for economic regeneration activities in CEAs and thereby retain employment.
6. The appeal site is an 'edge of centre' location in relation to Newtown Neighbourhood Centre. 'Saved' Paragraphs 7.27, 7.28, 7.32 and 7.33 of the Birmingham City Unitary Development Plan (2005)(UDP) set out a number of principles by which a leisure and entertainment use not within a centre will be assessed.
7. The Council consider that the use of the appeal site as a gymnasium does not fall within the range of employment uses identified as appropriate for CEAs and no exceptional justification has been provided. Also, that the information submitted is insufficient to demonstrate that this is the sequentially preferable location for the gymnasium use. The Framework does not give guidance as to how the prospect of a site being used for employment purposes should be assessed, thus the factors contained in the UDP paragraphs for assessing whether or not the benefits of a scheme outweigh the loss of a site allocated for employment are relevant.
8. The paragraphs of the UDP are broadly consistent with the Framework in that they recognise that town centres are the heart of communities and policies are needed to support their vitality and viability. Paragraph 22 of the Framework advises that where there is no reasonable prospect of a site being used for an allocated employment use applications for alternative uses should be treated on their merits having regard to market signals and the relative need for different land uses to support sustainable communities.
9. Both parties agree that the appeal site has been marketed for industrial use for a period of 20 months. However no end user has been found. The appellant cites its location near residential properties and on a culvert within the flood zone, its physical characteristics and the number of other industrial premises on the market in the city as the main reason for this. Having regard to the demonstrated lack of demand for the site for employment use for almost two

years, I consider that there is not a reasonable prospect of the site being used in its entirety for employment purposes in the foreseeable future.

10. The Council contends that the appellant has not sufficiently considered sites located within or adjacent to local centres and that any sequential assessment of land uses needs to consider these in order to be robust. Whilst the appellant has provided no details of dates of property searches or sites visited, he submits that enquiries have been made with the agent regarding the one sequential preferable available site in the Newtown Neighbourhood Centre¹ identified by the Council and found it not suitable for use as a gymnasium due to the size and structural limitations of the building. Although the appellant considers it is unrealistic to consider any potential sites which are over 1km away from the target demographic area of the business, he has investigated and could not identify any available sites within the Lozells Neighbourhood Centre.
11. There is not an up-to-date figure, in an adopted plan, for the amount of employment land required in Birmingham City. However, Policy TP16 of the DBDP indicates a 5 year minimum reservoir figure of 96 ha to be retained throughout the plan period. The appellant contends that only 0.0007% of the employment land reservoir would be lost by the use of the first floor as the ground floor would continue to be available for core employment use. Furthermore, the quality of this space as employment land is at the lower end of the spectrum of types of employment land as identified in the Council's hierarchy of employment land. Moreover, I have been provided with no convincing evidence to indicate that the Aston, Newtown and Lozells area of the City, in which the appeal site is located, has a shortfall in the supply of employment land.
12. I note the concerns of the Council regarding the incremental negative impact that the fragmentation of floorspace can have on the CEA. I have been provided with no substantial evidence that the development has a negative impact on the rest of the unit or adjacent units such that the primary employment function of the site would be undermined. In addition, the Council acknowledge that the parking demand generated by the development is unlikely to endanger highway safety or be otherwise unacceptable in highway terms.
13. Whilst I am mindful of the need to ensure that premises within a CEA are retained for employment purposes, from the evidence before me I am not persuaded that the use of this first floor premises in an 'edge of centre' location would undermine the objectives of the Council's policies to a harmful degree in this regard.
14. The appellant suggests that if the appeal were dismissed the appeal premises could be left vacant, be converted to B1 office accommodation or become an ancillary function to the ground floor use. The Council contend that any proposed B1 office accommodation would not conform to the acceptable uses as designated in the CEA, within DPDB policy TP18. However, for the reasons above I give this policy limited weight.

¹ Suites 4, 5 and 7, Alma House, Newtown Shopping Centre.

15. Given its size and function, the use of the first floor gymnasium could not be considered as a secondary activity which is incidental or ancillary to the main use of the whole unit.
16. Given the particular circumstances of this case and that local plan policies state that there may be exceptional circumstances where it is not possible to accommodate new development in centres I consider that an exception is warranted. I therefore conclude that although the use of the premises as a gymnasium does not fall within the range of employment uses identified as appropriate for CEAs, such a use does not prejudice the availability of employment property within a Core Employment Area (CEA) to a harmful degree. As such, the aims of Paragraphs 7.27, 7.28, 7.32 and 7.33 of the UDP, Policy CEA of the AAP and the guidance within the Framework which amongst other things seek to encourage a diversity of uses within centres and recognises the important role which leisure and entertainment uses can play in achieving this are not compromised.

Other matters

17. I have had regard to residents' comments concerning noise and disturbance, overlooking and loss of privacy. The appeal premises are situated in an area where there are a number of commercial buildings. Consequently there is a degree of noise and activity associated with the various businesses. Any additional noise and disturbance resulting from the gymnasium must be considered in this context. Given the location the environment is unlikely to be particularly quiet during the day and into the evening. The potential for noise and disturbance later into the evening when residents are likely to expect a quieter environment could be protected by way of planning conditions as suggested by the Council. Moreover, the Council consider that there is adequate separation distance between the appeal site and the nearest dwelling.
18. Local residents have also raised a concern that the gymnasium use results in litter and anti-social behaviour concerning drugs which has a negative impact on school children walking past the site. I have been given no evidence to show that the gymnasium use has led to an increase of litter in the area. I therefore attach limited weight to this issue. I have not been provided with any substantive evidence regarding drug crime in the area, which is a Police matter in any event.
19. The petition against the gymnasium use has been noted. The issues raised in the petition have been considered in this decision.
20. Residents have raised concerns that the gymnasium use has exacerbated parking issues and the safety of vehicles entering and leaving Salstar Close. Having regard to residents' photographs I sympathise with them regarding the obvious highway issues. However, I note the Council has not raised concerns regarding parking. Although the appeal premise has no dedicated parking, the majority of the surrounding roads have no parking restriction and due to the site proximity to the Newtown Neighbourhood Centre the site can be accessed by different modes of transport. The Council consider that the parking demand generated by the gymnasium is unlikely to have an adverse impact on highway safety. In addition, there is no substantive evidence to suggest that access/egress to Salstar close is affected to the extent that the safety of residents is compromised. From the evidence, I am satisfied that the proposal is not detrimental to highway safety.

21. I understand local residents' concerns about the appellant's apparent disregard of the planning process but I have to consider the development on its individual planning merits and enforcement action is intended to be remedial and not punitive.

Conclusion

22. For the reasons given above, and having regard to all other matters raised, I conclude that appeal A succeeds on ground (a) and planning permission is granted. The appeal on grounds (f) and (g) does not therefore need to be considered.

Conditions

23. I have considered the conditions suggested by the Council. The purpose of conditions 1 and 2 are necessary to safeguard the living conditions of occupiers of premises/dwellings in the vicinity. Condition 3 is necessary in order to define the permission.
24. In the case of a retrospective grant of permission a condition regarding the time limit for the commencement of development is not necessary because the development has already taken place.

Formal Decision

Appeal A: APP/P4605/C/16/3149154

25. 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 Act as amended for the development already carried out, namely the use of 120 Elkington Street, Aston, Birmingham B6 4SR as shown on the plan attached to the enforcement notice, for the material change of use of the first floor of the premises to use as a gymnasium subject to the following conditions:
1. The premises shall only be open for customers between the hours of 10:00 to 22:00 Monday to Friday, 10:00 to 18:00 Saturdays, Sundays and Bank Holidays.
 2. Noise emanating from any music system within the premises (Leq.5min) shall not exceed a level 10dB less than the background noise level (L90, 5min measured in the absence of the entertainment noise) in octave bands from 63Hz to 4Hz at the façade of any noise sensitive premises.
 3. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking or re-enacting that Order with or without modification), the first floor of the premises shall be used for a gymnasium and for no other purpose including any other purpose in Class D1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (or any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order with or without modification).

Appeal B: APP/P4605/W/16/3147408

26. The appeal is allowed and planning permission granted for the change of use of first floor from office associated with a general industrial use (Use Class B2) to

a gymnasium (Use Class D) at Tarmac Building, 120 Elkington Street, Aston, Birmingham B6 4SR, in the terms of the application, ref: 2015/10233/PA, dated 14 December 2015, the plans submitted with it and subject to the following conditions:

1. The premises shall only be open for customers between the hours of 10:00 to 22:00 Monday to Friday, 10:00 to 18:00 Saturdays, Sundays and Bank Holidays.
2. Noise emanating from any music system within the premises (Leq.5min) shall not exceed a level 10dB less than the background noise level (L90, 5min measured in the absence of the entertainment noise) in octave bands from 63Hz to 4Hz at the façade of any noise sensitive premises.
3. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking or re-enacting that Order with or without modification), the first floor of the premises shall be used for a gymnasium and for no other purpose including any other purpose in Class D1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (or any provision equivalent to that Class in any statutory instrument amending, revoking and/or re-enacting that Order with or without modification).

Elizabeth Jones

INSPECTOR