
Appeal Decision

Site visit made on 6 December 2016

by Geoff Underwood BA(Hons) PGDip(Urb Cons) MRTPI IHBC

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

Decision date: 16 December 2016

Appeal Ref: APP/N5090/W/16/3158463

Oak Lodge Medical Centre, 234 Burnt Oak Broadway, Edgware HA8 0AP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Mr Bhavin Morjaria, 247Pharm Ltd. against the Council of the London Borough of Barnet.
 - The application Ref 16/2583/FUL, is dated 20 April 2016.
 - The development proposed is the installation of 24 hour prescription collection point to an existing window opening to a store room.
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Decision

1. The appeal is dismissed and planning permission refused.

Preliminary Matters

2. Whilst interested parties have provided material from the proposed collection point's manufacturer relating to the range of services such systems may be able to offer this did not form part of the application and therefore does not necessarily reflect the configuration or services which the appellant proposes. I have determined the appeal on the basis of the information provided by the appellant.
3. The Council's Statement indicates that had they been in a position to determine the application they would have refused it. This would have been on grounds that a sequential test considering the availability of retail space in Burnt Oak Town Centre had not been provided and that it had not been demonstrated that the proposal would avoid a significant impact on the residential amenity of neighbours.

Main Issues

4. Therefore, the main issues raised by this appeal are the effect the proposal would have on the vitality and viability of Burnt Oak Town Centre, including whether the proposal would constitute a main town centre use, and the effect it would have on the living conditions of occupiers of neighbouring residential properties with particular reference to noise and disturbance.

Reasons

Town centre vitality and viability

5. The appeal proposal includes the insertion of an automated prescription collection point into the front elevation of the existing medical centre. Very
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limited information has been provided by the appellant regarding how the collection point would operate. However, the appellant contends that the proposal would not be a retail or town centre use and consequently he considers that a sequential test does not need to be applied or passed.

6. From the information supplied, as well as allowing patients to collect prescriptions, the unit would also have a payment facility. The appellant acknowledges that whilst some 'prescription collection machines' can 'dispense' retail products such as non-prescription medicines and toiletries that this is not the intention for the appeal development. Whilst the proposed unit would be able to accept payments the appellant advises that these would only be for paying the prescription charge. The appellant reasons that this would not amount to a retail use, contending instead that the payment of the prescription charge would be a 'tax', citing the Pfizer judgement¹ in support of this approach.
7. However, the Council and interested parties objecting to the proposal have referred to the Pattani judgement². This considered the earlier Pfizer judgement but found that there is "...no distinction between the supply of medicines on prescription and their supply otherwise than on prescription" and that the supply of prescription drugs is considered as a sale for the purposes of planning control. This position is reinforced by the explanatory note to the Use Classes Order³ which explains that 'dispensaries' are either within class A1 (shops) or, where ancillary to a hospital, within class C2 (residential institutions). In light of this, therefore, even though it is intended that the collection point would only provide prescription medicines I consider that their supply would be an A1, retail use in this case.
8. In reaching this conclusion I have had regard to a previous proposal relating to the site which included a pharmacy and which was dismissed on appeal⁴. I am conscious of the material distinctions between that previous proposal and that before me, in particular their respective sizes and that this proposal is automated and unstaffed. However they would share one key element; that being the exchange of prescriptions for a charge which amounts to a sale.
9. In light of the above and on the evidence before me I cannot agree that the collection point would not provide an element of retail as a result of customers paying at the unit for their prescriptions. Although it would appear likely that prescription medicines would in effect have to be pre-ordered before they could be collected, the transaction at the collection point would amount to a retail use very similar to that which would take place in a staffed pharmacy.
10. The appellant considers that the facility would 'mainly' be used by patients of the medical centre. However, no information has been provided as to whether there would (or indeed in practice could) be any restriction on who could elect to use the facility to collect prescriptions. Its convenience, particularly out of hours, would in all likelihood make it attractive to others. An inherent characteristic of the facility is that it would be used by patients independently of the medical centre, including when the centre is closed. Therefore whilst it would be limited in size compared to the overall size of the medical centre, in

¹ Pfizer Corporation v. Ministry of Health [1965] A.C. 512.

² R. v Maldon District Council and Tesco Stores Ltd, Ex Parte Ashok Pattani, Court of Appeal [1999] P.L.C.R. 1.

³ Town and Country Planning (Use Classes) Order 1987 (as amended)

⁴ APP/N5090/A/12/2188949/NWF, dated 16 October 2014.

the absence of any evidence to contrary, its physical scale would not mean that it would be otherwise ancillary to the use of the medical centre to any extent that would cease to make it a separate A1 retail use.

11. In light of the above, the proposal would amount to a main town centre use as defined by the National Planning Policy Framework (the Framework)⁵, which includes retail development. The appeal site is located outside Burnt Oak Town Centre. The Framework requires that local planning authorities should apply a sequential test for main town centre uses that are not in an existing centre and that where an application fails to satisfy the sequential test it should be refused. Barnet's Local Plan (Development Management Policies) Development Plan Document, 2012 (DMP) Policy DM11 is largely in accordance with the Framework's approach and strongly resists significant new retail and other appropriate town centre uses outside town centres unless they meet the Framework's sequential approach and tests. No sequential or other assessment has been provided.
12. The amount of storage in the unit would be limited by its size and capacity and the appellant advises it would be restocked daily. However there is no suggestion that its use would be limited should demand increase nor that it would necessarily remain limited to mainly serving patients of the medical centre. Therefore, whilst the appellant contends that the proposal's size would mean its effect would not be significant, there is insufficient information to ascertain the level of 'significance' the collection point's use may have in relation to the level of retail it might offer.
13. In any event I am conscious of the previous Inspector's exploration⁶ of the term "significant" in the wording of DMP Policy DM11 in the aforementioned appeal. I have been presented with no convincing reason to disagree with her conclusion that the effect of this policy reflects that of the Framework in that a sequential test should apply when considering a main town centre use and that this is not qualified by any size threshold. I am not satisfied, on the basis of the information provided, that the scale of the proposal would therefore indicate that a sequential test should not be carried out.
14. There is no suggestion that there is a particular functional relationship between the medical centre and the collection point beyond that of issuing of prescriptions in the former. Nor is there any suggestion that it would replace an existing facility currently on offer in the medical centre.
15. On the other hand there would appear to be a reasonable likelihood that the use of the facility would divert visitors away from the town centre where they might otherwise go to collect or buy a prescription and the associated opportunities for linked trips to other town centre facilities that may arise. Also, in the absence of any assessment indicating otherwise, the size and configuration of the facility is one which it would appear could be reasonably accommodated within the town centre.
16. Therefore in the absence of any evidence that the proposal could not be located within a town centre it has not been satisfactorily demonstrated that the proposal would not harm the vitality and viability of Burnt Oak Town Centre.

⁵ Annex 2: Glossary.

⁶ APP/N5090/A/12/2188949/NWF, paragraphs 13 – 16.

The proposal would consequently be contrary to DMP Policy DM11 and the Framework.

Neighbours' living conditions

17. The collection point would be located opposite a terrace of predominantly residential properties on Burnt Oak Broadway and the medical centre is situated adjacent to Aurora Court, a block of flats. The use of a collection point has the potential to give rise to disturbance to neighbouring occupiers as a result of visitors to the facility late at night and in the early hours of the morning including those who arrive by car. Disturbance from cars may arise from engines starting up and car doors slamming. During the day this would be unlikely to be remarkable in the vicinity of a busy road but could be more intrusive at certain times when neighbouring occupiers could reasonably expect lower levels of disturbance.
18. The appellant's figures suggest lower levels of use are expected during the night compared with that during the day. However, it is not certain that the levels of use of the facility would necessarily be limited to that anticipated over time, particularly in that it has the potential to offer a convenient service during hours when other pharmacies may be closed. No information has been provided as to how the effects of late night or early morning visitors might be mitigated, avoided or whether they might be less noticeable in light of any existing environmental conditions. It would not be feasible to attempt to control levels of use during these times by way of a condition and any attempt to limit its hours of operation would effectively fundamentally change the development from that for which the appellant sought permission.
19. Unlike that arising from visitors, it would appear that any noise from the unit itself could be limited or prevented by way of a planning condition as could ensuring deliveries are during hours less likely to cause disturbance. The potential for mitigation of these aspects does not, however, alter the prospect of disturbance from visitors.
20. Therefore, given the reasonable likelihood that such disturbance could arise and that there is no evidence that it could be effectively mitigated, it has not been satisfactorily demonstrated that the living conditions of neighbouring residential occupiers would not be harmed as a result of the proposal. This would be contrary to DMP Policy DM01 and the Framework's core planning principle⁷ of always seeking a good standard of amenity for all existing and future occupants of land and buildings.
21. I note that in considering late night opening of a proposed pharmacy the Inspector in determining the aforementioned appeal did not find that neighbours' living conditions would be harmed in that case. However there was no suggestion that proposal was a 24 hour operation and this does not, therefore, alter my view on this aspect of the proposal.
22. Barnet's Local Plan (Core Strategy) Development Plan Document, 2012 Policies CS1 and CS5 cited by the Council are concerned with the Borough's character and place shaping strategy and as such are less pertinent to the consideration of this particular issue.

⁷ Paragraph 17.

Other Matters

23. The proposed facility would no doubt provide a convenient option to cater for some patients' needs in light of the more limited opening hours the appellant states that other pharmacies in the area operate. I have noted the appellant's assertion that the medical centre's patient list is growing which could result in an increased demand for the services the facility would offer. However, these benefits would not outweigh the harm identified above.

Conclusion

24. For the above reasons, and having had regard to all other matters raised, it has not been demonstrated that the proposal would avoid harm to either the vitality and viability of Burnt Oak Town Centre or to neighbours' living conditions, contrary to the development plan and the Framework. The appeal is therefore dismissed and planning permission refused.

Geoff Underwood

INSPECTOR