
Appeal Decisions

Site visit made on 10 January 2017

by Lesley Coffey BA Hons BTP MRTPI

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

Decision date: 30 January 2017

Appeal A Ref: APP/A2280/W/16/3159835

Omer's Kebab, 7 Canterbury Street, Gillingham ME7 5TP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Hijratulla Nasari against the decision of The Medway Council.
 - The application Ref MC/16/3152, dated 20 July 2016, was refused by notice dated 13 September 2016.
 - The application sought planning permission for change of use from A3 to A3/A5 with extended trading hours without complying with a condition attached to planning permission Ref MC/15/0381, dated 30 April 2015.
 - The condition in dispute is No 3 which states that: The use hereby permitted shall only operate between the hours of 11:00 to 00:00 Sunday to Wednesday including Public Holidays, between the hours of 11:00 to 00:30 on Thursdays and between the hours of 11:00 to 01:00 on Friday and Saturday.
 - The reason given for the condition is: To regulate and control the permitted development in the interests of amenity in accordance with Policy BNE2 of the Medway Local Plan.
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Appeal B Ref: APP/A2280/W/16/3159732

Omer's Kebab, 7 Canterbury Street, Gillingham ME7 5TP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Hijratulla Nasari against the decision of The Medway Council.
 - The application Ref MC/16/3153, dated 20 July 2016, was refused by notice dated 15 September 2016.
 - The application sought planning permission for change of use from A3 to A3/A5 with extended trading hours without complying with a condition attached to planning permission Ref MC/15/0381, dated 30 April 2015.
 - The condition in dispute is No 4 which states that: The existing smoking shelter to the rear of the premises shall be used for the purposes of storage ancillary to the use of the restaurant/take away only and members of the public shall not access it at any time.
 - The reason given for the condition is: To regulate and control the permitted development in the interests of amenity in accordance with Policy BNE2 of the Medway Local Plan.
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Decisions

Appeal A Ref: APP/A2280/W/16/3159835

1. The appeal is dismissed.

Appeal B Ref: APP/A2280/W/16/3159732

2. The appeal is allowed and planning permission is granted for the change of use from A3 to A3/A5 with extended trading hours at Omer's Kebab, 7 Canterbury Street, Gillingham ME7 5TP in accordance with the application Ref MC/16/3153, dated 20 July 2016, without compliance with condition number 4 previously imposed on planning permission Ref MC/15/0381, dated 30 April 2015 but subject to the other conditions imposed therein, so far as the same are still subsisting and capable of taking effect and subject to the following new conditions:
 - 1) The smoking shelter permitted shall only operate between the hours of 11:00 to 23:00 Mondays to Sundays inclusive.
 - 2) No public address system or amplified music system, which is audible at the site boundary shall be used in connection with the smoking shelter hereby permitted to the rear of the premises.

Background (Both Appeals)

3. Planning permission for the change of use of the appeal property to a café (Class A3) and the construction of a new smoking shelter was granted in December 2011.¹ Amongst other matters, the conditions imposed restricted the hours of operation to between 09:00 hours to 23:00 hours Monday to Saturdays and 18:00 hours to 23:00 hours on Sundays and Bank Holidays. Other conditions imposed required the rebuilding of the smoking shelter and prevented any public address system or amplified music system, which would be audible from the site boundary.
4. In April 2015 planning permission was granted for the change of use of the property from A3 to A3/A5 with extended trading hours and also limited the use of the smoking shelter to ancillary storage.² Both appeals relate to this more recent planning permission.

Main Issues (Both Appeals)

5. I consider the main issue to be whether the disputed conditions are reasonable and necessary in order to safeguard the living conditions of surrounding residents with particular reference to noise and disturbance.

Reasons

Appeal A -Opening Hours

6. The appeal property currently operates as a restaurant/takeaway. The use ceases at 01:00 hours on Fridays and Saturdays and the appellant wishes to open until 03:30 hours on Fridays and Saturdays. The property is located within a mixed commercial frontage that extends close to the High Street. There are a number of other restaurants/takeaways within the immediate locality and a night club opposite.
7. I note that some of the other restaurants/takeaways nearby close at 23:00 hours. However, the appellant submitted details of three premises within

¹ LPA Reference MC/11/2055

² LPA Reference MC/15/0381

Canterbury Road, including the night club opposite, where the Council has granted a licence for extended opening hours up to 03:00 hours or 03:30 hours on Fridays and Saturdays. No evidence has been submitted by either party to indicate the factors the Council had regard to when considering these licences.

8. Although the appeal property is located within a predominantly commercial frontage, the upper floors of some of the properties in this part of Canterbury Road are in residential use. In addition, the area to the west and south of the appeal property is predominantly residential in character. On the opposite side of the road the area to the east of the commercial frontage includes a number of residential properties.
9. The appeal property is situated close to the town centre in an area where some noise during late evening is to be expected particularly during the weekend period. Exposure to noise can cause annoyance and sleep disturbance, which affects quality of life and can cause impacts on health. The NPPF states that planning policies and decisions should aim to prevent noise giving rise to significant adverse impacts on health and quality of life as a result of new development.
10. Residents in Green Street, to the east of Canterbury Road, state that there are existing problems with noise and disturbance during the early hours of the morning as people disperse from the night club and other establishments in the immediate locality. On the basis of the available evidence it would seem that the existing uses which currently open until 03:00 hours, or later, disturb local residents and disrupt their sleep as patrons either leave these premises or linger in the street.
11. As a consequence of the proposed extended opening hours it is probable that people would be less likely to disperse from the area when the night club closes at 03:00 hours. The additional customers attracted to the restaurant/takeaway would be likely to add to the noise and disturbance currently experienced by residents in the immediate locality at a time when most people would be trying to sleep.
12. In these circumstances I consider that the extended opening hours sought would be likely to unacceptably harm the living conditions of surrounding residents and would fail to comply with policy BNE2 of the Medway Local Plan 2003 which seeks to safeguard amenity. I therefore conclude that condition 3 is reasonable and necessary in order to safeguard the living conditions of residents in the locality.

Appeal B - Smoking Shelter

13. The smoking shelter is located at the rear of the property close to the boundary with the residential dwellings in Saxton Street. The use of the shelter was permitted by planning permission ref: MC/11/2055, which also required the shelter to be rebuilt. During the time the shelter was in use the permitted operating hours were 9:00 hours to 23:00 hours Mondays to Saturdays inclusive and 18:00 to 23:00 on Sundays and Public Holidays. There was also a condition prohibiting the use of amplified music and the use of public address systems. The submitted information suggests that the shelter was in use between 2011 and 2015.

14. The Council state that the design and access statement in respect of application ref: MC/15/0381 proposed that the smoking shelter would be used for storage and that the disputed condition was imposed to reduce the impact of the extended opening hours upon neighbours. Although the appellant disagrees that he proposed the smoking shelter would be used for storage, the design and access statement submitted at the time of the application confirms that this is the case.
15. The smoking shelter is screened from the residential properties to the rear by a solid wall. Whilst the flats at St Marks House, a sheltered housing scheme in Saxton Street, extend closer to the appeal property than the dwellings to the rear, they are separated from it by a two storey high building that extends the entire length of the boundary with 5 Canterbury Road up to the rear of St Marks House. These walls, together with the roof would tend to limit the extent of any noise emanating from the use of the shelter for shisha smoking.
16. The Council state that the use of the smoking shelter has given rise to complaints in the past and refers to a complaint received by Environmental Health. However, no details of the complaint, including whether it was substantiated have been submitted. In my view, one complaint over a period of four years does not indicate that the previous use of the smoking shelter had a significant adverse effect on the living conditions of the surrounding residents.
17. In these circumstances I consider that disputed condition 4 is not reasonable or necessary to safeguard the living conditions of the surrounding residents and removing it would not conflict with Local Plan policy BNE2. Notwithstanding this, a condition restricting the use of amplified music is required in order to ensure that the use does not give rise to any undue disturbance to surrounding residents. For the same reason the hours during which the smoking shelter is used should be restricted. The Council suggest that the hours should be limited to 09:00 hours to 23:00 hours Mondays to Saturdays and between the hours of 16:00 hours to 23:00 hours on Sundays and Public Holidays. Whilst I agree that the use of the shelter should cease at 23:00 hours, since the proposed use is ancillary to the A5/A3 use, I consider that it should not commence prior to the opening of the restaurant at 11:00 hours. The Council has not provided any justification as to why the use of the smoking shelter should not commence until 16:00 hours on Sundays and therefore I have imposed the same hours as on other days of the week. In my view these hours represent a reasonable balance between the business needs of the appellant and the amenities of surrounding residents.

Other Matters

18. Local residents refer to *Hot Food Takeaways in Medway – A Guidance Note* (July 2014). Whilst this provides guidance in respect of the location of takeaways, its primary focus is on issues of obesity and health, particularly in relation to children and young people. Therefore neither the extended hours sought, nor the use of the shelter for shisha smoking would conflict with this guidance note.

Conclusion

Appeal A Ref: APP/A2280/W/16/3159835

19. For the reasons given above I conclude that the appeal should be dismissed.

Appeal B Ref: APP/A2280/W/16/3159732

20. For the reasons given above I conclude that the appeal should succeed. I will grant a new planning permission without the disputed condition but substituting others and retaining the relevant non-disputed conditions from the previous permission.

Lesley Coffey

INSPECTOR