
Appeal Decision

Site visit made on 16 January 2017

by Richard Aston BSc (Hons) DipTP MRTPI

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

Decision date: 13 February 2017

Appeal Ref: APP/P4605/W/16/3163003

Former Public House The Rising Sun, Cockshut Hill, Birmingham B26 2HU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Singh (c/o SEP Properties Ltd) against the decision of Birmingham City Council.
 - The application Ref 2015/06476/PA, dated 7 August 2015, was refused by notice dated 13 October 2015.
 - The development proposed is change of use to Unit 2 from A1 to A5.
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Decision

1. The appeal is allowed and planning permission is granted for change of use to Unit 2 from A1 to A5 at Former Public House The Rising Sun, Cockshut Hill, Birmingham B26 2HU in accordance with the terms of the application, Ref 2015/06476/PA, dated 7 August 2015, subject to the conditions set out in the attached schedule.

Procedural Matter

2. Since the appeal was submitted, Policies 7.21-7.31A of the Birmingham Unitary Development Plan ('BUDP') as referred to in the Council's reason for refusal have been superseded by the Birmingham Development Plan ('BDP') which was adopted by the Council on 10 January 2017. With regard to the appeal the Council has confirmed that Policies PG3, TP21 and TP37 are applicable to this appeal and I have been provided with those policies. I am required to determine this appeal on the basis of the development plan and national policy which are in place at the time of my decision and accordingly I have determined the appeal on that basis.

Main Issues

3. The main issues are:
 - Whether the proposal is in an appropriate location for such a use, in accordance with the Sequential Test.
 - The effect of the proposal on the living conditions of neighbouring occupiers, with particular regard to noise and general disturbance.

Reasons

Location

4. The application site consists of part of a converted two storey former Public
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House which, at ground floor level, has been converted into A1 retail use under permitted development rights and subdivided into two units, one of which was in use as a 'One Stop Shop' convenience store at the time of my site visit. The appeal site has a car park to the side with 16 vehicle spaces and a forecourt area to its principal elevation facing onto Cockshut Hill that contains a bus stop. There are also vehicle spaces on the opposite side of the road.

5. The appeal site is not located within a designated commercial centre. Policy TP21 of the BDP requires that proposals for main town centre uses outside of the boundaries for main town centre uses will not be permitted unless they satisfy the requirements set out in national planning policy. This is supported by the Council's Shopping and Local Centres Supplementary Planning Document ('SPD') which sets out a hierarchy of shopping centres (exclusive of Birmingham City Centre). However, in this particular case the BUDP has been superseded by the BDP and I note that the hierarchy used in the SPD differs in some respect from that in this policy¹. It is proposed to update the SPD to bring it in line with the BDP but in the absence of any clarification as to how such changes may relate to the appeal proposal before me, I afford the SPD limited weight.
6. Whilst seeking to ensure the vitality of town centres, the National Planning Policy Framework ('the Framework') advocates a sequential, town centre first approach to applications for uses, allowing that, in some circumstances, such uses can be considered outside of town centre or edge of centre locations. The test requires main town centre uses to be located within centres, then in edge of centre locations and only if suitable sites are not available should out of centre sites, such as the appeal site, be considered. Paragraph 25 of the Framework requires flexibility to be demonstrated on issues such as format and scale.
7. The appellant has undertaken a sequential test which concludes that there are no sequentially preferable reasonable alternative locations for the development proposed. The requirements that have informed the test are a minimum of 1,000sqft of floorspace, with good road access, space for customer parking and within an existing shopping area. Of the 10 sites included, the test discounts 8 of the sites on the basis of the floor area being below the required minimum. The appellant seeks to justify this approach by reference to larger multinational hot food operators such as Papa John's, Pizza Hut and Domino's, all of which are pizza takeaways. The proper test of suitability means suitable for the development proposed by the applicant, rather than suitable for some other purpose and that the issue of suitability is directed to the developer's proposals, not some alternative scheme.
8. In this case however, the description of development for which permission is sought, as set out on the application form, is described as a general A5 takeaway use and not a specific pizza takeaway use. Moreover, the units discounted on the basis of falling below the minimum size range from 325 sqft through to 814 sqft. To my mind, this does not demonstrate sufficient flexibility in terms of scale.

¹ 7.22 of BDP

9. The test also sets out a minimum dedicated parking provision of 5 car parking spaces for the use. I share the Council's view that the availability of such dedicated spaces is an overly restrictive requirement for such a use, which is typically expected to take place in centres that share car parking provision. I also note that the Council have no parking standards for such a use, a point which is not disputed or evidenced by the appellant and the test would also appear to have discounted units in existing district centres that are in proximity to the appeal site.
10. For these reasons, I am not satisfied that the test undertaken has demonstrated sufficient flexibility and is sufficiently robust to demonstrate that the proposal would be in an appropriate location. In this respect, it would conflict with Policy TP21 of the BDP and the guidance within the Framework.
11. I am mindful that where an application fails to satisfy the sequential test it should be refused². However, on the evidence before me the site has been vacant for over a year and has a lawful A1 use. The Council has also not cited any particular harm to the vitality and viability of existing centres. Furthermore, it was evident from my site visit that the site is in an accessible location that is well served public transport, a consideration required by the Framework for such development.
12. The proposal would not result in the introduction of a town centre use on a site where no such use exists at present and there would be some, albeit limited economic benefits. Rather, it would result in the substitution of one town centre use for another, within an existing building and with no increase in floorspace. Although the unit is currently vacant, I also consider that at some point the potential fall-back position to a main town centre use is more than a theoretical prospect and I attach considerable weight to it. Overall, these are strong material considerations which in this particular case outweigh the conflict with Policy TP21 of the BDP and the Framework.

Living conditions

13. The appeal site is located within a predominantly residential area albeit that Cockshut Hill appeared to me to be a busy, urban thoroughfare. The closest residential property, No. 106 Cockshut Hill is a single storey semi-detached dwelling located on the opposite side of the car park. The rear garden areas of residential properties along Gleneagles Road form the rear boundary with the appeal site. The curtilage of No. 106 is separated from the car park by a mature hedgerow and it was clear from my visit that there were a number of comings and goings from customers accessing the convenience store and I noted some noise impacts in terms of vehicle engines running and the shutting of vehicle doors.
14. I also noted that the convenience store has opening times of 06:00 to 22:00 hours, seven days a week. In this case a condition restricting the hours of opening to be no later than the One Stop Shop would reduce the any noise and general disturbance and ensure the use does not operate beyond the closure of the existing store, at a time when adjoining residents would expect a relatively quieter environment to allow rest and sleep. It would meet the relevant tests set out in paragraph 204 of the Framework.

² Paragraph 27 of the Framework.

15. In combination with the presence of the existing boundary treatments, I do not consider that the likely levels of additional vehicles accessing the site for the proposal would materially add to this to the extent that it would cause unacceptable harm to the living conditions of the occupiers of No. 106 in terms of additional noise and general disturbance. Furthermore, the distance of the unit from this property is unlikely to lead to unacceptable levels of noise from customers that may congregate outside the unit. The depth of the rear gardens of properties on Gleneagles Road and the presence of further soft landscaping and trees on these boundaries would ensure that the living conditions of the occupiers of those properties would not be materially harmed.
16. For these reasons and subject to such a condition, the proposal would not harm the living conditions of existing and future residential occupiers in terms of noise and disturbance and it would not conflict with Policy PG3 of the BDP or the Framework in terms of seeking to ensure a high quality of design and a good standard of amenity for all existing and future occupants of land and buildings.

Other Matters

17. In reaching this view I am also mindful that Policy 6 of the SPD, which is a policy for local parades and locations outside centres, states that in parades or frontages which have fewer than 10 units, one A5 use may be permitted subject to meeting other policy considerations, for example, where there is no adverse impact on the amenity of residents. To my mind, this provides flexibility for A5 uses outside of the hierarchy and even though this I have afforded it limited weight, in the absence of any adverse impacts, it adds weight to my decision to allow the appeal.
18. My attention has been drawn to an appeal decision at the Former Stirrup Cup Public House, Brays Road, Birmingham in which an appeal for a change of use from part of a public house to a hot food takeaway was dismissed³. However, in that appeal the Inspector found harm to the living conditions of adjoining occupiers and no sequential test was submitted. Moreover, in that case the Inspector did not consider material considerations existed to outweigh the conflict with the development plan, whereas I have found otherwise. Consequently, I do not consider it is directly comparable to the appeal proposal before me and in any event each proposal must be determined on its own merits.
19. I have had regard to the representations from third parties including matters of health and wellbeing of residents, anti-social behaviour, litter and highway safety. However, I note that the Council did not object on any of these grounds and no objections were raised by West Midlands Police. On the basis of the evidence before me, I have no reason to disagree. In terms of waste and litter I have imposed a condition relating to waste and refuse which will ensure that litter does not harm the living conditions of neighbouring occupiers or the appearance of the area.

³ APP/P4605/A/13/2205612

Conditions

20. I have considered the conditions put forward by the Council and have amended the wording where necessary in the interests of clarity and simplicity. I consider a condition is required to ensure compliance with the approved plan, as this provides certainty. In order to protect the living conditions of neighbours a condition is necessary to restrict opening hours in accordance with those suggested by the Council. However, for their reasons given above I have amended the closing time to reflect that of the existing convenience store and adjusted the Sunday and Bank Holiday opening times, in accordance with the Council's suggestion that on such days it should not be open to customers until one hour later and it should close one hour earlier, than on a Monday to Saturday.
21. The Council has suggested a condition to control noise. I am satisfied that a single condition which specifies the approval, implementation and retention of a scheme to control noise emanating from the premises would suffice. A condition requiring the approval of extraction and odour controls and that such equipment and its subsequent retention and maintenance is necessary to limit the potential for smells and fumes. A condition requiring details of refuse storage and litter bins and collection is also required, in the interests of the character and appearance of the area and living conditions of neighbouring occupiers. I have included such requirements into a single condition.

Conclusion

22. For the reasons set out above, although the proposal would conflict with Policy TP21 of the BDP and the Framework this conflict is outweighed by other material considerations. Insofar as the Council's second reason for refusal is concerned, I have found that subject to conditions the proposal would not cause harm to the living conditions of neighbouring occupiers and in this regard, the proposal would not conflict with the development plan, when read as a whole or the Framework. Having considered all other matters raised, I therefore conclude that the appeal should be allowed.

Richard Aston

INSPECTOR

SCHEDULE

CONDITIONS

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: 001 Rev A.
- 3) The use hereby permitted shall not be open to customers outside the following times 0900 to 2200 Monday to Saturday and 1000 to 2100 on Sundays and Bank Holidays.
- 4) Before the use hereby permitted begins, a scheme for the installation of equipment to control the emission of fumes and smell from the premises, including details of any noise levels, noise control and external ducting shall be submitted to and approved in writing by the local planning authority. The approved scheme shall be fully implemented prior to the commencement of the use. All equipment installed as part of the scheme shall thereafter be operated and maintained in accordance with the manufacturer's instructions.
- 5) Before the use hereby permitted begins, a scheme which specifies the provisions to be made for the control of noise emanating from the building and the site shall be submitted to and approved in writing by the local planning authority. The approved scheme (including any noise insulation) shall be fully implemented prior to the commencement of use and thereafter retained as approved.
- 6) Before the use hereby permitted begins, details of facilities for the storage of refuse, receptacles for the disposal of litter and a scheme for the collection and disposal of such litter shall be submitted to and approved in writing by the local planning authority. The facilities shall be provided in accordance with the approved details prior to the commencement of the use and thereafter retained as approved.