
Appeal Decision

Site visit made on 19 December 2017

by Helen Cassini BSc(Hons) DipTP MRTPI

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

Decision date: 03 January 2018

Appeal Ref: APP/W0734/W/17/3181751

2A Woodrow Avenue, Middlesbrough TS7 8EZ

- 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 S Chambers and Mr M Ali against the decision of Middlesbrough Borough Council.
 - The application Ref: 17/0328/COU, dated 24 May 2017, was refused by notice dated 19 July 2017.
 - The development proposed is a change of use from (use Class A1) shop to hot food takeaway (Use Class A5).
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Mr S Chambers and Mr M Ali against Middlesbrough Borough Council. This application is the subject of a separate Decision.

Procedural Matter

3. In the body of the Council's delegated report and second reason for refusal, reference is made to Policy CS5 of the Middlesbrough Local Development Framework Core Strategy (the CS). It is noted that Policy CS5 of the CS was not contained within the list of planning policies and key areas of guidance also contained within the delegated report. To my mind, a typographical error occurred during the drafting of the delegated report. As the policy is referenced within the main body of the delegated report, and is also within the decision notice, it is not considered either party has been prejudiced by this minor error.

Main Issues

4. 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; and

- the effect of the proposal on the character and appearance of the surrounding area.

Reasons

Sequential test

5. The appeal site is a vacant unit, located on the east side of Woodrow Avenue. It is understood that the unit was originally a residential garage which was converted into retail use in the 1960's. The site is adjacent to a parade of commercial units including a newsagents and two hairdressers. Residential units are located on the first floor above the newsagent and Copper Angels hairdressers. Unrestricted car parking is located to the front of the site which could accommodate approximately 6-8 vehicles. The surrounding area is predominately residential, with a mix of architectural styles being evident.
6. The planning history of the site is noted. In particular the application refused in 2016¹ for a similar scheme.
7. The appeal site is located outside any existing town, district or local centre as defined by Policy CS13 of the CS. The appellants consider that Policy CS13 of the CS is out of date given the date of publication of the CS almost 10 years ago. Despite this, the approach adopted in Policy CS13 of the CS is consistent with Section 2 of the National Planning Policy Framework (the Framework), which seeks to ensure the vitality and viability of town centres. Policy CC13 of the CS is therefore not considered out of date and significant weight is attached to the policy.
8. In order to protect the vitality and viability of existing centres, paragraph 24 of the Framework requires that a sequential test is applied to applications for main town centre uses that are not in an existing centre and not in accordance with an up-to-date local plan. The test requires such uses to be located within centres, then on the edge of centre locations and only if suitable sites are not available should out of centre sites, such as the appeal site, be considered.
9. A degree of dispute exists between the parties as to whether a sequential test is required. The appellants maintain that a hot food takeaway unit does not constitute a main town centre use, as defined within Annex 2 of the Framework. Establishments where the primary purpose is for the sale of hot food for consumption off the premises, fall within the A5 Use Class. The list of main town centre uses within Annex 2 of the Framework is not exhaustive. The list defines main town centre uses as retail development, leisure, entertainment facilities, and the more intensive sport and recreation uses. As such, it is considered that as the use falls within the retail development category and it is therefore a main town centre use.
10. Despite the dispute, the appellants submitted a sequential test with the planning application². It is accepted that a sequential test needs to be considered in the context of the specific development proposed. The sequential test should consider the suitability of sites in light of the specific application proposal. As such, the test should identify whether any sequentially preferable sites of broadly the same size of the subject site are currently available and suitable.

¹ Council reference 16/5269/COU

² Total Planning Solutions – Sequential Assessment May 2017

11. The submitted sequential test focused on the Marton Road/Gypsy Lane local centre. It is noted that at the time of the test a vacant unit was identified within the local centre. The appellants contend that this is not a viable option as the last use was A1 retail and it is being marketed as such. Although email correspondence³ has been submitted detailing dialogue between the appellants and the agent managing the vacant unit, no confirmation has been provided confirming the unit has been let or that no other use, other than A1 retail, would be considered. Furthermore, the submitted sequential test fails to consider any sequential locations on the edge of the centre.
12. 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 the absence of such information, it is not possible to satisfactorily conclude whether the proposal would have a harmful effect on the vitality and viability of the Marton Road/Gypsy Lane local centre. Accordingly, the proposal would conflict with Policy CS13 of the CS and guidance contained within the Framework.
13. The Council has also referred to Policy REG29 of the CS in the decision notice. However, this policy relates to other complementary uses, including use Class A2 and A3 and community uses, within defined local centres. Given the proposed location of the unit outside of a local centre, this policy is not considered relevant in this instance.

Living conditions

14. As already identified, the proposed unit is located within a predominantly residential location. The unit would be in proximity to both the semi-detached dwelling at 1 Canberra Road and the residential units above the commercial units adjacent to the appeal site.
15. The proposed opening hours of the unit would be between 1600 and 2300 hours, seven days a week including public and bank holidays. The appellants contend that 85% of the business would be home deliveries to the Marton, Coulby Newham and Nunthorpe areas. The appellants anticipate that the remaining 15% of customers would arrive at site either on foot or in a private motor vehicle.
16. Noise would be generated as a result of customers coming and going to the appeal property whether on foot or in a motor vehicle. Consequently, conversations held outside the premises, the slamming of car doors and the turning over of car engines and vehicles manoeuvring to and from the parking area and wider street would be experienced by neighbouring occupiers.
17. During the day time such noise levels may not result in an impact on the living conditions of the adjoining occupiers. However, later in the evening or during weekends and bank holidays, vehicle noise from the surrounding road network and adjoining units would be reduced. Therefore, the background noise would be lower than in the daytime. It is at these times, later in the evening and after 2100 hours in particular, that residents living in proximity of the site might reasonably expect a reasonable degree of peace and quiet as they watch television, get younger or elderly family members ready for bed or otherwise wish to relax within their homes.

³ Total Planning Solutions – Planning Appeal Statement 19 July 2017. Appendix 5 Email from Agent on occupancy of Unit 1 Marton Est.

18. It is accepted that the Council's Environmental Health team, subject to conditions, raised no objection to the proposal. Nevertheless, no substantive evidence has been submitted which persuades me that there is reasonable certainty that the impact of the noise and disturbance as a result of customers arriving and leaving, and potentially congregating outside on the pavement, would not adversely affect the living conditions currently enjoyed by the neighbouring residents.
19. The appellants have drawn my attention to a number of appeal decisions for similar proposals. However, I have limited information relating to the particular circumstances of these developments and as such, a comparison is of limited relevance in this instance. Accordingly, I have considered the appeal before me on its individual merits.
20. The potential for local employment opportunities is acknowledged. However, this benefit does not overcome the identified harmful effect on the living conditions of neighbouring residents, with particular regard to noise and disturbance. The proposal is therefore contrary to the protection of residential amenity objectives of Policy CS5 of the CS and Policy DC1 of the Middlesbrough Local Development Framework, Regeneration Development Plan Document 2009 (the DPD).
21. The proposal would also run contrary to one of the Framework's core planning principles of seeking to secure a good standard of amenity for all existing occupants of land and buildings.

Character and appearance

22. It is proposed that the unit would open at 1600 hours daily. The Council has raised concern that as a consequence of the opening hours, the unit would be closed with a shuttered frontage. The Council consider that this would be an unattractive feature within the street scene.
23. Whilst the concern is acknowledged, the appellants have confirmed in their evidence that a roller shutter is not proposed for the unit. If planning permission is granted, the appellants propose that a separate application would be forthcoming in terms of a new frontage.
24. In addition, in their statement of case, the Council also raised the issue of fear of crime as a result of the proposal. Paragraph 69 of the Framework states that planning policies and decisions should aim to achieve places which promote safe and accessible environments where crime and disorder, and the fear of crime, do not undermine quality of life or community cohesion. Vulnerability to and fear of crime are therefore material considerations in planning decisions, although the weight that can be attributed to it is often limited unless there is significant evidence to show that the increased fear of crime would actually occur.
25. It is appreciated that local residents have genuine concerns about the potential for an increase in crime and anti-social behaviour. However there is no firm evidence that such occurrences, which are ultimately a matter for the relevant authorities to manage, would be attributed to the proposed change of use. Crime and disorder does not seem to me to be an inevitable consequence of the proposed change of use, but is rather a question of individual behaviour and appropriate management.

26. In the absence of any firm evidence before me to the contrary, I am unable to conclude that the proposal would result in an increase of criminal activity or anti-social behaviour.
27. It therefore follows that the proposal complies with the design objectives of Policy CS5 of the CS and Policy DC1 of the DPD. The proposal would also comply with one of the Framework's core planning principles of seeking to secure high quality design.

Conclusion

28. The proposal would not have an unacceptably harmful effect on the character and appearance of the surrounding area. However, the identified harm to the living conditions of the neighbouring occupiers and the harm in terms of the vitality and viability of the Marton Road/Gypsy Lane local centre is decisive.
29. For the reasons given above, and taking account of all other matters raised, I conclude that the appeal should be dismissed.

Helen Cassini

INSPECTOR