



Appeal Decision

Site visit made on 17 June 2019

by Graeme Robbie BA(Hons) BPI MRTPI

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

Decision date: 16 July 2019

Appeal Ref: APP/M4510/W/19/3223573

Former Potraviny Shop - ground floor unit only, 75 Shields Road, Byker, Newcastle Upon Tyne NE6 1DL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
 - The appeal is made by Mr Anthony Lang against the decision of Newcastle-upon-Tyne City Council.
 - The application Ref 2019/0079/01/DET, dated 15 January 2019, was approved on 20 February 2019 and planning permission was granted subject to conditions.
 - The development permitted is change of use from Shop (Use Class A1) to café / restaurant (Use Class A3) with ancillary takeaway; and new extraction flue to rear elevation, rising to termination point with a high velocity cowl, above eaves level (below ridge): RESUBMISSION OF APPROVED SCHEME 2018/1552/01/DET, BUT REQUESTING DESCRIPTION OF DEVELOPMENT AS APPLICATION FORMS AND LONGER OPENING HOURS.
 - The condition in dispute is No 3 which states that: *The premises shall close for business by 00:00 hours. The premises shall not re-open for business before 07:00 hours.*
 - The reason given for the condition is: *In the interests of the amenity of the occupiers of nearby residential properties, in accordance with the National Planning Policy Framework, saved Policy H2 of the Unitary Development Plan and Policy CS14 of the Core Strategy and Urban Core Plan.*
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Newcastle City Council against Mr Anthony Lang. This application is the subject of a separate Decision.

Background and Main Issues

3. Planning permission was initially granted at the appeal property on 2 January 2019¹ for '*Change of use from shop (Class A1) to café / restaurant (Class A3) and erection of extraction flue to rear elevation*'. The description of the development used on the decision notice (and quoted herein) was subject to correspondence between the Council and the applicant and was subsequently accepted by the applicant. Amongst other conditions imposed, that permission was subject to a condition requiring the business to close by 23:00 and to not open for business before 07:00.
4. A second application, the proposal now before me as an appeal, was granted planning permission on 20 February 2019². It was subject to a different

¹ 2018/1552/01/DET

² 2019/0079/01/DET

opening hours condition, requiring the premises to be closed for business by 00:00 and to not open for business before 07:00. This application adopted the same development description as the former, albeit without the express agreement of the applicant.

5. In both instances, the development description was initially set out in the terms described in the banner heading above. Other than minor revisions to the wording of the description as it refers to the extraction flue, the appellant restated his desire to retain reference to '....with ancillary takeaway....' within the description.
6. The appellant is clear that the development description should include reference to '....ancillary takeaway....', that being included in the development description set out on the original planning application form. The matter of whether or not an ancillary use, in this instance a takeaway use ancillary to a café / restaurant use, should be specifically referred to in a development description is a matter of significant disagreement between the two main parties. However, the extent to which an ancillary use remains ancillary to the main use is a matter of fact and degree, and is not a matter for me to determine in the context of an appeal made under s78 of the Act. It is open to the appellant to apply to have the matter determined under sections 191 or 192 of the Act. Any such application would be unaffected by my determination of this appeal.
7. The appeal before me is made under section 78 (s78) of the Town and Country Planning Act 1990 (as amended) (the Act) against a grant of planning permission subject to conditions. The condition in dispute, for which the appellant seeks alternative wording, is condition 3. The application form and the appellant's Statement of Case sets out alternative wording, thus:

Condition 3: The premises shall not be open to seated customers outside of the hours of 7am and midnight. Ancillary delivery from the premises shall not occur between the hours of 6am and 7am.
8. The version of condition 3 set out on the planning permission³ is justified as being in the interests of the amenity of occupiers of nearby residential properties. Thus, the main issue is the effect of the proposed amendment to condition 3 on the living conditions of occupiers of nearby residential properties.

Reasons

9. The appeal property is a corner unit located at the end of a short terrace of commercial properties on Shields Road, and part of a busy commercial street in Byker. To the west of the appeal property, across a cul-de-sac and turning area, is a large, modern retail unit, whilst to the rear beyond the rear access road is an open square and landscaped car park. Although predominantly commercial in its character and appearance, there are residential properties at upper floors along Shields Road, including above and adjoining the appeal property.
10. Notwithstanding the proximity of the upper floor residential units to the proposed café / restaurant, the Council were satisfied that the use of the ground floor unit as a use falling within Use Class A3 until midnight would not

³ 2019/0079/01/DET

give rise to material harm to the living conditions of occupiers of those properties. Key to the Council's conclusion it seems, and something that I observed during the course of my visit to the site, is that Shields Road is a busy, bustling commercial area and designated District Centre.

11. The effect of the appellant's proposal to revise the wording of condition 3 would be to restrict the opening hours of the café / restaurant use so as to be closed to seated customers between midnight (00:00) and 07:00. This would, the appellant states, also allow kitchen activities to continue for the purposes of cooking food for delivery orders, with deliveries restricted between the hours of 06:00 and 07:00.
12. Setting aside the disagreement between the main parties regarding whether an ancillary use needs to be specifically cited within the description of development, the effect of the revisions to condition 3 would be to allow the 24-hour operation of the kitchen for food preparation, and the dispatch of deliveries for 23 hours in a 24-hour period. By omission, it could also allow the 24-hour operation of takeaway activities by walk-up customers on a collection-basis.
13. The proposal would considerably extend operations within the appeal premises over and above those previously granted. It may well have been the case that the Council were content that the operation of the appeal property until 00:00 would not cause harm to, or otherwise be unexpected for occupiers of residential properties in such an overtly commercial context as Shields Road. However, on-going operation of a commercial kitchen into, and through, the early hours of the morning would go beyond what I consider to be reasonable in a setting such as that of the appeal premises.
14. Prohibiting deliveries for a one hour slot between 06:00 and 07:00 would do little to alleviate harmful effects of kitchen operations continuing through the night. Nor am I persuaded that the absence of seated customers within the premises beyond 00:00 would adequately ensure the protection of the living conditions of occupiers of nearby residential properties, principally because the suggested condition would not prevent the premises being frequented by take-away customers beyond 00:00.
15. Shields Road may well be a wide, main and 'bus-routed' arterial road, as the appellant suggests. However, whatever activity might be associated with such a road will naturally die down into the early hours of the morning. It may well also be the case that other commercial premises are operating late at night and in breach of hours restrictions. The appellant has not provided anything other than vague and generalised statements to this effect and so the weight that I can give to these arguments is limited as a consequence.
16. Saved policy H2 of the Unitary Development Plan (UDP) and policy CS14 of the Core Strategy and Urban Core Plan (CSUCP) were cited in support of the condition restricting the hours of operation of the café / restaurant use. UDP policy H2 seeks to protect the amenities of any dwelling from harm, setting out the factors that will be given particular regard in assessing the impact on residential amenity. CSUCP policy CS14 seeks to maintain and improve the wellbeing and health of communities by, amongst other things, preventing negative impacts on residential amenity from noise.

17. Although the appeal property may be situated within a commercial context and an established District Centre and commercial uses dominate the surrounding area, they do not do so exclusively. There is a residential unit above the appeal site and there are others close by. The proposal, to extend the opening and operating hours at the premises, would allow activity into periods of the day (and night) when comings and goings, activities and transport associated with the evening and late-night economy are less, and when it would not be unreasonable for local residents to be able to expect a quieter local environment.
18. The proposed condition might restrict seated customers, but it would not address takeaway customers, thereby effectively allowing unfettered, 24-hour takeaway service. In addition to this, the proposed condition would cater for the appellant's desire to serve the 'Uber Eats' and 'Deliveroo' economy by allowing the commercial kitchen to operate on a 24-hour basis. Outgoing deliveries might be restricted by the proposed condition, but this would only be for an hour, and would not prevent operational noise and comings and goings at hours of the day (and night) when nearby residents could reasonably expect some relief from commercial operations. The proposal would fail to achieve the aims of CSUCP policy CS14 and UDP saved policy H2, and is therefore contrary to those policies.
19. The Framework states that the purpose of the planning system is to contribute to the achievement of sustainable development, and that the planning system has three overarching objectives; economic, social and environmental. I agree that the Framework states that the planning system should seek to build a strong economy and to support business. But it also has social and environmental objectives. For the reasons I have set out above, the proposal would fail to contribute positively to social and environmental objectives through the operation of a use at times of the day (and night) that would not adequately safeguard the living conditions of occupiers of nearby residential properties.

Conclusion

20. For the reasons set out, and having considered all other matters raised, I conclude that the appeal should be dismissed.

Graeme Robbie

INSPECTOR