



Appeal Decision

Site visit made on 23 July 2019

by Anthony J Wharton BArch RIBA RIASI

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

Decision date: 5 August 2019

Appeal A Ref: APP/U4610/C/19/3222391

Land at Ground Floor, 77 Humber Avenue, Coventry CV1 2AU

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Moaz Islam against an enforcement notice issued by Coventry City Council.
 - The enforcement notice, numbered AA/2018/01004, was issued on 7 February 2019.
 - The breach of planning control as alleged in the notice is as follows:
The material change of use of the land to a hot food takeaway (Use Class A5).
 - The requirement of the notice is as follows:
Permanently cease the use of notice on the land as a hot food takeaway; and permanently remove from the land all facilities and equipment associated with the unauthorised use , including any extract flues and/or any other plant and machinery; and permanently remove from the land all building materials and waste arising from compliance with this requirement.
 - The period for compliance with the requirements is three calendar months.
 - The appeal is proceeding on grounds (a), (c), (f) and (g), as set out in section 174(2) of the Town and Country Planning Act 1990 as amended.
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Appeal B - Ref: APP/U4610/W/3221671

Land at Ground Floor, 77 Humber Avenue, Coventry CV1 2AU

- The appeal is made under section 78 of the Town and Country Planning Act 1990.
 - The appeal is made by Mr Moaz Islam against a refusal of planning permission by Coventry City Council.
 - The application Ref FUL/2018/3298 dated 28 November 2018 was refused on 23 January 2019.
 - The development proposed is as follows:
Change of use from existing retail unit (Use Class A1) to Hot-Food Take-Away (Use Class A5), new shopfront and extraction flue.
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Decisions

1. Both appeals, A and B are dismissed. See formal decisions below.

Matter of clarification, background information and relevant policy

2. The Council failed to turn up for my site visit at the appointed time. However, I was met by the appellant and was able to carry out an 'Accompanied Required Site Visit' (ARSV) and saw everything I needed to see. I am satisfied that in carrying out the ARSV no injustice has been caused.

3. The appeal property is located on the ground floor of a pre-war, end of terraced property on the south-western corner of St Georges Road and Humber Avenue. Prior to the appellant commencing to use it as a Hot Food Takeaway (HFT) it was vacant.

However, its lawful use is in Use Class A1 retail. At first floor level there is a separate independent residential flat. There is a single storey flat-roofed extension to the rear of the property and a back yard which is enclosed by a 1.8m high brick wall which runs along St Georges Road.

5. The HFT (Use Class A5) was noted by the Council to be in operation and this was the case at the time of my site visit. A large extraction flue has been fitted to the east elevation and there is a new shop front facing onto Humber Avenue. The immediate surrounding area is predominantly residential comprising terraced pre-war red-brick dwellinghouses. There are retail units on the opposite corners of the road junction and these also have residential accommodation above at first floor level. Parking levels are generally high in the area and there are two schools in close proximity to the appeal premises.

6. The Humber Road local shopping area lies approximately 230m to east. This provides convenience shopping, HFTs and a public house. I noted these and walked around the area prior to my site visit including looking into the nearest school entrance which is very close by at the end of Humber Avenue.

7. Planning permission for a change of use (COU) from existing retail (Class A1) to a HFT (Class A5) was refused on 21 August 2018 (Application No FUL/2018/1751). This included the new shop front and the extract flue. The reasons for refusal of the COU related to it being contrary Policy R6 of the Coventry Local Plan 2016 (CLP) in that it was located outside of a defined centre and that it would be harmful to living conditions in this predominantly residential area.

8. By reason of its design, size and bulk the extract flue was also considered to be contrary to Policies DE1 and R6 of the CLP as well as to design policies within the National Planning Policy Framework (NPPF) and would be harmful to the visual amenities of the locality and the character of the surrounding residential area.

9. A second Planning application (FUL/2018/3298) for the same COU and development was refused on 23 January 2019. This is now the subject of Appeal B and it had proposed better acoustic and extraction details and the screening (by enclosing it as a chimney breast) of the external extract flue. This proposed hidden flue was considered to overcome the visual clutter of the current flue.

10. However, this application was also refused on the basis of it being contrary to Policy R6 of the CLP, as well as being contrary to Policy DS3. The Council also referred in the reasons for refusal (RfR) to the proposal being contrary to the Emerging Supplementary Planning Document (SPD) on Hot Food Takeaways and to it being contrary to the NPPF by reason of its close proximity to the two schools. It was further stated that the proposal has further undermined its pledge to *'improve its population's health and wellbeing and to reduce health inequalities'*.

11. After each of the above applications the appellant had been asked to cease trading in breach of planning control but the appellant continued to trade unlawfully. The LPA, therefore issued a Temporary Stop Notice (TSN) on 7 February 2019 (reference AA/2019/00095) and the enforcement notice, the subject of Appeal A was issued on the same day. At the time of my site visit the HFT was open and appeared to be in operation.

Appeal A on ground (c)

12. To be successful on this ground it must be shown that either there is a planning permission in place for the change of use and the operational development alleged to have been being carried out, or that one is not required because, for example, the works constitute permitted development. The merits of the case do not fall to be

considered under this ground. The onus is upon the appellant to show that there has not been a breach of planning control.

13. At paragraph 2.1 of the appellant's statement it is stated '*that the use is operating as a take away is not disputed, however the unit currently has a lawful use as a shop*'. By this admission it is evident that a breach of planning control has occurred. The lawful use of the premises is as a Class A1 retail. Its use as a HFT in Class A5 is not lawful and there is no planning permission in place.

14. On behalf of the appellant the '*permitted development rights*' (PD) set out in Schedule 2, Part 3, Class C of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO) are referred to. In particular, attention is drawn to the fact that a COU from Class A1 (shops) to a use falling within Class A3 (restaurants and cafes); and the potential to undertake building or other operations for the provision of facilities for ventilation and extraction constitutes permitted development (PD) under the GPDO.

15. It is also stated that '*the applicant is indeed considering the change of operation to a predominant café use which would, subject to an application for possible prior approval, allow the flue and cooking equipment installed to be retained. Therefore the retention of the flue and equipment does not represent a breach of planning control as they could be lawfully used*'.

16. However, in the context of this appeal under ground (c), this argument is flawed. As indicated by the LPA the GPDO does allow such a COU, but such a change to a possible alternative future use cannot be used to support this appeal on ground (c). The COU that has occurred is unlawful; there is no planning permission in place and a COU from Class A1 to Class A5 does not constitute PD under the GPDO. The appeal on ground (c) must, therefore fail.

Appeal A on ground (a) and Appeal B

17. The main issue in both appeals are as follows:

- Whether the principle of a HFT in this location is acceptable
- The effect of the change of use on the living conditions of nearby residents;
- The effect of the extraction flue as fitted on the character and appearance of this residential area and;
- The effect on the health and wellbeing of school children and the wider population of the City.

The principle of the HFT use in this location

18. Policy R6 of the CLP requires that restaurants, bars and HFTs should be located within defined centres and will normally be discouraged outside of these locations. Even in defined centres the policy aims to protect residential amenity and to ensure that a scheme will not be detrimental to highway safety. Main Town Centre uses are set out in Annex 2 of the NPPF but do not include HFTs. The appeal property does not lie within a defined local centre and other than the two other nearby retail units the area is predominantly residential. In principle, therefore, the proposal is contrary to Policy R6 due to its location, but I have considered it on its merits in relation to its specific effects.

The effect on living conditions

19. HFTs have the potential to result in undue levels of noise and disturbance for those living adjacent and/or nearby to the use. There is a flat above the unit and the appeal property shares party walls and ceilings with the adjacent residential use and with the flat above. However, for the second application the appellant has provided an acoustic

survey and an assessment of the extraction system in terms of noise, smells and odours.

20. The Environmental Protection Officer (EPO) for the Council is satisfied with the extraction system and the noise assessment, subject to the installation of additional insulation as recommended in the report for Bedrooms 1 and 2 in the flat above and an acoustic housing been placed around the chiller unit.

21. However, the Planning Officer (PO) was still concerned about the potential for general disturbance caused by a HFT use in this particular location. Reference is made to the usual likely frequent comings and goings to HFT premises; to the likelihood of revving engines and car doors slamming and to general noise caused by people talking in the street outside of the premises. The Council stresses that this is a very quiet residential area with low background noise levels and it considered very likely that any general noise and disturbance would be much greater, particularly in the evenings, than for the current lawful use as a retail shop.

22. It is accepted by the Council that it is possible to measure certain specific noises, but it is stressed that it is not possible to measure and quantify general disturbance likely to be caused by customers of the HFT in this location. It is considered, therefore, that the findings in the acoustic report have not been shown to outweigh the harm caused by general disturbance which would result from the HFT use.

23. Having noted the specific corner location of the property; the location of the windows in the first floor flat and the proximity of the other residential uses in the street, I share the PO's concerns about the likelihood of unacceptable levels of noise and disturbance for residents which could be caused by a continued HFT use at this corner location. The surrounding terraced houses are relatively small and close together and although I noted some double glazing, I also noted open windows to some of the properties close to the corner on what was a very hot day.

24. Despite the acoustic report and the improved insulation, I do not consider that these measures would be sufficient to mitigate against the gathering of people outside the HFT; the general level of 'comings and goings'; possible revving car engines and the slamming of car doors. These are all likely and typical scenarios for a HFT and particularly at night after other restaurants and even public houses might have closed. Although restrictions on opening hours could help in this respect, late at night and early and mid-evening use of the HFT would still have the potential of disturbing nearby families with children.

25. On balance, therefore, and as a matter of fact and degree, I consider that the HFT use would be harmful to residential amenity and contrary to R6 of the CLP. I do not consider that any other planning conditions would be sufficient to overcome the likely harm to the living conditions of the people living 'over the shop' and in other nearby terraced dwellings. The appeal fails therefore on this issue.

The effect of the flue on character and appearance

26. The current flue is visually harmful and very poorly designed. I agree with the Council that it detracts markedly from the character and appearance of the residential area and that it is contrary to Policies DE1 and R6 of the CLP as well as to design policies within section 12 of the NPPF.

27. However, I acknowledge that the proposed chimney breast flue would overcome these issues and thus in Appeal B the proposal would be visually acceptable in this particular location. There is clearly sufficient a set-back to construct a chimney breast solution to hide the flue. In relation to this issue for Appeal B, I therefore find in favour of the appellant.

The effect on health and wellbeing

28. Whilst acknowledging that there is a significant evidence base focussing on the harms of excess weight and the relationship between HFTs; the levels of obesity and the proximity of HFTs to schools, the Council's HFT SPD has not yet been adopted. I have been informed, however, that it is being put before Committee in August of this year. The appellant's agent has pointed out that the nearest school is only just within the limits referred to within the SPD and that it is a primary school, whereby it is unlikely that the children would make direct independent use of any HFT.

29. I conclude that, although this issue can be afforded some weight in my consideration of whether or not planning permission should be granted for this COU that weight must be limited. The SPD has not yet been adopted and this, together with the fact that the school is a primary school, results in me concluding that, at present my overall conclusion regarding this issue is neutral. Thus, on balance, I find neither in the Council's favour nor the appellant's on this issue.

Overall planning balance on the merits of the case – ground (a).

30. I have found in the appellant's favour in relation to the visual effect of the flue (for the second application and Appeal B) and with regard to the effect on health and wellbeing I do not consider that emerging HFT SPD can carry sufficient weight in itself to justify withholding planning permission.

31. However, these two factors are far outweighed by my conclusions that the HFT in this particular location is harmful to both local and national policies which seek to ensure that the living conditions of residents are not detrimentally affected. Overall, I find the unauthorised COU to be contrary to the relevant policies and conclude that planning permission is not justified in this particular case. Both appeals, A and B, therefore, fail on the merits of the cases.

Appeal A on ground (f)

32. To be successful on this ground of appeal, the onus is upon an appellant to conclusively show that the steps required to comply with the requirements of the notice are, in the first instance, 'excessive' and secondly, that 'lesser steps' would overcome the objections. The notice was issued in order to remedy the breach of planning control. This was the undisputed unauthorised COU from a retail shop (Use Class A1) to a HFT (Use Class A5). The reasons for issuing the notice referred to the harm which the Council contends has occurred due to the breach.

33. On behalf of the appellant it is contended that the requirements are excessive because PD rights allow for the retention of the kitchen equipment and the extraction flue. In fact planning permission is not required for any kitchen equipment but it is required for any extraction equipment (in this case the flue) which has materially affected the external appearance of the building.

34. The notice was aimed at the flue as erected and not at the improved solution and I have already dealt with the contention that the cooking facilities, means of ventilation and air conditioning equipment could lawfully and reasonably be retained for an alternative use (referred to above as a café) as permitted development. For the reasons set out above these arguments are rejected.

35. With regard to the enforcement notice and its requirements, the Council has referred to long established caselaw to support the principle that when enforcing against an unlawful COU, the notice can also target any operational development which is also in breach of planning control. This is the case of *Somak Travel Ltd v SSE &*

Another (1988) 55 P&CR 250. In this case it is clear that the operational development is directly related to the COU which as occurred.

36. The flue and other alterations have facilitated the unauthorised COU and there is no reason to suggest that these operational works are related to anything other than the use of the premises as a HFT. I agree with the LPA, therefore, that it is justified to have included the removal of these operational works as part of the requirements of the enforcement notice.

37. The requirements are quite straightforward. The breach was the unauthorised COU and the associated works which facilitated that use. The requirements were to cease the HFT Class 5 use and to permanently remove from the land all facilities and equipment associated with the unauthorised use. The notice was issued on 7 February 2019 and at that time there is no dispute about the use or the fact that the initial flue was in place. I conclude, therefore, that the requirements were not excessive.

38. The apparent suggestion that another use as a café (as PD) could overcome the harm caused and constitute 'lesser steps' cannot be a justified reason to allow the appeal on ground (f). I therefore agree with the LPA that the requirements set out within the enforcement notice are the minimum requirements necessary to ensure that the breach of planning control ceases in order to overcome the harm caused by the breach of planning control. Appeal A also fails, therefore, on ground (f).

Appeal A on ground (g)

39. It is contended on behalf of the appellant that the compliance period of 3 months falls short of what should reasonably be allowed. It is suggested on behalf of the appellant that the requirement to comply with the enforcement notice before the outcome of the planning appeal is a factor which should be considered in extending the compliance period. However, as indicated by the LPA any decision to pursue compliance or to undertake a prosecution for non-compliance are held in abeyance until the outcome of the planning appeal.

40. As indicated by the LPA, the question to be considered is whether or not 3 months is a reasonable period once the outcome of the planning appeal is known. Both appeals have been considered in this decision and it is a fact that the HFT business has been in operation (unlawfully) since September 2018. Following the TSN the premises started trading again unlawfully in April of this year and has continued to do so as noted during my site visit.

41. In the public interest it is my view that the HFT should not be allowed to continue operating unlawfully any further significant period. I agree, therefore, with the LPA that a 3 month compliance period is reasonable and appropriate and the appeal on ground (g) also fails.

Other Matters

42. In reaching my conclusions in both appeals I have taken into account all of the other matters raised by the Council and by and on behalf of the appellant. These include the full planning history of the property; the initial submissions; the detailed statements relating to both appeals; the detailed comments on the RfR; the references to local and national policies; the Officer Reports and comments thereon; the Noise Assessment Report ; all references to the Councils HFT SPD; the consultations on the planning applications and any final comments.

43. However, none of these carries sufficient weight to alter my conclusions on the grounds of appeal in Appeal A or on the merits of Appeal B. Nor is any other factor of

such significance so as to change my decisions that both Appeal A and Appeal B should be dismissed.

44. Whatever course of action the appellant might take in relation to any future retail/café use for the property is a matter between him and the Council and there would need to be a prior approval application submitted. Again I stress that such an intention cannot carry weight in relation to the ground (c) appeal in Appeal A and neither can it be a positive factor in relation to Appeal B.

Formal Decisions

45. Appeal A is dismissed. The enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the Town and Country Planning Act 1990 as amended.

46. Appeal B is also dismissed.

Anthony J Wharton

Inspector