



Appeal Decision

Site visit made on 26 September 2019

by E Brownless BA (Hons) Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 8 November 2019

Appeal Ref: APP/H5390/W/19/3229961
200 Uxbridge Road, London W12 7JP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Mr D & R Parry against the decision of the Council of the London Borough of Hammersmith & Fulham.
 - The application Ref: 2018/03754/FUL is dated 2 November 2018.
 - The development proposed is described as 'the change of use of ground floor and basement from shop (Class A1) into a restaurant (Class A3) and install extract duct to the rear elevation'.
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Decision

1. The appeal is dismissed and planning permission is refused.

Procedural Matters

2. The appeal results from the Council's failure to reach a decision on the information submitted by the appellant. There is no formal decision, as jurisdiction over that was taken away when the appeal was lodged. However, I note the assessment and conclusions submitted in the statement of the Council, which sets out its concerns regarding the effect of the proposal.
3. The appeal is identical to a previous application¹ which was dismissed on appeal in January 2018. However, since the previous appeal the Council have adopted the Hammersmith & Fulham Local Plan (2018)(LP) and the Hammersmith and Fulham Planning Guidance Supplementary Planning Document (2018)(SPD). I have therefore considered this appeal against the policies of the current LP and the guidance of the SPD.

Main Issues

4. The main issue are the effect of the proposal on:-
 - i) the vitality and viability of the Shepherd's Bush Town Centre Prime Retail Frontage; and
 - ii) the living conditions of neighbouring occupiers with particular regard to noise and odour.

¹ Ref: 2017/02452/FUL

Reasons

Vitality and viability

5. The appeal property consists of a ground floor and basement unit within a four storey terraced row of buildings. The appeal site is presently in A1 use at ground floor level, with residential accommodation situated above. In general, both sides of this part of Uxbridge Road form a long linear arrangement of shops and services. This part of Uxbridge Road is a busy thoroughfare and, at the time of my site visit, footfall was relatively high with customers using the facilities that are on offer.
6. For the purposes of the LP, the site lies within the defined Shepherd's Bush Town Centre. It also lies within the Prime Retail Frontage of that centre. LP Policy TLC2 sets out a number of considerations regarding vitality and viability that are of relevance. It is permissive of changes from A class use at street level to alternative uses however, no more than 40% of the length of the prime retail frontage as a whole will be permitted to change to non-class A1 uses.
7. It is the Council's case that within the Shepherd's Bush Town Centre Prime Retail Frontage (SBPRF) the concentration of non-class A1 stands at 49%. This figure is taken as a whole rather than being determined on a 'street block' basis. The supporting text to this policy explains that the Council will use retail survey data to arrive at these figures. In calculating the length of frontage and the proportion of frontage in A1 use, the Council shall take into account lawful use and unimplemented permissions.
8. The proposal, as a non-class A1 use, would further increase the proportion of the non-class A1 ground floor frontage length. The Council suggests this would increase the proportion to 49%, a figure which is not disputed by the appellant, and to my mind is significantly in excess of the threshold of 40%. As such, the proposal would undermine the retail function of LP Policy TLC2 which seeks to avoid non-retail uses on a large scale that would otherwise reduce the attractiveness of a centre and damage its trading position.
9. Notwithstanding that the appeal premises have historically included provision for customers to 'eat-in', it is not for me to determine as part of a section 78 appeal whether the premises have demonstrated a lawful use as Class A3. It would be open to the appellant to make an application for lawful use to the Council.
10. Reference has been made to Nos 182-184 Uxbridge Road. Albeit the appellant states that the premises have historically operated as a Class A3 café, there is no evidence before me that the A3 use was lawful. Moreover, the appellant advises that the recorded use was as Use Class A1. Given that LP Policy TLC2 requires lawful uses to be used in determining whether the threshold has been exceeded, I am unable to find that the proportion of non-class A1 uses has decreased to an extent that demonstrates that the threshold has not been exceeded. Notwithstanding that some A2 use may be provided, the primary frontage will be of an A1 use which would support the aims of this policy.
11. The appellant suggests that the Council have, on a number of occasions, allowed non-class A1 uses despite the threshold for those uses being exceeded. Specific reference is made to Nos 190-192 Uxbridge Road and a scheme for demolition of an existing office block in close vicinity to the appeal site.

However, I have little information relating to the particular circumstances of these developments and whether the circumstances are therefore comparable to the appeal proposal. As such, a comparison is of limited relevance in this instance and I have considered the appeal before me on its individual planning merits.

12. Whilst a limited range of cooked foods are presently on offer at Nos 190-192 Uxbridge Road, the ice-cream parlour, there is nothing to prevent the existing or a future operator from intensifying the A3 use of the premises. Similarly, whilst I note the appellants intention to offer a limited range of foods given the limited size of the appeal premises, this would not prevent the position from changing at a future date.
13. I am mindful that economic conditions can present difficulties to high street businesses, in addition to competition from neighbouring developments such as the large Westfield complex. Whilst I accept it is possible that the threshold for non-class A1 uses may change, as it did so in the current LP and that permitted development rights may be altered at some future date, I am required to determine this appeal in accordance with the development plan and legislation as is in effect at the time of making the decision.
14. It is part of the appellant's case that the appeal site, the street block within which it sits, and a number of other nearby premises form a distinct island of units separate from the SBPRF. However, LP Policy TLC2 is clear that the appeal site falls to be included within the SBPRF and given that the LP is recently adopted, I find no reason to conclude any differently.
15. Accordingly, taking everything into account, I conclude that the proposal would result in the loss of a Class A1 unit and the subsequent increase in non-Class A1 use would have a significantly harmful effect on the vitality and viability of the Shepherd's Bush Town Centre Prime Retail Frontage. Thus, the proposal would conflict with LP Policy TLC2 insofar as it seeks to ensure that alternative uses maintain or increase the vitality and viability of the town centre and do not have an adverse impact on the local area.

Living conditions

16. The proposal would include an extraction unit to mitigate against odours of the proposed A3 use. A duct is proposed to the rear elevation of the building which would terminate below the ridge line but in close proximity to the nearest window to the third floor residential dwelling. In addition, it would be positioned close to other windows on the rear of the property that serve other residential dwellings at first and second floor.
17. There is no detail before me concerning the design and specification of the extraction duct system, nor any information related to associated noise and vibration from the operation of it. As such, in the absence of such detail I find that it has not been demonstrated that the proposal would provide an efficient filtration/odour control system that would be capable of mitigating the adverse effects of odour and noise likely to be experienced by neighbouring occupiers.
18. I have had regard to correspondence between the parties on this issue. I note that the appellant has sought to work with the Council to address their concerns. Whilst the appellant has suggested increasing the height of the extraction duct and providing a sound test, these details are not before me in

consideration of this appeal. The appellant has expressed a willingness to adhere with the Council's suggested conditions regarding the provisions of details of odour abatement equipment, details of external sound levels emitted from plant/machinery/ equipment and suggested mitigation and anti-vibration measures. However, I do not consider it appropriate to require the necessary detail by way of an appropriately worded condition as there is no certainty that the effect of the proposal on neighbouring occupiers can be satisfactorily mitigated.

19. Taking everything into account and on the basis of the evidence before me, I conclude that the proposal would have a materially harmful effect on the living conditions of neighbouring occupiers, having particular regard to odour and noise. Therefore, the proposal fails to comply with LP Policies CC11 and CC13 insofar as these policies seek to ensure that there will be no undue detriment to the general amenities enjoyed by existing surrounding occupiers with regard to, among other things, smell and noise. The proposal would also conflict with similar provisions within the guidance of the SPD.

Conclusion

20. For the reasons given above, and having taken all relevant matters into account, the appeal is dismissed.

E Brownless

INSPECTOR