



Appeal Decisions

Site visit made on 18 December 2019

by Elaine Gray MA(Hons) MSc IHBC

an Inspector appointed by the Secretary of State

Decision date: 20 January 2020

Appeal A - Appeal Ref: APP/W4705/C/19/3233439 20 Summerville Road, Bradford, Yorkshire BD7 1PX

- 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 Muhammad Mahboob Hussain against an enforcement notice issued by City of Bradford Metropolitan District Council.
 - The enforcement notice was issued on 6 June 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the building on the land to a Class A3 restaurant and café use.
 - The requirements of the notice are: i. Cease the unauthorised use of the building on the land for a Class A3 restaurant and café use. ii. Remove from the land all equipment, goods and signage associated with the unauthorised Class A3 restaurant and café use.
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) of the Town and Country Planning Act 1990 as amended.
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Appeal B - Appeal Ref: APP/W4705/W/19/3230537 20 Summerville Road, Bradford, Yorkshire BD7 1PX

- 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 Muhammad Mahboob Hussain against the decision of City of Bradford Metropolitan District Council.
 - The application Ref 19/00007/FUL, dated 29 December 2018, was refused by notice dated 27 February 2019.
 - The development is described as 'change of use from shop (A1) to restaurant/cafe (A3) (retrospective)'.
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Decisions

1. It is directed that the enforcement notice be corrected as follows:
 - a) The deletion of the entire text of the allegation and its substitution with 'Without planning permission, the material change of use of the building on the land to use for the sale of hot and cold food and drink for consumption on and off the premises (sui generis use).
 - b) The deletion of the entire text of the requirements and its substitution with 'i. Cease the unauthorised use of the building on the land for use for the sale of hot and cold food and drink for consumption on and off the premises (sui generis use). ii. Remove from the land all equipment, goods and signage associated with the unauthorised use.'

2. Subject to these corrections, Appeal A is dismissed and the enforcement notice is upheld.
3. Appeal B is dismissed.

Appeal A - ground (c)

4. The appeal on ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. Under this ground, the onus of proof is on the appellant.
5. Prior to the commencement of the appellant's business, the appeal site was occupied by a plumbers' merchant and a carpet retailer. There is no dispute between the main parties that the lawful use of the appeal site is Class A1.
6. The Town and Country Planning (Use Classes) Order 1987 defines 'Class A1. Shops' as uses that include the following purposes — (a) for the retail sale of goods other than hot food, and (d) for the sale of sandwiches or other cold food for consumption off the premises. The alleged activity is framed in the notice as a 'restaurant and café' falling within Use Class A3. The defining characteristic of a Class A3 use is that the food and drink sold is for consumption on the premises or of hot food for consumption off the premises.
7. The appellant contends that his business is analogous to a sandwich bar, albeit with a South Asian take on the concept. He confirms that the business sells some hot foods, and that these are reheated for sale, rather than cooked on site. Although it is stated in the written evidence that the only cooking facility available is a microwave oven, I also saw on my visit a sizeable hot plate in the front window, with an extractor hood above. This may indicate an element of A5 (hot food takeaway) within the business, but there is insufficient evidence to be certain of this.
8. I saw that four tables have been provided on the left-hand side as one enters the unit. These tables seat four people each, so a total of 16 eat-in customers could be accommodated at any given time. The appellant states that these seats are primarily for the use of customers awaiting their orders. Nonetheless, these tables could be used to eat food on the site, which would fall within A3 usage. The appellant confirms that over 16% of the products listed at paragraph 2.17 of his statement of case are of the sort that would usually be sold to eat in at an A3 establishment.
9. Conversely, I saw that a sizeable part of the floor was taken up with a covered counter which contained wrapped pre-prepared foods, cold drinks, desserts and fruit. These appeared to be intended for purchase and consumption off the premises.
10. The gist of the appellant's case is that a large proportion of customers buy products on a takeaway basis. He indicates that the element of the business whereby customers eat food on site is ancillary to the main A1 use. Although it is referred to in his statement of case, the appellant has not provided a breakdown of the proportions of sales that are for consumption on or off the site. However, it is apparent from the appellant's list that a greater proportion of the available foods are cold or warmed, as opposed to what could be termed hot dishes.

11. Taking all this evidence into account, I find that the business involves the sale of hot and cold food and drink for consumption both on and off the premises. The exact ratio of on-site to off-site sales has not been provided. However, from what I have seen, on balance of probability, it is likely that the takeaway element forms the greater proportion of the business.
12. As the new business is a composite of both Class A1 and Class A3 elements, and does not fall fully within either, I conclude that it is a sui generis use. Therefore, the allegation of a Class A3 restaurant and cafe is incorrect as a matter of fact and degree.

Correction of the allegation

13. Whilst this finding would lead to the success of the appeal had it been made under ground (b) (that the alleged development has not occurred as a matter of fact), that does not mean, necessarily, that the notice would have to be quashed. Instead, the powers of correction are wide, limited only by the proviso that no injustice shall be caused to the appellant and/or the Council.
14. In view of my findings above, I consider that the use is best described simply as a use for the sale of hot and cold food and drink for consumption on and off the premises (sui generis use).
15. As to the matter of whether any injustice would arise by correction, I am satisfied that the issues around the nature of the use at the appeal site have been set out in detail by the appellant, and the Council have had the opportunity to consider this evidence. I am therefore satisfied that no injustice would be caused to either of the main parties by the correction to the allegation, and the subsequent correction to the requirements.

Conclusion

16. A change of use from one falling within a Use Class to a sui generis use is not always material. However, it is likely that the pattern and degree of customer activity associated with current use of the appeal site is significantly different from that which would have occurred at the plumbers' merchant and carpet retailer which comprised the last lawful use.
17. For example, I note that the application form specifies opening hours of 08.00-23.00, seven days a week, and including Bank Holidays. Although there is no evidence to confirm the opening hours of the previous businesses, it seems unlikely that they would have kept such long hours across seven days a week. In view of the nature of the use, it therefore seems probable that the number of trips to and from the premises throughout the day will have increased, particularly due to the takeaway side of the business.
18. I am therefore satisfied that the change of use has been material as a matter of fact and degree. The appellant has offered no compelling reason as to why planning permission would not have been required for such a change of use.
19. Taking into account the corrections to the enforcement notice, I therefore conclude that, in the absence of planning permission, the change of use amounted to a breach of planning control. The appeal on ground (c) fails.

Appeal B – section 78

Main issues

20. The main issues are the effect of the development on:

- the character and appearance of the surrounding area, and;
- highway and pedestrian safety and the living conditions of nearby residents.

Reasons

Character and appearance

21. Although a flue has been constructed at the appeal site, it differs significantly in height from the proposed flue shown on drawing 18112-P-02-A. For clarity, I have therefore based my consideration of this main issue on the proposed drawings.
22. The proposed flue would be located on the front slope of the roof, just behind the main fascia board. Although no measurements are given, the new flue would exceed the height of the ridge by some way. Due to its height in relation to the modest scale of the existing building, and its prominent location at the front, the proposed flue would be visually dominant in the streetscape.
23. The surrounding area is mixed in character, and the properties in the vicinity of the appeal site have a generally utilitarian character. Nonetheless, I saw nothing to indicate that such flues are a characteristic feature of the surrounding area.
24. I therefore conclude that the character and appearance of the surrounding area would be unacceptably harmed by the proposed flue, contrary to Policy DS5 of the Bradford District Core Strategy Development Plan Document (CS), insofar as it requires development to make a positive contribution through high quality, inclusive design.

Highway safety and residential amenity

25. Amongst other things, CS Policy TR2 requires the assessment of new developments against indicative parking standards contained in Appendix 4. The planning officer's report clarifies that one space per 5-10sqm of gross floor space is required, leading to a need in this case of 20 off-street spaces. The appellant does not dispute this policy requirement.
26. Taking into account the relatively sustainable location of the site, close to housing and public transport, the Council indicate that a reduced level of parking may be appropriate. Nevertheless, no off-street spaces have been provided for the development.
27. The Council allude to issues with on-street parking along Summerville Road, which are echoed in the representations of objection to the scheme from neighbouring residents. However, little detailed evidence has been submitted in this regard. The appellant argues that there is no reason to consider that an A3 use would generate a greater amount of traffic than the previous A1 use.
28. However, as noted above, I consider that a business comprising a combination of eat-in and takeaway food sales is likely to generate a significantly greater

number of trips to and from the premises throughout the day and into the evening. As a result, there is likely to be a subsequent increase in demand for parking in the area, and in disturbance for nearby residential occupants, given that no dedicated parking spaces are provided for the development.

29. In order to justify a departure from the requirements of CS Policy TR2, it would be reasonable to expect the appellant to provide evidence of the number of trips that the new business typically generates. Since the change of use was established by mid-2018, and the serving of the enforcement notice in June 2019, there has been ample time for such information to have been gathered.
30. In light of the above, there is insufficient evidence for me to be certain that the new business does not have a detrimental impact on pedestrian and highway safety and the living conditions of neighbours. The setting aside of the adopted parking requirements has not been justified, and I therefore conclude that the development unacceptably fails to accord with CS Policy TR2.
31. I have no doubt that, if the appeal site were to continue in an A1 use, it would generate some degree of traffic. However, this, by its nature, would be lawful and not subject to consideration against the relevant policies, and so this matter has not led me to a different conclusion.

Conclusion

32. For the reasons above, the appeal scheme fails to comply with the development plan as a whole, and so the section 78 appeal (Appeal B) should be dismissed.

Overall conclusion

33. Appeals A and B are dismissed, and the enforcement notice is upheld, subject to corrections.

Elaine Gray

INSPECTOR