The Planning Inspectorate

Appeal Decision

Site visit made on 28 July 2020

by Mark Harbottle BSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27th AUGUST 2020

Appeal Ref: APP/N4720/X/20/3250686
Snack Box, 97 Great North Road, Micklefield, Leeds LS25 4AF

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Shaun Best against the decision of Leeds City Council.
- The application Ref 19/04328/CLE, dated 8 July 2019, was refused by notice dated 24 January 2020.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is a mixed shop and hot food takeaway.

Decision

1. The appeal is dismissed.

Preliminary matters

2. Changes were made during the application process, firstly to amend the use for which an LDC is sought from a hot food takeaway to a mixed shop and hot food takeaway, and secondly to include "Snack Box" in the address.

3. While the Council's report states that the application red line is drawn around the building, I have considered the appeal based on the red line on drawing 2768-01-01AB, which encloses approximately half of the building.

Main Issue

4. The main issue is whether the Council's refusal to issue an LDC was well-founded. This turns on whether the appellant can show, on the balance of probability, that on the application date the premises was in a mixed use as shop and hot food takeaway, and if so whether it had been used as such continuously for 10 years beforehand.

Reasons

5. When an LDC is sought, the burden of proof lies with the applicant. In addition, the Planning Practice Guidance states "In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability."

6. The appellant's and the tenant's personal statements confirm that the tenant has operated a shop, Snack Box, selling hot and cold food and drinks, predominantly to take away, from the premises since January 2009, more than 10 years before the date of the application. Neither statement indicates the proportions of hot and cold food sold during this period.

7. Premises selling sandwiches or other cold food to take away are a shop use within Class A1 of Part A of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended). A sandwich bar that also sells a limited amount of hot drinks or hot food does not necessarily cease to be in Class A1. Similarly, it is possible for a few customers to eat on the premises without involving a material change of use. Provided this, and the sale of any hot food, are ancillary parts of the business, the retail sales element would be the primary purpose and the sandwich bar would remain in Class A1.

8. Accordingly, the proportion of hot food sold to take away, as a proportion of total sales, is a major consideration in determining whether the change of use has occurred. I saw that the premises only have a small area for customers to either wait or eat and it is therefore probable that a significant proportion of any hot food sold at the premises was taken away, as stated by the tenant.

9. An accountant's letter confirms that the tenant continuously sold hot food from 23 January 2009 to 19 August 2015. A second letter, dated 5 November 2019, confirms that the accountant had prepared accounts on the tenant's behalf since 23 September 2009 and that he had traded from the premises during that period, including the sale of hot food.

10. These letters do not indicate whether hot food was sold to be eaten in or taken away, or what proportion of total sales it represented. There also appears to be some ambiguity in the dates of 23 January and 23 September 2009. If the latter date is correct, the second letter does not provide evidence that the use as a mixed shop and hot food takeaway began on or before 8 July 2009. However, taken overall, this evidence is consistent with the appellant's and tenant's statements.

11. A ward councillor's letter provides personal testimony of the use of the premises for over 8 years prior to 4 September 2015. I understand the Council's concern that the councillor's reference to bacon sandwiches alone does not, of itself, point to anything more than a sandwich bar also selling hot sandwiches. While that is acknowledged, this evidence does confirm that sale of hot food from the premises began on or before 8 July 2009. However, it does not include evidence that hot food sales have been continuous for a 10-year period. Furthermore, the letter does not state the proportion of total sales that were hot food, or whether the sales of hot food that were witnessed were to eat in or take away.

12. A parish councillor's letter confirms that hot food was cooked on the premises and sold to eat in and take away from May 1999 to 31 August 2015. The letter implies there may have been a break in activity in late 2008 but that was more than 10 years before the date of the application. Of itself, the letter provides evidence that the sale of hot food began on or before 8 July 2009 and for a continuous period exceeding 10 years. However, it does not provide any information on the proportion of hot food sold during that period.

13. Some evidence does not demonstrate that the claimed use began on or before 8 July 2009 and some does not demonstrate a 10-year period during which it continued without material interruption. Nevertheless, when considered as a whole, the evidence provides a consistent view of hot food being sold at the premises for over 10 years beginning before 8 July 2009.

14. However, it is also necessary to determine whether, as a matter of fact and degree, sales of hot food to take away over the 10-year period have resulted in there being a mixed use of shop and hot food takeaway. If takeaway hot food consistently accounted for a substantial proportion of total sales during that period, there may have been a material change in the character of the use. Alternatively, if takeaway hot food sales were irregular, or formed a relatively small proportion of the business, it is unlikely that the character of the use would have changed, and any such sales would in all probability have been ancillary to the shop use.

15. The statements and letters are silent on the balance between sales of hot food to eat in and to take away and the submitted evidence is therefore not sufficiently precise and unambiguous on this point. None of the statements indicate the extent of hot food takeaway sales in comparison with all food sales and the accountant's letters do not indicate the proportion of turnover they formed. Consequently, it has not been demonstrated that sales of hot food to take away were so substantial that they brought about a material change of use from shop to a mixed use of shop and hot food takeaway on or before 8 July 2009 or that such a mixed use has continued without material interruption since.

Conclusion

16. For the above reasons, I conclude that the Council's refusal to issue an LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Mark Harbottle

INSPECTOR