



Appeal Decision

Site visit made on 15 September 2020

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 October 2020

Appeal Ref: APP/P4605/C/19/3228465
854 Bristol Road, Birmingham B29 6HW

- 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 Pourya Bastanhagh against an enforcement notice issued by Birmingham City Council.
 - The enforcement notice was issued on 4 April 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the change of use of the property from Financial and Professional (Use Class A2) to hot food take-away (Use Class A5), the installation of extraction flue to rear of the premises, and the unauthorised display of Chop and Wok internally illuminated fascia sign as shown on plan CWOK-A-002 (attached).
 - The requirements of the notice are:
 - (i) Cease the use of premises as a hot food takeaway (A5 Use)
 - (ii) Permanently remove the Chop and Wok internally illuminated fascia sign as shown on plan CWOK-A-002 (attached) from the front elevation of the premises.
 - (iii) Permanently remove the extraction flue attached to the rear of the premises.
 - (iv) Make good any damage to the premises occurred as a consequence of complying with the requirements of the notice.
 - The period for compliance with the requirements is 1 month after this enforcement notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected by:
 - The deletion of the words 'as shown on plan CWOK-A-002 (attached)' from the following from section 3 of the notice; and
 - The deletion of the words 'as shown on plan CWOK-A-002 (attached)' from section 5(ii) of the notice.
2. It is directed that the enforcement notice is varied by:
 - The deletion of '1' month in relation to the time period for compliance at section 6 of the notice and the substitution of '6' months as the period for compliance.
3. Subject to these variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Matters concerning the notice

4. The breach and the requirements make reference to plan 'CWOK-A-002'. However, from the evidence before me and my observations on site, it is clear

that the fascia sign that has been erected is in a different position. It is clear from the evidence that the appellant knows it is the fascia sign that it being attacked by the notice. I shall therefore correct the notice to remove references to the plan.

Procedural Matters

5. The appellant has requested that the appeal be dealt with by way of a hearing. However, I am satisfied that I have sufficient evidence upon which to make a decision and shall proceed to determination on the basis of the evidence before me.

Ground (a)

Main Issues

6. The main issues of the ground (a) appeal are the effect of the appeal scheme on:
 - The vitality and viability of the local centre;
 - The living conditions of nearby residents having regard to noise, disturbance and odour.
 - The character and appearance of the area.

Reasons

Vitality and viability of the local centre

7. The appeal site comprises a ground floor unit which is located along a parade of shops within the Primary Shopping Area of the Selly Oak District Centre, an area which Policy 8.6 and 8.7 of the Birmingham Unitary Development Plan 2005 (UDP) and the Shopping and Local Centres Supplementary Planning Document (SPD) seek to direct new hot food takeaways to, subject to consideration of the impact it will have on the vitality and viability of the frontage and centre of which it forms a part, amongst other things. The Selly Oak District Centre covers a substantial area along and around Bristol Road, including the Selly Oak Shopping Park and the Battery Retail Park. Parades with retail and commercial units at ground floor and residential units above are characteristic of the area.
8. The appellant suggests that the policies of the UDP are outdated and significant weight cannot be attached to them. Although the UDP was adopted some time ago, Policies 8.6 and 8.7 have been saved. It has not been demonstrated that they have been overtaken by things that have happened since the plan was adopted, either on the ground or through a change in national policy, or for some other reason and so I do not consider that they are out of date.
9. The Council has made reference to Policies TP21 and TP24 of the Birmingham Development Plan 2017 (BDP) within its statement. Although not specifically identified within the enforcement notice, it is clear from the evidence submitted by the Council that conflict with these policies forms part of its objections to the scheme. The appellant has addressed the implications of the policies on the appeal scheme through his appeal statement and so I am satisfied that the appellant would not be prejudiced by my consideration of them in this appeal. Policy TP21 seeks to ensure the vitality and viability of centres is maintained

and enhanced and identifies Selly Oak as a District Growth Point. Policy TP24 seeks to promote a diversity of uses within centres and does this, in part by stating that no more than 10% of units within a centre or within any frontage shall consist of hot-food takeaways.

10. The premises has previously operated as an Estate Agents and Bookmakers and has been granted planning permission to allow unrestricted A2 use on the ground floor. As such, there would be no loss of A1 retail use as a result of the proposal and Policy 3 of the SPD is therefore not relevant. The Shopping and Local Centres Supplementary Planning Document (2012)(SPD) directs new A5 uses to District Centres subject to avoiding an over concentration or clustering of these uses. The document sets out that no more than 10% of units within the centre or frontage shall consist of hot food takeaways. The appellant questions the origins of the 10% threshold, however, given the Council's aim to avoid an over proliferation of A5 uses, despite many Centres already exceeding this level, I do not consider it to be unreasonable.
11. The Council has assessed the frontage as those units which front onto Bristol Road, from No 848 to 864 Bristol Road. However, the units extend around the corner onto Oak Tree Lane. The appellant has drawn my attention to Appendix 1 of the SPD which advises 'A frontage will comprise a row of units between clear boundaries such as roads and other physical breaks or boundaries.' Although the units are located on a different road, they form part of a continuous run and, in my view, should therefore be considered as part of the same frontage as the appeal site. Nevertheless, since there is already a hot food takeaway along the parade, Papa John's the 10% threshold is still breached.
12. The SPD explains that the proliferation of A5 uses and their clustering can lead to dead frontages during the daytime. The appellant has provided me with a survey which, it is asserted indicates the number of existing hot food take away is not excessive. However, the survey identifies a greater number of takeaways within the District compared with the monitoring report which points towards there being a breach of the 10% threshold even without the appeal site. Whilst Selly Oak has a range of large units, because the retail parks predominantly comprise A1 uses, this means that A5 uses are more likely to be concentrated elsewhere in the District Centre. Consequently, the exceedance of the 10% threshold by even a limited amount is likely to result in an overconcentration compared with Centres with predominantly small units.
13. Despite its setback from the main road, the parade occupies a relatively prominent position along Bristol Road and visually functions as part of a wider area comprising a mix of retail and commercial uses along Bristol Road and Oak Tree Lane. I saw that there are a number of takeaways within the vicinity of the appeal site along both Bristol Road and Oak Tree Lane. Although not identified as a takeaway, one of the other units along the parade, Sliced 'N' Diced, was not open to the public at the time of my visit, around 12:30pm, with roller shutters in use.
14. The appeal premises is open for preparation from 10am and is open to the public from 11am. However, whilst it would be possible to limit the hours that the premises operates, it would not be reasonable to impose a condition requiring the premises to remain open during the day. Were I to grant planning permission, it would not be reasonable to seek to prevent an alternative hot

food takeaway from subsequently occupying the site which may choose to have more limited opening times during the day. I therefore share the Council's concern that the appeal scheme could lead to an overconcentration of dead frontages during the daytime which would harm the vitality and viability of the District Centre.

15. The appellant asserts that the unit was marketed for a retail use prior to the betting shop taking over the use and prior to the current use with little success. The appellant has provided a photograph of the property prior to its conversion which shows a 'To Let' board was displayed and a third-party representation points towards the unit being empty for some time. However, details of the nature and outcome of any marketing efforts are not before me.
16. Comments made by interested parties refer to the contribution the site makes in terms of footfall and charitable contributions. Although there is support for the appeal scheme from a number of local businesses, vacancy rates in Selly Oak do not appear excessive and I am not persuaded that it would not be possible to secure an alternative use at the unit which could also generate footfall and the ensuing economic benefits. Whilst I agree it is possible for commercial considerations to weigh in support of a scheme¹, in the absence of evidence of a robust marketing exercise, I afford the economic benefits of the appeal scheme very limited weight.
17. Both parties have drawn my attention to appeal decisions which they deem pertinent to my decision. I agree that decisions relating to Pershore Road² and West Heath Road³ are not directly comparable as they both concerned A1 uses. However, I am not persuaded that the matters considered by the Inspector in relation to an appeal at High Road⁴ are comparable to this appeal scheme either. In that case, the Inspector had before him an undisputed marketing exercise and was considering a change of use from A1 use to a mixed A3/A5 use in Tottenham, which has a different policy context to this appeal site.
18. Chop and Wok is a franchise business with a number of other outlets in the Midlands. The business provides delivery, collection and eat in, which is ancillary to the takeaway element. The Chop and Wok business model is to provide fresh, tasty and healthy food which would meet a range of dietary needs, appealing to a different clientele compared with more traditional hot food takeaways. Whilst I accept not all hot food take away shops will have the same impact, were I to grant planning permission, it would not be reasonable to seek to prevent an alternative hot food takeaway from subsequently occupying the site. I therefore afford this matter very limited weight in support of the proposal.
19. Whilst there have been amendments to the GPDO relating to the temporary provision of takeaway food, these allow a change of use from A3, A4, A3&A4 or a drinking establishment with expanded food provision and are therefore not relevant to the appeal scheme before me which was previously in A2 use.
20. Thus, for the reasons given above, I conclude that the appeal scheme has a modest adverse effect on the vitality and viability of the Selly Oak District Centre and conflicts with Policies 8.6 and 8.7 of the UDP, policies TP21 and

¹ Bexley LB V SOS 930/07/2009

² APP/P4605/W/17/3189267

³ APP/P4605/W/17/3181080

⁴ APP/Y5420/W/19/3224824

TP24 of the BDP and the SPD, the requirements of which are set out above. It is also contrary to Policy PG3 of the BDP which seeks development which creates a strong sense of place, amongst other things. It would also be contrary to the National Planning Policy Framework ('the Framework') which seeks to ensure the vitality of town centres.

Living conditions: Noise, disturbance and odour

21. Policy PG3 of the BDP seeks development which reinforces a positive sense of place, amongst other things. Policy 8.6 and 8.7, together seek to ensure that proposed hot food shops do not give rise to additional problems of noise and disturbance, such as to cause demonstrable harm for the occupiers of any nearby dwellings. The SPD has similar aims, with both policy 4 and 5 necessitating consideration of the impact of proposals on residential amenity.
22. The appellant accepts that the flue as constructed does not meet the guidelines and requests that the revised plans should be considered using the Wheatcroft principles. However, Wheatcroft has no application in this case. S177 of the Act gives me the power to grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters. It does not give me the power to grant planning permission for something different. The flue, as constructed, starts and finishes in a different location to the proposed flue, which terminates above the roof line and is fitted with an extraction fan and in-duct silencer. The proposed flue does not therefore form part of those matters constituting the breach.
23. The extraction flue, as constructed, runs past a window of the flat above the appeal premises and terminates close to an upper floor window. The windows of the flat are single glazed and although some road noise was apparent along the service road to the rear of the appeal premises, the noise being generated by the extraction flue was the dominant source of noise outside the flat of No 854 Bristol Road. Although the appellant has provided me a noise assessment for the proposed flue, it does not address the flue as constructed.
24. Whilst I note that no complaints have been made to the Council regarding the flue, from my observations on site and in the absence of evidence to the contrary, I consider it likely that occupiers of the flat would find the noise generated by the flue to be intrusive, particularly if they choose to open the windows. Furthermore, given the proximity of the discharge point of the kitchen extraction flue to windows of the flat, I consider it is likely to cause odour nuisance to occupants of the flat. This would be contrary to Policy PG3 of the BDP, paragraph 8.7 of the UDP and the SPD, the requirements of which are set out above. It would also be contrary to the Framework, which seeks development with a high standard of amenity for existing and future users.
25. The appeal site is located in an area generally characterised by commercial units at the ground floor with residential units above. The Council advise that the takeaway is taking orders and remains open until midnight. However, the appellant advises that should planning permission be granted, a condition on opening hours could be applied limiting opening hours to 11:30pm with last access to the Premises at 11pm.
26. I have no details regarding the noise levels that are currently generated by the premises or background noise levels. Were I to restrict opening times in this

way, I am not persuaded that this would sufficiently mitigate noise and disturbance such that it would not have an adverse effect on nearby residents. The appellant states that although he serves customers until 11pm this is not peak time and that given the food offer, is unlikely to attract 'drunken revellers'. However, in my experience, even customers wishing to eat their meal away from the area may still generate noise.

27. Given the close proximity of the above flat to the appeal premises, I consider it likely that noise and disturbance would be caused by customers entering and leaving the premises. Furthermore, noise and disturbance would still be caused by activity in the shop once customers have left at a time when occupants of the above flat are likely to be trying to sleep. This would be contrary to Policy PG3 of the BDP, paragraph 8.7 of the UDP and the SPD, the requirements of which are set out above. It would also be contrary to the Framework.

Character and appearance

28. The Shopfronts Design Guide (1996) advises that the size and projection of internally illuminated fascias should be kept to a minimum and suggests the fascia background in a dark material. Whilst the position and size of the fascia sign is in keeping with the surrounding area, the illumination of the 3 dimensional letters that project from the fascia would be a dominant feature. Although internally illuminated fascias may be permissible elsewhere, given the prominent location of the appeal site, it diminishes the character and appearance of the area. The appellant has drawn my attention to 'House of Games', which is asserted to use a similar green on its fascia, however, no such unit was in situ at the time of my site visit.
29. The appellant suggests a condition could be imposed requiring that the sign is not illuminated. I consider that the imposition of such a condition would be reasonable and would address concerns regarding the effect of the fascia on the character and appearance of the area. Consequently, subject to the suggested condition there would be no conflict with Policy PG3 of the BDP, the Shopfronts Design Guide, the requirements of which are set out above, or the Framework, which seeks well designed places.

Conclusion and balance

30. The appellant suggests that current planning policy is unduly onerous and restrictive and has a disproportionate impact on new minority ethnic businesses. I have had due regard to the Public Sector Equality Duty (PSED) contained in section 149 of the Equality Act 2010, which sets out the need to eliminate unlawful discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it. The policies detailed above apply to all hot food takeaways regardless of ethnicity and do not therefore unduly affect minority ethnic businesses.
31. Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise. Whilst I have concluded that there would be no harm arising from the retention of the fascia, for the reasons set out above, and having regard to cited case law⁵, I conclude that the appeal scheme would

⁵ City of Edinburgh Council v Secretary of State Scotland [1997] 1 W.L.R 1447 and R(oao TW Logistics Ltd) v Tendring DC [2013] EWCA Civ 9.

conflict with the development plan as a whole. There are no material considerations that outweigh that conflict. I therefore conclude that the appeal under ground (a) should be dismissed.

Ground (g)

32. An appeal on ground (g) is made on the basis that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed. The appellant asserts that a month for the use to cease and fittings to be removed is unreasonable and that 12 months should be given and has raised the issue of hardship caused by Covid-19 and the effect on employees, including the appellant and his wife. In this regard I am sympathetic. Furthermore, the flue is likely to require removal by someone suitably qualified which is likely to take some time, particularly as a result of the current pandemic.
33. Whilst the business has operated for a number of years, the appellant was entitled to assume success on the ground (a) appeal. Given the current uncertainty as a result of Covid-19, and having regard to the above matters, I consider a period of 6 months would be proportional and I shall vary the notice accordingly.

Conclusion

34. For the reasons given above I conclude that a reasonable period for compliance would be 6 months, and I am varying the enforcement notice accordingly, prior to upholding it with corrections. The appeal under ground (g) succeeds to that extent.

M Savage

INSPECTOR