The Planning Inspectorate

Appeal Decision

Site visit made on 24 November 2020

by Guy Davies BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 December 2020

Appeal Ref: APP/Q1445/W/20/3252700
22-23 Duke Street, Brighton BN1 1AH

- 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 Mrs J Scully of Duke Street Properties (Brighton) Ltd against the decision of Brighton & Hove City Council.
- The application BH2019/03530, dated 26 November 2019, was refused by notice dated 15 April 2020.
- The development proposed is change of use of existing building at 22-23 Duke Street from A1 retail to a Class A3/A5 mixed use restaurant.

Decision

1. The appeal is allowed and planning permission is granted for the change of use from a shop to a mixed use as a café/restaurant and hot food takeaway at 22-23 Duke Street, Brighton BN1 1AH in accordance with the terms of the application BH2019/03530, dated 26 November 2019, subject to the following conditions:

   1) The development hereby permitted shall begin not later than 3 years from the date of this decision.

   2) The development hereby permitted shall not be occupied until details of refuse and recycling storage facilities have been submitted to and approved in writing by the Local Planning Authority. The facilities, once approved, shall be installed and thereafter retained.

   3) The premises shall only be open for customers between the hours of 0900 – 2200 on any day.

   4) The development hereby permitted shall not be occupied until a delivery and service management plan, which includes details of the types of vehicles, how deliveries will take place and the frequency of deliveries, has been submitted to and approved in writing by the Local Planning Authority. All deliveries shall be carried out in accordance with the approved plan.

Procedural Matters

2. An amendment to the Town and Country Planning (Use Classes) Order 1987 came into effect from 1 September 2020. The amended Order creates a new 'commercial' use class (Class E) that includes 'shops' and 'restaurants and cafes' uses (former Classes A1 and A3). Hot food takeaway use (former Class A5) no longer falls within any designated use class and is now sui generis ('on its own').

3. Transitional arrangements provide that for applications submitted before 1 September 2020, the use classes in effect when the application was submitted will be used to determine the application[1]. However, the new use class is capable of being a material consideration in the appeal.

4. I have modified the description used in my decision from that given on the application form to take into account that the former use classes A1, A3 and A5 no longer exist.

Main Issue

5. The main issue is the effect of the proposed change of use on the vitality and viability of the shopping centre.

Reasons

6. The site lies within a primary retail frontage of the regional shopping centre. Within this frontage, policy SR4 of the Brighton & Hove City Plan Part One seeks, amongst other criteria, to control new ground floor uses so as to avoid the number of non-retail units or proportion of frontages exceeding 25% of the shopping street to which it relates. Put another way, the policy seeks to retain at least 75% of shop units or frontages in retail use.

7. In the case of Duke Street, 77% of units are currently in retail use, mixed retail use or authorised for retail use. However, extant permissions exist to enable two units to be changed to restaurant use. When these unimplemented permissions are taken into account, the percentage of retail units falls to 71%. The proposed change of use would reduce that further to 65%.

8. The appellant argues that limited weight should be given to the extant permissions as these may never be implemented. I disagree. The fact that permission has been sought would indicate that there is a desire to change the use and it is therefore more likely than not that a change of use will occur. With the unimplemented permissions extant, the change of use of the appeal premises to a non-retail use would further reduce the retail dominance of units in Duke Street below that sought by policy SR4.

9. The appellant has also carried out an assessment based on shop frontages rather than shop units. Using this method of assessment, the proposed change of use would still bring the percentage of shop frontage to under the policy SR4 threshold, albeit only marginally at 74%. In any case, the policy is triggered either by units *or* frontages so that if either method of assessment falls below the threshold, the change of use would conflict with the aims of the policy.

10. Policy DM12 of the draft Brighton & Hove City Plan Part Two intends to widen the assessment of retail frontages to the whole of the regional shopping centre rather than by street. However, the draft Plan has only just completed a public consultation and has yet to be submitted for examination. As it is still at a formative stage in its development, I place little weight on the emerging policy.

11. I conclude that the proposed change of use from a shop to a restaurant, café or hot food takeaway would conflict with policy SR4 of the Brighton & Hove City Plan Part One, because it would reduce the proportion of retail units and retail frontage below the threshold of 75%, which the policy considers to the

[1] The Town and Country Planning (Use Classes) (Amendment)(England) Regulations 2020, Article 4.

minimum necessary to maintain a healthy vitality and viability to the regional shopping centre.

12. Since the Council's decision there has been an amendment to the Use Classes Order which now places shops, financial and professional services, cafes and restaurants, offices and other business uses all in the same use class. A change from one to another of these uses no longer requires planning permission or prior approval.

13. The explanatory memorandum accompanying the amending regulations explains that the changes have been made '*to better reflect the diversity of uses found on high streets and in town centres and to provide the flexibility for businesses to adapt and diversify to meet changing demands. This is considered particularly important at the present time as town centres seek to recover from the economic impact of Coronavirus'*.

14. This explanation reflects an argument put forward by the appellant that greater flexibility is needed to enable a rapid response to changing economic circumstances, in particular the contraction of retail uses and the growth of food and leisure uses in the city centre. These represent the benefits of the appeal proposal.

15. The amendment to the Use Classes Order effectively undermines the purpose of policy SR4 in attempting to retain a retail dominance to primary retail frontages in the regional shopping centre, it now being possible for retail premises to change to a variety of non-retail uses without the need to seek planning permission.

16. It is an important material consideration in this appeal that use of the appeal premises as a restaurant or café would no longer require planning permission. Had the application been made after 1 September 2020 it would only be because of the takeaway element that the development would still require permission. Policy SR4 makes no distinction between restaurant and café uses on the one hand and hot food takeaway uses on the other when assessing the proportion of retail and non-retail uses in a primary retail frontage. It follows that there would be no material difference in terms of the effect on the vitality and viability of the shopping centre of the appeal premises being a restaurant/café or it being a mixed use of a restaurant/café and hot food takeaway.

Other Matters

17. The site lies within the Old Town Conservation Area. I am required to consider whether the development would preserve or enhance the character or appearance of the Conservation Area. In this case, no alterations are sought to the building, and the proposed uses are ones that are already found in the Conservation Area. I therefore consider that the use would have a neutral effect on the Conservation Area and in that sense would preserve its character and appearance.

18. Use of the premises for the preparation and sale of hot food would require cooking facilities, with accompanying need for extraction equipment and storage of waste. None of these details have been included in the current application, albeit nor would they be before me had the change of use been just to a restaurant or café, as that would not have needed planning

permission. The effect of cooking smells on surrounding properties, including the residential use which has been granted for the upper floors of the appeal property, is a matter that could be controlled through environmental health legislation; and any external extraction ducting that amounted to development would be subject to a separate application. The provision of waste storage facilities can be required by a condition. I am satisfied that, given these controls, no harm would be caused to the living conditions of the occupants of neighbouring properties.

19. The appellant has made reference to the unsuccessful marketing of premises for retail use and alluded to a marketing report that was to be submitted under separate cover. No such marketing report has been submitted with the appeal documents but given my decision I have not considered this issue any further.

Planning Balance

20. I have concluded that the proposal would conflict with policy SR4 of the Brighton & Hove City Plan Part One, because it would reduce the proportion of retail units further below 75% in the primary retail frontage, thereby impacting negatively on the dominance of retail uses in the regional shopping centre.

21. However, given the amendment made to the Use Classes Order and the justification for that amendment being made, it is now the case that a greater diversity of uses can take place in the regional shopping centre without complying with policy SR4, which is effectively outdated. Paragraph 11 of the National Planning Policy Framework (the 'Framework') advises that where policies which are most important for determining the application are out-of-date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole.

22. I have concluded that the change of use of the premises to a mixed use of a restaurant/café and hot food takeaway is no different, in terms of its impact on the vitality and viability of the shopping centre, than a change of use to a restaurant/café alone, which now no longer needs planning permission. As a result, I consider that there would be no adverse impacts that would significantly and demonstrably outweigh the benefits. The presumption in favour of sustainable development is therefore triggered.

23. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that any determination must be taken in accordance with the development plan unless there are material considerations that indicate otherwise. In this case, I conclude that presumption in favour of sustainable development resulting from the amendment to the Use Classes Order and the reason for it being introduced is a material consideration that does indicate otherwise, and which in my view outweighs the conflict with policy SR4. Consequently, I am persuaded that permission should be given in this instance.

Conditions

24. I have considered the conditions suggested by the Council against the tests set out in paragraph 55 of the Framework. I have also taken into account a further two conditions suggested by the Highway Department.

25. The standard time limit is necessary for precision and certainty. I consider a condition listing the approved plans is not necessary in this instance because no physical changes are proposed to the building.

26. A condition relating to the provision of refuse and recycling storage is necessary in the interests of the proper functioning of the proposed use and to avoid harm being caused to the living conditions of neighbouring occupants by improperly stored waste. I have modified the wording to require details of the storage facilities to be submitted to and approved by the Council prior to installation as no such details are included in the application.

27. The Council has suggested a condition limiting the hours of activity at the premises. I consider this to be necessary in the interests of controlling disturbance to the living conditions of neighbouring occupants. I have used a different wording to that suggested by the Council in the interest of clarity and precision. The Council has proposed a cut-off time of 2200. While it seems to me that this is early for a restaurant use, I note that it is the cut-off time suggested by Sussex Police. I shall therefore use it. It remains open to the appellant to submit an application to vary the condition if circumstances dictate that a later closing time is appropriate in the future.

28. I have imposed a condition suggested by the Highway Department requiring a delivery and service management plan, in the interests of the safe operation of the use and the living conditions of neighbouring occupiers.

29. I have not imposed a condition restricting take away collection and delivery to pedestrians only as it would be difficult to enforce, and therefore fails one of the tests in paragraph 55 of the Framework.

Conclusion

30. I conclude that the appeal should be allowed.

Guy Davies

INSPECTOR