
Appeal Decision

Site visit undertaken on 4 November 2020

by J Somers BSocSci (Planning) MA (HEC) MRTPI IHBC

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision Date: 04 December 2020

Appeal Ref: APP/U5930/W/20/3245080

230 High Road, Leyton, E10 5PS

- 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 Faruque Gani against the decision of the London Borough of Waltham Forest.
 - The application, ref. 183187, dated 13 September 2018, was refused by notice dated 3 October 2019.
 - The development proposed is the conversion of an A1-retail shop into an A3-restaurant and a new rear chimney flue.
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Decision

1. The appeal is allowed and planning permission is granted for the conversion of an A1-retail shop into an A3-restaurant and a rear chimney flue; at 230 High Road, Leyton, E10 5PS; in accordance with the terms of the application, Ref: 183187, dated 13 September 2018 subject to the schedule of conditions as specified within this decision.

Procedural Matters

2. On 1 September 2020, the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987. The effect of this amendment in relation to this appeal was to revoke A1 and A3 use classes and merge them into a new Class E 'Commercial Business and Service.' This amendment is a material consideration to the determination of this appeal¹.
3. Regulation 4 of the Amendment Regulations provides that an application submitted prior to 1 September 2020 referring to uses or use classes specified in the Schedule to the Use Classes Order as at 31 August 2020 should be determined by reference to those uses or use classes.
4. The application also sought permission for the installation of a flue. The proposed flue would be located to the rear of the property and project above the eaves. It is noted that within the appeal documents that the Council raised no objection to the installation of the flue or its impact upon the living

¹ Both parties were emailed by the Planning Inspectorate with regards to the change in the Use Classes Order on 21/10/2020, asking for any comments, however no response was received.

conditions of the locality, and did not cite the flue as a reason for refusal. Having considered the information presented within the appeal, I have no reason to dispute the Council's opinion and will base this decision solely on the proposed change of use.

Main Issue

5. The main issue is the effect of the proposed change of use on the viability and vitality of the Primary Shopping Area.

Reasons

6. The appeal site is located within the Leyton District Centre Primary Shopping Area where Policy DM25 of the Waltham Forest Development Management Policies 2013 (DMP) sets out the approach to maintaining and enhancing the vitality and viability of the district's town centres. The policy seeks to safeguard and strengthen District Centres to fulfil their primary role of providing convenient and accessible shopping facilities.
7. Part A of Policy DM25 stipulates that the Council will seek to ensure Class A1 retail uses predominate on ground floors and that other uses will be permitted where i) the proposal will not result or contribute to the proportion of non-retail uses in the relevant frontage exceeding 30% of its total length; ii) the proposal will not result or contribute to the equivalent of a group of three or more adjoining standard size shop units in non-retail uses; iii) the use proposed provides a service directly related to a shopping trip (such as banks, building societies, cafés). It is also noted that the applicant does not submit any evidence to support views that 'A1 uses are dying rapidly' or that there are no alternative units where the use could be situated or that the unit has been appropriately marketed in accordance with DMP Policy DM25.
8. The retail unit is part of a total of 8 units at ground floor between Warren Road and St. Georges Road. A total of three of the eight units are within A1 Use, with the current proportion of units being 37%. The loss of an additional unit from this frontage would bring the total of A1 uses down to 25%. The current situation within this frontage is one where A1 uses do not dominate and the further loss of an A1 retail unit would not assist in the Council achieving their aim of reduction of A1 uses. Whilst the proposal may meet section iii) of this policy given that a café/restaurant may be a service relating to a shopping trip, overall the proposal would fail DMP Policy DM25 given the failure to comply with sections i) and ii).
9. Consequently, it has not been sufficiently demonstrated that the retail unit is no longer required, redundant or that a retail use could not viably trade there. The proposed change of use, and subsequent loss of the A1 retail unit, would therefore have a harmful effect on the retail function of the District Centre. The proposal is therefore contrary to Policy DM25 of the DMP, the aims of which are set out above.
10. Planning law², as noted by Paragraph 12 of the National Planning Policy Framework (the Framework), dictates that planning applications must be

² Section 38(6) of the Planning and Compulsory Purchase Act 2004

made in accordance with the development plan unless material considerations indicate otherwise.

11. As noted previously, the changes to the use classes order is a material consideration. The implications for this appeal being that beyond 31 August 2020 the proposed change of use would no longer constitute an act of 'development'³ and therefore the retail use of the unit could be lost without the need for planning permission. This represents a significant fallback for the applicant in the event that the appeal was to fail and I am satisfied that there is a greater than theoretical possibility of this fallback option being implemented. Therefore, I give the fallback position significant weight as a material consideration that outweighs the conflict I have found with the development plan.

Conclusions and Conditions

12. I conclude that with regard to the change of use, the above mentioned material consideration is significant and would warrant a decision other than in accordance with the development plan. The proposal for the flue is generally appropriate and would be compliant with the development plan. For these reasons, the appeal should be allowed and planning permission granted, subject to the conditions as detailed in the appendix to this letter.
13. I have had regard to the list of suggested conditions provided by the Council and have considered these in the context of the Framework which advises that conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Suggested conditions 2 (operating hours); 3 (construction management plan); 4 (hours of operation for construction); 5 (delivery operation); and 8 (insulation of premises) are not relevant or related to the installation of the flue and would not meet the tests for conditions as prescribed by the Planning Practice Guidance.
14. Suggested condition 1 which specifies a time limit to commence the development and constructed in accordance with approved plans for the avoidance of doubt is necessary, as is suggested condition 7 which seeks that noise is controlled to specific levels as a result of the installation of the flue. Condition 9 is a pre-commencement condition⁴ regarding the submission of details regarding how odours can be controlled with relation to the flue which is deemed to be necessary in this case given the residential uses surrounding.

J Somers

INSPECTOR

³ Article 3(1) of the Use Classes Order provides that where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same use class shall not be taken to involve development of the land.

⁴ A notice for approval of pre-commencement conditions was sent by the Planning Inspectorate on 5/11/2020 to the applicant in accordance with Section 100ZA(5) of the Town and Country Planning Act 1990. The pre-commencement condition is therefore deemed acceptable given no response was received within the time limit given.

Appendix: Schedule of Conditions

1. The development hereby permitted shall begin no later than the expiration of three years from the date of this permission.
2. The development hereby permitted shall not be carried out otherwise than in complete accordance with the approved plans.
3. Noise from all new building services plant for the lifetime of the development shall be controlled to a level not exceeding 10dB(A) below the typical underlying background noise level (LA90) during the time of plant operation at a position one metre external to the nearest noise sensitive premises. The underlying background LA90 shall be determined in the absence of the new plant noise. This assessment shall be completed in accordance with BS4142: 'Method for Rating Industrial Noise Affecting Mixed Residential and Industrial Areas'.
4. Prior to the commencement of the development hereby approved, details of how odours generated or emanating from the development are to mitigated and controlled shall be submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved mitigation measures and methods of control and shall be thereafter be maintained for the lifetime of the development.