



Appeal Decision

Site visit made on 19 October 2020

by M Cryan BA(Hons) DipTP MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 January 2021

Appeal Ref: APP/V5570/W/20/3251760

Ground Floor Shop, 28 Highbury Park, London N5 2AA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Schedule 2, Part 3, Class C of the Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended).
 - The appeal is made by Mr Andreas James Norman Georgiou against the decision of the Council of the London Borough of Islington.
 - The application Ref P2019/3484/PRA, dated 19 November 2019, was refused by notice dated 10 March 2020.
 - The development proposed is described as 'notification for Prior Approval for the change of use from retail (A1 use) to cafe and restaurant (A3 use) to ground floor unit and associated external alterations'.
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Decision

1. The appeal is dismissed insofar as it relates to the proposed external alterations. The appeal is allowed insofar as it relates to the change of use, and approval is granted under the provisions of Article 3(1) and Schedule 2, Part 3, Class C of the Town and Country Planning (General Permitted Development) (England) Order 2015 (hereafter 'the GPDO') for the change of use from retail (A1 use) to cafe and restaurant (A3 use) at Ground Floor Shop, 28 Highbury Park, London N5 2AA in accordance with the terms of the application Ref P2019/3484/PRA, dated 19 November 2019, subject to the conditions set out in Paragraph C.2 of Schedule 2, Part 3, Class C of the GPDO and the following additional conditions:
 - 1) Before the use hereby permitted takes place, equipment to control the emission of fumes and smell from the premises shall be installed in accordance with a scheme to be first submitted to and approved in writing by the local planning authority. All equipment installed as part of the approved scheme shall thereafter be operated and maintained in accordance with that approval and retained for so long as the use continues.
 - 2) The premises shall only be open for customers between the following hours:
08.00 to 19.00 from Mondays to Saturdays
08.00 to 18.00 on Sundays, and on Bank and Public Holidays

Procedural Matters

2. The description of development in the banner heading is taken from the appeal form, as it is a more concise and accurate description than that used on the original application form. My formal decision above also reflects the description used on the appeal form.
3. The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 ('the UCO Amendment Regulations'), amending the Town and Country Planning (Use Classes) Order 1987 ('the UCO'), came into force on 1 September 2020. This introduced a new Commercial, Business and Service Use Class E. As a consequence, a change between the use of the premises for retail and as a café would no longer comprise development requiring either planning permission or prior approval. Paragraph 4 of the UCO Amendment Regulations requires that applications submitted before 1 September 2020 must be determined with reference to the UCO as it stood on 31 August 2020. While I have therefore taken the UCO Amendment Regulations into account, the application therefore still falls to be considered under Schedule 2, Part 3, Class C of the GPDO.
4. The Council's second reason for refusing the application referred to the impact of the proposed development on the character and appearance of the Highbury Fields Conservation Area, within which the appeal site lies. I sought the main parties' views as to whether or not the external alterations described in the application, which include replacement windows within the shopfront, fell within the scope of the permitted 'building or other operations' set out in Paragraph C (b) of Schedule 2, Part 3, Class C of the GPDO. The appellant did not comment, but the Council was of the view that they would not be permitted operations, that it should not have assessed the proposed alterations as part of the prior approval application, and requested that they should not therefore form part of my consideration of the appeal. I agree that the proposed alterations fall outside the scope of the works permitted by the GPDO. Accordingly, the appeal should be dismissed in respect of the proposed external alterations, and I have done so without further consideration of the effect of the proposal on the character and appearance of the Conservation Area.
5. I also sought views from the main parties as to whether or not the application was determined in accordance with the procedural requirements and timescales set out in Article 7 and Schedule 2, Part 3, Paragraph W of the GPDO. The application form was dated 19 November 2020, and the decision notice was dated 10 March 2021, some sixteen weeks later. Again, the appellant did not comment. However, the Council confirmed that the application was not made valid until 15 January 2021 (as indicated in the decision notice) when, in line with the requirements of Paragraph W(2)(b), a plan indicating the site and showing the proposed development was submitted. The application was then determined less than 8 weeks later. I am therefore satisfied that there can have been no deemed grant of prior approval for the proposed change of use in this case, and I have determined the appeal accordingly.

Main Issue

6. Taking all of the aforementioned matters into account, the main issue is the effect of the proposal on the sustainability of the Highbury Barn Local Shopping Area.

Reasons

7. The appeal site is a ground floor unit within a three-storey corner building located on the eastern side of Highbury Park, within the Highbury Barn Local Shopping Area ('LSA'). LSAs are less significant in terms of shopping provision than the borough's town centres, but still play an important role in meeting the day-to-day needs of their surrounding communities. The GPDO does not define a 'key shopping centre'. However, based on the reasonable range of goods and services I saw on offer within the Highbury Barn LSA in my view it performs the role of a key shopping centre for its local community.
8. Policy DM4.6 of the 2013 Islington Development Management Policies seeks to protect the mix and balance of uses within LSAs, and in particular to prevent the loss of existing ground floor retail units to other uses. It requires such proposed changes of use to be limited to those units which have been vacant for at least two years, and then to be supported by evidence which demonstrates that the premises have been marketed for that period and that there is no realistic prospect of the unit being used in its current use in the foreseeable future. No evidence of any marketing activity has been submitted. The policies of the development plan are not determinative in prior approval cases. However, they are relevant to the planning judgements to be made, and to that extent therefore they are considerations of material relevance in determining the effect on the shopping area.
9. There is some disagreement between the main parties on the precise number of non-A1 units within the centre, although this may stem primarily from differences in when the centre was surveyed. The Council found 19 A1 units within the LSA in September 2019, while the appellant counted 13 in April 2020, the more recent survey indicating that fewer than half of the units within the centre are within A1 use. In any event, the effect of the proposed change of use would be to further reduce the number of shops within the LSA, which could reduce the breadth of goods on offer within the centre.
10. However, the changes introduced by the UCO Amendment Regulations mean that both the existing permitted A1 use and the proposed A3 use would now fall into the new Class E of the UCO. As the Explanatory Memorandum to the UCO Amendment Regulations notes, this is to better reflect the diversity of uses found on high streets and in town centres, to provide the flexibility for businesses to adapt and diversify to meet changing demands, and to support the viability of these areas now and in the future.
11. Whilst it is my responsibility to determine this appeal by reference to the use classes that applied when the original application was submitted, the changes to the UCO have been in force since 1 September 2020 and are a material consideration of great weight in this case. The proposed change of use could now occur within the new Class E, notwithstanding that any external works would still be likely to require planning permission. This attracts very substantial weight as a fallback position.
12. To that end, although the appeal proposal does not accord with the aims and requirements of the Council's policies in respect of LSAs, the other considerations identified indicate that the proposed development would be unlikely to harmfully affect the sustainability of the key shopping area.

Other Matters

13. The area around the appeal site is mixed in character and use. The appeal building fits into the general pattern within the LSA of having commercial uses at ground floor level with residential accommodation above, while the side streets off Highbury Park are predominantly residential. The GPDO provides for the noise and odour impacts of the proposed development to be taken into account in determining the application. However, the Council raised no objections to the proposal in these regards, subject to the imposition of conditions which I address below.

Conditions

14. As well as the standard conditions which are imposed by the GPDO, I have considered the further conditions which the Council suggested. I have made minor amendments to the suggested wording in the interests of clarity.
15. No details of proposed extraction or ventilation systems were submitted with the application. I consider that a condition requiring the submission and approval of these details is reasonable and necessary to protect neighbouring occupiers, in particular those in the upstairs residential accommodation, from noise and odour disturbance arising from the proposed use.
16. The original application sought permission for the premises to operate between 06.00 and midnight daily. I have not been provided with any evidence in respect of the opening hours of other cafés or restaurants nearby, although given the small scale of the LSA and the close proximity of residential properties, the centre does not appear to me to be one where late night café and restaurant opening would be appropriate. I consider that a condition limiting opening hours is necessary and reasonable in the interests of protecting the living conditions of nearby residential occupiers from unacceptable noise disturbance. The appellant did not object to the opening hours condition suggested by the Council, justify the original proposed opening hours, or propose alternatives. In the absence of any such response I have therefore adopted the opening hours which the Council suggested.

Conclusion

17. As explained in the 'Procedural Matters' section, I conclude that the appeal must be dismissed insofar as it relates to the proposed external alterations. However, for the other reasons set out above I conclude that the appeal should be allowed insofar as it relates to the proposed change of use, subject to conditions.

M Cryan

Inspector