The Planning Inspectorate

Appeal Decision

Site visit made on 12 January 2021

by J Williamson BSc (Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 February 2021

Appeal Ref: APP/C3430/W/20/3261372
3 Rosemary Road, Cheslyn Hay WS6 7DY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Mr H Kok against the decision of South Staffordshire Council.
- The application Ref 19/00864/VAR, dated 28 October 2019, was refused by notice dated 22 May 2020.
- The application sought planning permission for hot food takeaway shop without complying with a condition attached to planning permission Ref 06/01323/COU, dated 21 February 2007.
- The condition in dispute is No 2 which states that: the premises shall remain closed between 23:00 hours and 11:30 hours on Mondays to Saturdays and shall remain closed on Sundays and Bank Holidays.
- The reason given for the condition is: to safeguard the amenity of the area in accordance with policy BE26 of the adopted Local Plan.

Decision

1. The appeal is dismissed.

Procedural Matters

2. Although the application sought to remove condition 2, the appellant's statement confirms that he would accept the opening hours condition being varied, should the appeal be allowed. The suggested variation is that the premises would be allowed to open on Sundays and Bank Holidays with a closing time of 11pm. Additionally, the appellant's final comments state that he would accept a varied hours of operation condition proposed by the Planning Inspectorate, should the appeal be allowed.

3. I consider no one would be prejudiced by me considering the suggested variation at this stage. I have therefore taken it into account in reaching my decision.

4. The appellant's statement notes that the application to the Council to remove/vary the condition also included a proposed up-grade to the existing extraction system, which was supported with a noise assessment. I appreciate the appellant's position regarding this matter. However, the proposed alterations to the extraction system do not relate to the condition which the appellant seeks to have removed/varied. Consequently, it does not form part of

the appeal proposal. Notwithstanding this, given the main issue in this case, I have had regard to the noise assessment.

Main Issue

5. The main issue is the effect on the living conditions of occupiers of nearby residential properties, with regard to noise and disturbance, should the condition be removed or varied.

Reasons

6. The appeal site comprises the ground-floor of a 2-storey mid-terrace property. The terrace consists of 3 properties, all of which have hot food takeaway uses on the ground-floor and residential accommodation above on the first floor. There are other residential properties very close to the appeal site; in particular, those north-west of the site on Rosemary Road and Liberty Square. There is a public car park and Public House opposite the site and an area of public open space to the rear of the terrace, also close to the residential properties, with benches where people can sit.

7. The appellant's evidence suggests that the site lies within the village Retail Centre, which the Council has not challenged. In addition to the premises noted above, other commercial premises are located to the east/north-east of the site on High Street/Station Street. Hence, the area within which the site is located consists of a mix of uses - commercial and residential. However, I disagree with the appellant's characterisation of the area as being "overriding bustling commercial". Although there is a community/social club and a restaurant in this part of the Retail Centre, most of the commercial premises are of a type that operate during the day time only, including accountants, hair and beauty salons, chemists, a bakery and electrical shop.

8. Although I did not experience the Retail Centre as it usually would be, as my observations were made during a period of Covid-19 restrictions, due to the Centre being relatively small-scale and the nature of the businesses along the High Street/Station Street section of the Centre, I would characterise the Retail Centre as a small, local village Centre where small numbers of people calmly go about their day-to-day activities, with limited activity in the evenings.

9. The Council refer to a previous appeal decision related to the site, APP/C3430/A/09/2107644, which was also an appeal against the Council's refusal to remove/vary condition 2 on application 06/01323/COU. The appeal was dismissed; the Inspector considered that the occupiers of neighbouring residential properties should be given respite from, among other things, noise and disturbance resulting from customers congregating outside the premises, revving car engines, and slamming car doors. I have had significant regard to this appeal decision as the current appeal to remove/vary the condition is the same, and I have not been provided with any evidence that there has been significant changes in site circumstances during the intervening 10 or so years. Where local and national planning policies have changed during the intervening period, I have had due regard to them.

10. Within the context outlined above, I have no justifiable reason to reach a different conclusion to that of the Inspector in the previous appeal. Hence, I conclude that removing or varying condition 2 attached to approval

06/01323/COU would have a detrimental impact on the living conditions of existing occupiers of the residential units close to the site due to noise and disturbance, particularly the flats above the terrace and the residential properties immediately north-west of the site on Rosemary Road and Liberty Square.

11. I appreciate the appellant's assertion that commercial uses take precedence in town and village centres. However, the character of the relevant centre needs to be borne in mind and occupiers of existing residential properties within such centres are entitled to retain satisfactory living conditions should development occur. Like the Inspector in the previous appeal, I consider that existing occupiers of residential properties close to the site should have some respite from the type of noise and disturbance generated simply whilst people queue and/or congregate outside the takeaway premises or sit and consume their takeaway in the nearby open space. That is, noise and disturbance resulting from people talking, shouting, laughing and/or using their mobile phones. Additional noise disturbance could also result from engines revving and car doors slamming if people use their cars and/or taxis to travel to/from the premises.

12. The appellant considers that the proposal would not generate an increase of people in the area desiring a takeaway; and also suggests that increasing the number of takeaway premises with more extensive opening hours would ensure those people using such facilities were served quicker and dispersed from the area sooner than at present. However, I am not persuaded by these arguments. I believe more takeaway premises being open for longer hours, as a result of either removing or varying condition 2, has the potential to generate an increase in users and for users to visit such facilities at times that are currently not an option.

13. The appellant contends that there have been no instances of anti-social behaviour within the vicinity of the site, and therefore it is not necessary to continue to restrict the opening hours of the premises to prevent an exacerbation of anti-social behaviour in the area, as such behaviour does not exist. However, the behaviours I have referred to above that could result in residents being disturbed by noise would, for the most part, not constitute anti-social behaviour requiring intervention by the police.

14. The appellant refers to paragraph 182 of the National Planning Policy Framework (the Framework), which advises that existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. In this case, however, the residential development known as Liberty Square actually existed before the appeal premises were granted planning permission for a change of use from retail to hot food takeaway.

15. The appellant contends that they have taken account of the living conditions of occupiers of existing residential properties, as required by policy EQ9, and I acknowledge that this is the case. However, bearing in mind all the above, I consider that the proposal to remove or vary condition 2 attached to approved planning application 06/01323/COU does not accord with Policy EQ9 of the Core Strategy Development Plan Document 2012 or sub paragraph 127 (f) of the Framework. This is because these policies, taken together, and among other things, require development proposals to not only take account of the

living conditions of occupiers of existing properties, but to also ensure development provides a high standard of living conditions for existing occupiers and does not unacceptably affect such living conditions.

Other considerations

16. As noted above, the appellant submitted a noise assessment. However, this assessment dealt specifically with the impact of up-graded plant at the premises on the most sensitive receptor, ie the residential premises above, taking account of the sound insulation between the units. The assessment did not encompass the type of noise and disturbance described above.

17. A covering letter submitted with the planning application refers to the trade organisation for Turkish speaking individuals in the food & leisure industry and the importance of human rights legislation in the context of determining planning applications. The letter suggests that the opening hours of all the takeaway premises in the terrace should be consistent. Also, it is contended that one of the objectors on a previous application at the site has a financial interest in an adjoining takeaway. As such, it is suggested that the motives for objecting were financial and therefore the basis of the concerns raised is questioned.

18. I understand that the hours of opening of number 1 Rosemary Drive are not restricted, and therefore the 3 takeaway premises have different opening hours. However, due to the history of No 1, the opening hours of the premises is outside the control of the planning system.

19. I note that the Council did not receive any comments from members of the public regarding the application. Comments submitted in respect of previous applications are not relevant to the current proposal.

20. I also note that in general the courts have concluded that planning is concerned with land use in the public interest, rather than the protection of purely private interests. I have reached my decision based on this principle and the appellant has been given a fair trial through the appeal process. I have had due regard to the Human Rights Act 1998 and the Public Sector Equality Duty contained in the Equality Act 2010.

21. Finally, I acknowledge that removing or varying the opening hours could provide economic/commercial benefits, and I attach moderate weight to this. However, I consider the limited scale of these benefits do not outweigh the harm I have found in respect of the detrimental impact on the living conditions of existing occupiers of nearby residential properties.

Conclusion

22. For the reasons outlined, I conclude that the appeal is dismissed.

J Williamson

INSPECTOR