
Appeal Decision

Site visit made on 19 July 2022

by A Berry MTCP (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 August 2022

Appeal Ref: APP/P4605/W/22/3296172

77-79 Cato Street, Birmingham B7 4TS

- 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 M Iltaf against the decision of Birmingham City Council.
 - The application Ref 2021/07249/PA, dated 16 August 2021, was refused by notice dated 8 October 2021.
 - The development proposed is change of use of part of industrial warehouse (Use Class B2) to commercial kitchen (sui generis) and installation of extraction flue to rear.
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Decision

1. The appeal is allowed and planning permission is granted for the change of use of part of an industrial warehouse (Use Class B2) to a commercial kitchen (sui generis) and the installation of an extraction flue to the rear, at 77-79 Cato Street, Birmingham B7 4TS in accordance with the terms of the application, Ref 2021/07249/PA, dated 16 August 2021, subject to the conditions in the schedule to this decision below.

Preliminary Matters

2. The appeal site was previously in use as an ancillary office to a Use Class B2 premises. On this basis, I have taken the description of development from the Council's decision notice as the description on the planning application form does not accurately describe the existing use of the premises. The decision notice also provides a clearer and more concise description of the proposed use.
3. There has also been some debate between the parties as to what Use Class the proposed development falls within. The appellant describes the use as a "dark kitchen". This is a relatively new concept which involves a commercial kitchen producing takeaways but using online delivery platforms. Having regard to the totality of evidence provided, I am satisfied that the nature of the use does not fit into the designation of either Class E(g) (formerly B1) or B2 of The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. This is due to a number of features of the use, including the frequency of small-scale deliveries that would occur from the premises. I therefore agree with the Council that it is a sui generis use and I have determined the appeal on this basis.

Main Issue

4. From the submissions, including no reference being made to it in the reason for refusal or within the appellant's statement of case, it seems clear that the proposed flue was considered acceptable by the Council. I have no reason to

disagree. The main issue is therefore the effect of the proposed change of use on the loss of an employment use within a Core Employment Area (CEA).

Reasons

5. The appeal site comprises part of an existing unit that fronts onto Cato Street. The building is located within a CEA, as identified by Policy TP19 of the Birmingham Development Plan, 2017 (DP). This policy seeks to retain employment uses and defines an "employment use" as those falling within the former B1(b) and B1(c) Use Classes (now Use Class E(g)) and Use Classes B2 and B8¹, and "other uses appropriate for industrial areas such as waste management, builders' merchants and machine/tool hire centres". Uses outside these categories will not be supported unless an exceptional justification exists.
6. In terms of the examples of "other uses appropriate for an industrial area", the use of the phrase "such as" indicates that this list is not exhaustive and therefore other uses may also be acceptable in principle. Importantly, therefore, the policy does not require all uses to be within the B1, B2 or B8 Use Classes. Similarly, there is no requirement in the policy for applicants to demonstrate why an industrial area is necessary for the proposed use.
7. Cato Road is characterised by industrial premises, including waste management/recycling, vehicle repair garages, tool hire, vehicle parts delivery companies, a vehicle accident repair centre, and businesses involved in air conditioning and fabrication. At the time of my site visit, most of the premises were occupied, and it appeared to be a thriving commercial/employment area. As detailed above, the proposed use is sui generis and therefore the acceptability of the proposal to be located within the CEA falls to whether it is a use that is appropriate for an industrial area.
8. Limited information has been provided as to the scale or operation of the use, other than that food would be cooked on the premises, which would then be collected by a delivery driver, who would then deliver the food to the customer. However, the cooking of the food could be described as an "industrial process" as it would be similar to a commercial kitchen. This would include the potential for noise, smells and other activities, such as delivery of raw ingredients, which would not be out of place in an industrial area. The delivery of the food would involve frequent trips of small orders direct to the customer, rather than less frequent trips of large orders to a shop or catering facility/function that would usually be found with a commercial kitchen. However, other commercial uses exist on Cato Road that also involve the frequent delivery of small orders, such as tool hire and vehicle parts delivery. Furthermore, I note that Policy TP19 of the DP specifically states that machine/tool hire centres comprise an "other use" that is deemed appropriate for CEAs.
9. The proposed use would therefore comprise two parts, a commercial kitchen and frequent small deliveries, both of which are appropriate within an industrial area. The proposed change of use is therefore supported in principle by Policy TP19 of the DP. On this basis, there is no need to demonstrate exceptional justification to occupy a premises within the CEA. The proposed change of use would therefore comply with Policy TP19 of the DP which, amongst other things, seeks to strictly control the supply of employment land.

¹ The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020.

10. As I have concluded the proposed development would comply with Policy TP19 of the DP, it follows there is no conflict with the "Loss of Industrial Land to Alternative Uses Supplementary Planning Document" (SPD) which details the information that is required to be submitted with a planning application involving the loss of industrial land.
11. The Council has referred to the Bordesley Park Area Action Plan (AAP) (2020) in the decision notice. The site is within the Vauxhall area, the policy for which refers to proposals for the introduction of new businesses which will be supported. It also outlines measures to facilitate the growth and expansion of industrial uses. The development would introduce a new business into the area without impacting on the existing business in the remainder of the building. Moreover, the Vauxhall policy makes no reference to resisting changes of use of the manner proposed. On this basis, I see no conflict with the objectives of the AAP.
12. I also see no conflict with the requirements of the National Planning Policy Framework which, amongst other things, seeks to support economic growth.

Conditions

13. I have had regard to the conditions suggested by the Council. Where necessary, I have made amendments to these in the interests of clarity and precision. In addition to the standard condition, which limits the time for the commencement of development, I have specified the approved plans for the avoidance of doubt.
14. Conditions requiring the submission and approval of details for the extract ventilation and odour control equipment and limits on noise levels of any plant and machinery, are considered necessary to ensure the proposed change of use does not result in any adverse effect for adjacent users. However, I have amended the wording of the extract ventilation condition as the details do not need to be approved prior to the commencement of development, just prior to their installation.
15. A condition controlling hours of use is not appropriate given that the appeal site is located within an industrial area with no residential properties in close proximity. A condition preventing customers from collecting orders from the appeal site is not considered necessary as the proposed use would not operate in this manner. If the use were to become a "traditional" hot food takeaway, then it would require a separate planning application.

Conclusion

16. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be allowed.

A Berry

INSPECTOR

Schedule of 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 be carried out in accordance with the following approved plans: 002
- 3) Prior to the installation of the flue hereby approved, details shall be first submitted to and approved in writing by the local planning authority. The development shall be undertaken in accordance with the approved details prior to the first use of the development hereby approved. 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.
- 4) The rating levels for cumulative noise from all plant and machinery shall not exceed 5dB below the existing LA90 background levels and 10dB below the existing Laeq at any noise sensitive premises as assessed in accordance with British Standard 4142 (2014) or any subsequent guidance or legislation amending, revoking and/or re-enacting BS4142 with or without modification.

*****End of Conditions*****