



Appeal Decisions

Site visit made on 10 January 2023

by **Stephen Hawkins MA, MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 27TH JANUARY 2023

Appeal A Ref: APP/D5120/C/21/3278648

159-161 Broadway, Bexleyheath, Kent DA6 7ES

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr T Ozsoykal against an enforcement notice issued by the Council of the London Borough of Bexley.
 - The notice was issued on 17 June 2021.
 - The breach of planning control as alleged in the notice is without planning permission, the subdivision of the land into two units, comprising dessert parlour (Use Class E) and a takeaway shop (Use Class Sui Generis) (Use Classes as defined by the Use Classes Order 1987 (as amended)) and the installation of an associated ventilation system on the side elevation of the property.
 - The requirements of the notice are: (1) Cease the use of the ground floor unit shown in the approximate location with a blue cross on the plan attached to the notice as [a] hot food takeaway and; (2) Remove all machinery and equipment from the land that is used solely for the purposes of the unauthorised hot food takeaway use and; (3) Remove the internal wall which facilitates the subdivision of the premises and (4) Remove the ventilation equipment from the side elevation of the property.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Appeal B Ref: APP/D5120/W/21/3273919

159-161 Broadway, Bexleyheath, Kent DA6 7ES

- 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 T Ozsoykal against the decision of the Council of the London Borough of Bexley.
 - The application Ref 20/03355/FUL, dated 21 December 2020, was refused by notice dated 9 April 2021.
 - The development proposed is: *"Subdivision of the shop into two units. A3 dessert parlour to remain on one side and a new A5 takeaway (burger shop) on the other side and with associated ventilation system (previously approved under planning ref: 19/01328/FUL)."*
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Decisions

1. Appeal A-The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act.
2. Appeal B-The appeal is dismissed.

Appeal A, Ground (a) appeal and Appeal B

Main Issues

3. The main issues in these appeals are:

- The effect of the change of use to a hot food takeaway on the health and wellbeing of the local community, in particular children, having regard to the proximity to a secondary school.
- The effect of the extraction system on the living conditions of occupiers of adjoining residential property, having regard to noise and disturbance.

Reasons

Health and wellbeing

4. The appeal property contains a three storey semi-detached double-fronted building. The hot food takeaway occupies less than a quarter of the building's ground floor, the remainder being in use as a dessert parlour selling items including waffles, crepes, cakes, puddings, milkshakes and hot and cold drinks. Permission had been granted in January 2018 for the change of use of the ground floor from retail to a dessert parlour¹. The upper floors of the building are in residential use. The property is situated in a lengthy row of premises with commercial uses at ground floor level, including retail and food and drink outlets.
5. There was no dispute that the property is located around 350 metres walking distance from an access point to Bexleyheath Academy, a secondary school. Policy E9D of the London Plan (LP) states that development proposals involving hot food takeaway uses should not be permitted where they are within 400 metres walking distance from the entrances and exits of primary or secondary schools. The LP supporting text explains that obesity is one of the greatest health challenges facing the capital. Hot food takeaways generally sell food high in calories, fat, salt and sugar, and low in fibre, fruit and vegetables. The LP points to evidence that the regular consumption of energy-dense food from hot food takeaways is associated with weight gain and that such food appeals to children. It goes on to state that a wide range of health experts recommend restricting the proliferation of hot food takeaways, particularly around schools, to help create a healthier food environment. The objective of Policy E9D is therefore to improve the health and wellbeing of the community by limiting the ability of children to access unhealthy food through resisting the proliferation of hot food takeaways in proximity to schools.
6. As I understand it, Bexley is one of the least deprived London Boroughs. Therefore, local children might be regarded as having a reduced risk of obesity compared to those living in some other parts of the capital. Nevertheless, according to the LP London contains a higher percentage of children that are overweight or obese compared to the rest of the country. Consequently, local children are still more likely to be at greater risk of obesity relative to those living in the rest of the UK. Moreover, the presence of a further takeaway outlet in this location puts local children at an increased risk of becoming overweight or obese in future by offering them greater access to unhealthy foods. There was no suggestion by the appellant of there being any existing

¹ Council Ref: 17/02040/FUL.

management measures which limit the ability of children to access the food offered by the takeaway, or of any such proposed measures.

7. Although there might be similarities in terms of calorific content, there was no firm evidence to show that the type of items offered by the dessert parlour held a level of appeal for children comparable to that of hot takeaway food. Compared to the type of food items such as cakes, puddings and so on, which might to some extent be regarded as 'treats', items offered by a takeaway such as burgers and fries are highly likely to be consumed on a more regular, possibly day-to-day, basis. Additionally, although a takeaway option is also available from the dessert parlour my understanding is that it is primarily an 'eat in' establishment. It is highly probable that children on a break or returning home from school would be more attracted to food which they can purchase and consume relatively quickly. This means that in practice, compared to a takeaway the dessert parlour is less likely to be regularly frequented by children during or immediately following school hours. It follows that food offered by the takeaway is more likely to be associated with an increased risk of childhood obesity compared to that on offer in the dessert parlour.
8. There might well be other establishments in the vicinity also within 400 metres walking distance of the school access point, also offering hot takeaway food. However, it is highly likely that such uses pre-date the LP. The mere presence of similar uses is not a good reason to permit a further takeaway outlet. Whilst there might not be an over-concentration of such uses in the vicinity, that also is not a good reason for further provision. Both arguments could be repeated, undermining the objective of Policy E9D. The takeaway might not significantly increase the overall amount of floorspace in similar use in the vicinity. Even so, that is of limited relevance, as the amount of floorspace in use for such purposes is not necessarily a reflection of overall trading levels.
9. Therefore, the use of the property as a takeaway does not support the health and wellbeing of the local community, in particular children, as it contributes to the proliferation of such establishments within 400 metres walking distance from the entrance and exit to a secondary school, being contrary to the objective of Policy E9D of preventing the proliferation of takeaways in proximity to schools.

Living conditions

10. Permission was granted for a scheme involving the installation of an extraction system at the property in June 2020². However, a system which is considerably different in terms of its technical specification has subsequently been installed, which vents via a flue erected on a side elevation of the building. The Council explained in detail why the system installed is inadequate and fails to meet the relevant Emissions and Air Quality Control (EMAQ) guidance. Whilst visiting adjoining residential property I experienced significant levels of noise and disturbance highly likely to be associated with the operation of the system.
11. The appellant claimed that the system installed offers superior control over emissions to that previously permitted. However, the manufacturer's marketing literature provides little firm evidence to support reaching such a

² Council Ref: 19/01328/FUL.

conclusion in respect of what has been installed at the property and its operation. No detailed, site-specific technical assessment of the system as installed and operated, carried out by a suitably experienced and qualified person, including any recommended remedial measures where necessary, has been supplied. Such information might have gone some way towards addressing the matters raised by the Council and an interested local resident. Consequently, I am not persuaded that the system installed offers advantages in terms of minimising the effects of noise from its operation on occupiers of adjoining residential property, compared to the permitted scheme.

12. The appellant argued that the system installed should not be removed given the previous permission granted for a different scheme. Whilst this formed part of the ground (f) submissions it is of greater relevance to the ground (a) appeal, as it would involve granting permission for part of the breach. Nevertheless, in the absence of further information I cannot reasonably be assured that attaching conditions to a grant of permission would satisfactorily overcome the identified shortcomings in the system and the significant noise and disturbance caused by its operation. Consequently, retaining the system does not represent an obvious alternative to the notice requirements.
13. For the above reasons, on the evidence before me I find that the extraction system has significantly increased the levels of noise and disturbance experienced by occupiers of adjoining residential property, having an unacceptable adverse effect on their living conditions. By prejudicing the environment of occupiers of adjacent property, the system does not accord with criterion in Policy ENV39 of the Bexley Unitary Development Plan (UDP). Also, the system does not accord with criterion in UDP Policy SHO9, as there are adverse effects on the amenities of residential occupiers by reason of noise emanating from the property; this policy is relevant as the permitted extraction system scheme was assessed against the criteria set out therein.

Other Matters

14. I acknowledge that the appellant has sought to diversify their business in the wake of the adverse effects of the COVID-19 pandemic. I am also mindful that the economic outlook for town centres generally is challenging in the aftermath of the pandemic, with the continuing growth of internet shopping, an imminent threat of recession and declining disposable incomes contributing to additional uncertainty. Even so, this matter carries limited weight. This is because any benefit offered by the takeaway in terms of contributing positively to the vitality and viability of the town centre is of modest scale. Moreover, factors including the relatively high levels of pedestrian footfall and limited incidences of vacant or underused premises I observed during my visit lead me to believe that Bexleyheath has a thriving and vibrant town centre. There was no firm evidence before me which might indicate otherwise. Additionally, it is highly likely that an alternative use of the property falling within Use Class E, which encompasses commercial, business and service uses, would offer a similar benefit without the harmful effects associated with the takeaway use.

Conclusions on Appeal A, Ground (a) appeal and Appeal B

15. The use of part of the property as a hot food takeaway and the associated extraction system do not accord with the Development Plan. Therefore, the ground (a) appeal in Appeal A does not succeed, nor does Appeal B.

Appeal A

Ground (f) appeal

16. The ground of appeal is that the notice requirements are excessive.
17. An enforcement notice can have the purpose of remedying the breach, including by discontinuing any use of the land or by restoring the land to its condition before the breach took place as provided by s173(4)(a) of the Act, or it can remedy any injury to amenity which has been caused by the breach as provided by s173(4)(b). By requiring the takeaway use to cease and the removal of amongst other things the extraction system and the internal partition, the notice seeks to restore the property to its condition prior to the breach taking place. Therefore, although it does not state as such, the purpose of the notice must be to remedy the breach.
18. Whether conditional permission could be granted for the extraction system was considered as part of the ground (a) appeal. In the context of ground (f), retaining the system would result in operations which sustained the breach remaining in situ and so would not achieve the purpose of the notice.
19. There was no dispute that the partition was erected to subdivide the takeaway from the dessert parlour. It is legitimate for an enforcement notice to require the removal of works where, as in this instance, they are integral to and solely for the purpose of facilitating the unauthorised change of use, even if such works on their own might not constitute development, so that the property is restored to its condition prior to the breach taking place. Not removing the partition would also fail to achieve the purpose of the notice, as works that sustained the breach would remain in situ. Furthermore, as it is highly unlikely that the partition would be re-erected following compliance with the notice, there is no realistic 'fallback' position in that respect.
20. Therefore, the appellant's suggested variations do not represent an obvious alternative to the notice requirements. No other alternatives were drawn to my attention and to my mind, there are none that would also achieve the purpose of the notice.
21. It follows that the requirements of the notice are not excessive-they are proportionate, being the minimum necessary to remedy the breach. The ground (f) appeal fails.

Conclusions

22. For the reasons given above I conclude that Appeal A should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application. Similarly, I conclude that Appeal B should be dismissed.

Stephen Hawkins

INSPECTOR