



Appeal Decision

Site visit made on 19 June 2023

by Nichola Robinson BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 July 2023

Appeal Ref: APP/C4615/W/22/3304191

12 Halesowen Road, Dudley, Halesowen B62 9AA

- 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 Mohammad Qureshi against the decision of Dudley Metropolitan Borough Council.
 - The application Ref P22/0272, dated 22 February 2022, was refused by notice dated 9 May 2022.
 - The application sought planning permission for the variation of condition 9 of approved planning application p18/0122 to allow takeaway use at the premises until 31st March 2022 between the hours of 4pm and 11pm Mondays to Fridays, 10am and 11pm Saturdays and 10am and 10:30pm on Sundays and bank holidays without complying with a condition attached to planning permission Ref P21/0303 dated 16 February 2021.
 - The condition in dispute is No 9 which states: a takeaway use service is permitted at the premises until 31st March 2022 between the hours of 4pm and 11pm Mondays to Fridays, 10am and 11pm Saturdays and 10am and 10:30pm on Sundays and Bank Holidays only. The takeaway use hereby permitted shall cease on or before 31st March 2022 (31/03/2022). After 31st March 2022 (31/03/2022) no ancillary take-away service or facilities shall be provided at the site
 - The reason given for the condition is: to support the business through the Covid 19 pandemic, to protect the amenities of nearby residents and in the interest of highway safety, in accordance with Borough Development Strategy 2017 Policy D5 Noise Pollution, D9 Hot Food Takeaways and Policy L1 Housing Development, extensions and alterations to existing dwellings and CEN5 and TRAN2 of the Black Country Core Strategy.
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Decision

1. The appeal is dismissed.

Background and Main Issues

2. Planning Application number P18/0122, dated 14 May 2018, granted permission for the use of the appeal property as a restaurant/cafe (A3) with proposed new fume extraction and a rear shed. That planning permission included a number of conditions, one of which (condition 9) requires that no ancillary take-away service or facilities shall be provided at the site.
3. In March 2020, as part of the Government's response to the Covid-19 pandemic, permitted development rights were relaxed under the Town and Country Planning (General Permitted Development) (England) (amendment) regulations 2020 to allow pubs and restaurants to temporarily provide takeaway food. This was a time limited permitted development right which expired on 23 March 2022.

4. Planning application Ref P21/0303 granted consent for the variation of condition 9 to planning application P18/0122, to temporarily allow takeaway use at the site until 31st March 2022. That consent was the subject of a condition (condition 9) which states that after 31st March 2022 no ancillary take-away service or facilities shall be provided at the site.
5. The appellant wishes to vary this condition and replace it with a condition which allows for the continued operation of the takeaway service. The Council's statement indicates that the condition is necessary due to the effect on the viability and vitality of The Stag Local Centre and the effect on highway safety. This is consistent with the reasons for the condition given on the decision notice.
6. Taking the above into account, the main issue is whether the condition is reasonable or necessary in the interests of the viability and vitality of The Stag Local Centre and highway safety.

Reasons

Vitality and viability

7. The appeal site is located in a row of buildings in commercial use. The area is defined in the Dudley Borough Development Strategy (2017) (DS) as The Stag Local Centre which comprises an area of designated protected frontage. The consented use of the appeal property is a restaurant/café. At the time of my site visit the appeal property appeared to be in use as a hot food takeaway.
8. DS Policy D9 sets out that within protected frontages, planning permission for hot food take aways will only be granted where no more than 5% of the units will consist of hot food takeaways. The supporting text to this policy states that hot food takeaways can have a detrimental impact on the retail character and function of shopping centres due to their hours of operation, increased incidence of litter, odours, noise and general disturbance as well as parking and traffic problems. The supporting text goes on to state that the policy will aim to restrict new premises opening where they would lead to an overconcentration of such premises.
9. The permanent use of the unit would increase the proportion of takeaways in the centre from 16.7% to 20.8%. This is a significant increase in its own right, particularly when considering the relatively small scale of the centre and the fact this would be 4 times the level permitted by the policy. Furthermore, the fact that the centre already exceeds the % permitted by DS Policy D9 demonstrates that there is already an overconcentration of hot food takeaways in the area. The proposal would further contribute to this to the detriment of the retail function of the Local Centre.
10. The proposal would not result in the loss of a retail unit and the hours of operation would be the same as for the consented café/restaurant use. However, whilst the proposal would maintain a ground floor presence within the Local Centre, there is no reason to assume that a hot food take away is the only way to achieve that. Additionally, there is no particular evidence that the hot food takeaway would maintain or encourage footfall or encourage activity within this defined centre. Given the hours of operation, any footfall which is generated would most likely be during the evenings when many of the retail units within the Local Centre would not be trading. It is reasonable to assume

that this is what the Council are seeking to avoid through this policy. The proposal would therefore result in little benefit to the vitality of the other retail units within the centre and the litter, noise, odours and general disturbance associated with this overconcentration of hot food takeaways at the Local Centre could have the potential to have a detrimental effect on its vitality and viability and retail character and function.

11. For the above reasons I conclude that the proposal would result in harm to the vitality and viability of The Stag Local Centre and thus conflicts with DS Policies D9 and S2 which require that the concentration of hot food takeaways is controlled and only granted where no more than 5% of the units will consist of hot food takeaway units. Therefore, the condition is necessary in order to safeguard the vitality and viability of The Stag Local Centre.
12. Whilst referred to by the Council, Paragraph 86 of the National Planning Policy Framework (The Framework) relates to the promotion of the role of town centres and primary shopping areas. I have not been presented with any particular evidence that the site is within a town centre or primary shopping area. Thus, I find no conflict with the Framework in relation to this main issue.

Highway safety

13. The Stag Local Centre is located on Halesowen Road close to a busy junction with Long Lane and Kent Road. Halesowen Road is part of the strategic road network which connects Birmingham and other local areas including Halesowen. A parking forecourt is located to the front of the Local Centre which allows vehicles to access and egress the highway in a forward gear. A pedestrian crossing and footpath are located to the front of the parking forecourt. The appeal property and other properties in this row are served by a rear access.
14. At my weekday evening site visit I observed that the highway was heavily trafficked in both directions and there was a steady flow of pedestrians using the footpath and the pedestrian crossing. The parking area was well used with a frequent turnover of vehicles and the rear access was in use. Whilst this is a snapshot in time, there is nothing in the evidence before me to suggest that these observations are atypical of the area.
15. Whilst the hot food take away has been operational with no apparent issue, the Council state that the high proportion of hot food takeaways within the Local Centre leads to a large number of short-term vehicle movements with short dwell times which results in a high turnover of vehicles within the parking forecourt. This results in significant conflicts along the highway between pedestrians and vehicles, including cars driving over designated pedestrian walkways, indiscriminate parking on the parking forecourt, illegal parking on the highway and the blocking off of the rear access. Whilst I did not observe any conflict with the use of the rear access, on the whole the Council's comments appear to support my own observations during my site visit and it is reasonable to assume that these conflicts would be happening at other times.
16. The hours of operation, which do not fall within school hours, would unlikely result in conflicts with pedestrians walking to and from the nearby school. Nonetheless, the driving and parking of vehicles on pedestrian walkways and the parking of vehicles on the highway close to the pedestrian crossing and the parking forecourt access results in a reduction in the visibility for drivers

entering and exiting the parking forecourt and of pedestrians gathering in preparation to cross the road which would result in an increase in potential for conflict between road users and pedestrians and could result in crashes or injuries and delays to the free flow of traffic.

17. Whilst I note that the consented café/ restaurant use also generates some vehicular movements, these would likely be lower in volume with a longer dwell time and thus would not have the same turnover of vehicles and effect on the surrounding highway network. Even if the number of vehicular movements associated with delivery drivers and their use of the rear access could be controlled, the number of customers using the main access cannot. Furthermore, a different operator with a different mode of operation may not seek to control deliveries in this way. As such, the use of the rear access does not weigh heavily in favour of the proposal.
18. Based on the evidence before me, the proposal appears to give rise to the potential for conflict between highway users and pedestrians. The threat to the safety of highway users and pedestrians at these times would be significant. Thus, the proposal would result in harm to highway and pedestrian safety and thus conflicts with DS Policies D9 and S17 and Policy TRAN2 of the Black Country Core Strategy (2011) (CS) which require that all development make adequate and safe provision for access and egress by vehicle users, cyclists, pedestrians and other road users and states that planning permission for hot food takeaways will only be granted where there would not be an adverse impact on highway safety. The proposal would also conflict with Section 9 of the Framework, which seeks to ensure development does not have unacceptable impacts on highway safety. Therefore, the condition is necessary in the interests of highway safety.

Other Matters

19. The reasons for the imposition of the condition subject of this appeal also make reference to the protection of the amenities of nearby residents. There is no suggestion from the Council that the use of the property as a hot food takeaway is harmful to the living conditions of the occupants of nearby properties, and I see no reason to take a different view.
20. The economic benefits of the proposal and the direct and indirect employment resulting from it weigh in favour of the proposal. Nonetheless, these benefits do not outweigh the harm I have identified in relation to the main issues. Additionally, notwithstanding any challenges presented by the COVID-19 pandemic, there is no substantive evidence that the business would become uncompetitive or cease to trade if the appeal were dismissed. Moreover, there is nothing to suggest similar economic benefits, including the payment of VAT, could not be derived from alternative uses at the appeal property.
21. There is no substantive evidence to suggest that, following the COVID-19 pandemic, the public expect delivery services from all restaurants. I therefore give such assertions only limited weight. Whilst I note that no objections have been made to the proposal by third parties, nonetheless these matters do not weigh in favour of this appeal proposal.
22. The appellant's comments that the high number of deliveries reduces potential noise nuisance and pollution are noted. However, the number of deliveries

cannot be controlled. Therefore, this does not add anything in favour of the proposal and would not outweigh the harm I have identified in any event.

Conclusion

23. For the reasons given above, I conclude that the appeal should be dismissed.

Nichola Robinson

INSPECTOR