



The Planning Inspectorate

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## Appeal Decision

Site visit made on 7 March 2023

**by Anthony J Wharton BArch RIBA RIAS MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 11 August 2023**

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**Appeal Ref: APP/W4223/C/22/3306307**

**324 Manchester Road, Oldham OL9 7ES**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
  - The appeal is made by Mr Muzafar Iqbal against an Enforcement Notice (EN) issued by Oldham Metropolitan Borough Council (LPA).
  - The enforcement notice was issued on 27 July 2022.
  - The breach of planning control as alleged in the notice is as follows:  
The change of use of the land from land used as a car park to land used as a car park and hot food takeaway by the continued siting and use of a metal container and canopy on the land as a hot food takeaway, despite refusal of planning permission FUL/347488/21
  - The requirements of the notice are as follows:
    1. Permanently cease the use of the land as a hot food takeaway; and,
    2. Permanently remove the container, canopy, and associated materials from the land.
  - The period for compliance with the requirements is two months.
  - The appeal is proceeding on grounds (a), (c) and (e), as set out in section 174(2) of the Town and Country Planning Act 1990 as amended.
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**This decision is issued in accordance with Section 56(2) of the Planning and Compulsory Purchase Act 2004 as amended and supersedes the decision issued on 22 March 2023.**

### Decision

1. The appeal is dismissed. See formal decision below.

### Background information

2. The appeal site is a car park located on the west side of Manchester Road (A62), immediately to the south of No 324 and at the junction with Stanley Road. No 324 operates as a restaurant (Nandini's) with an 11 bedroom House in Multiple Occupation (HMO) on the upper floors. Immediately to the north-west of the car park there is a modern residential block of flats, known as 'Goodwin Court', which shares its eastern boundary with that of the appeal metal container.
3. On 23 March 2021 Planning Permission (PP) was granted for a container type 'food take-away' within the car park (FUL/345408/20). However, due to the operator breaching the conditioned opening hours, a Breach of Condition Notice (BCN) was served. The container was removed from the site. In the meantime a new planning application (FUL/347488/21) had been submitted, again for a larger proposed

container type 'food-takeaway' within the car park. This was in the position of the current container, adjacent to the 'Goodwin Court' boundary. Before the Council reached its decision the container was positioned on the site.

4. The LPA contacted the then operator and indicated that if it started to operate a 'Stop Notice' could be issued. In response the operator indicated that the operation was closed. Subsequently application FUL/347488/21 was refused.

5. However, the proposed container was sited within the car park in its current position and started to operate. A Planning Enforcement Officer spoke with the then operator and a planning agent and gave a deadline of the 29 March 2022 in which to remove the container, timber decking and associated materials from the site or appeal the Council's decision. This deadline passed and no appeal was made. The container remained on the site and the business remained operational without PP.

6. A further application for a proposed food 'take-away' (FUL/348720/22) in the same location was refused on 7 June 2022 and the EN was issued on 27 July 2022.

### **The appeal on ground (e)**

7. Since the applications were made there has been a change in the operator of the site. Although the Council was not aware of the change it confirms that the EN was served on the landowner, Mr Mujahid Hussain, (of 37 Suffolk Street, Oldham) who was listed in the Land Registry as the owner of the car park.

8. The notice was subsequently sent back to the Council because the address no longer existed. Copies of a new the notice were then hand delivered to the site on 28 July 2022. One was posted into 'Nandini's restaurant (at No 324) and the second one was attached to the take-away container which was closed at the time.

9. Clearly the appellant, as the new operator, became aware of the notice and appealed on grounds (a), (c) and (e). The Council had informed the agent and the decision was also available on-line.

10. It is not realistic that the appellant would not have been aware that the application had been refused. But the business was re-opened, despite the Council insisting that this should not take place until a decision reached. It is then stated that the appellant had *'since obtained a copy of the refusal notice from the council website'*.

11. The courts have held that Secretary of State can disregard incorrect service if no person would be prejudiced. In this case it is evident that the appellant, as the current operator, has been able to appeal the notice. Thus, neither he, nor any other person who might have an interest in the land (including the owner/landlord) has been prejudiced. It follows that the appeal on ground (e) must fail.

### **The appeal on ground (c)**

12. I agree that in continuing to operate a breach of planning control has occurred in that there is no PP in place for the unit to operate in its current position. I have noted reference to the previous application (FUL/345408/20). However, that container was positioned further forward in the car park, closer to the A62 and away from residents at 'Goodwin Court'. It is stated that there was a road drainage issue relating to its use in this position and that is why it had to be moved to the rear of the site.

13. However, that does not alter the fact that there is no PP in place for the container and decking to be in its current position. Furthermore, the other container was smaller in size to the appeal container. It had a smaller kitchen area, a smaller waiting area

and resulted in the loss of only three, as opposed to six, parking spaces. For these reasons and because the container was further away from 'Goodwin Court', the Council had considered that it was acceptable and not contrary the DPD policies.

14. In the absence of any PP for the operation of this larger unit in this new position (immediately adjacent to 'Goodwin Court'), the use is unlawful and a contravention of planning control has occurred. The appeal, therefore, must also fail on ground (c).

### **The appeal on ground (a)**

#### *Relevant Policy*

15. The National Planning Policy Framework (NPPF) is a major material consideration, as is Planning Practice Guidance (PPG). The NPPF has confirmed that applications for PP must be determined in accordance with the development plan unless material considerations indicate otherwise. The guidance in the NPPF is that due weight should be given to policies in existing plans, according to their degree of consistency with the NPPF and that, the closer these policies are, the greater the weight they may be given.

16. The most relevant development plan policies are Policy 9 (Local Environment) and Policy 15 (Centres) of the Council's Development Plan Document – Joint Core Strategy and Development Management Policies (DPD). Although Policy 20 was referred to in the Enforcement Notice, the Council is of the view that it was not considered to be a policy that was breached in the refusal of PP for FUL/347488/21. For that reason only policies 9 and 15 have been considered in the Council's appeal statement of case. I share that view and have dealt with the appeal accordingly.

#### *The Main Issues*

17. The main issues in this appeal are, therefore, as follows:

- Firstly, the effect of the change of use and the operation of the current take-away container on the living conditions of nearby residents, with particular reference to odours and smells and noise and disturbance, and secondly,
- The effect that the operation of the take-away container in this new location has on highway safety, amenity and parking.

#### *The effect on living conditions*

18. Having visited the site and having noted its relationship to the adjacent and other nearby residential uses, I share the Council's concerns about the use and operation of the 'food take-away' container in this particular position within the car park. I agree with the Council, that due to the proximity of the 'Goodwin Court' flats, there is the clear potential for the operation to cause unacceptable smells and odours for residents. In fact there have been complaints from residents to indicate that this is the case. The container backs immediately on to the 'Goodwin Court' boundary and some windows to habitable spaces are only a few metres away from the back of the container and its associated open decking.

19. There is also an extract from the cooking area on the roof of the container and although this is not pointing directly towards the flats, it seems to me that in certain weather (wind) conditions smells and odours would be blown towards the nearby openable windows of 'Goodwin Court'. As well as the complaints, during my site visit, I could detect some of the odours and smells from the cooking process when standing close to the access to the flats immediately behind the container unit.

20. Normally, when a planning application is submitted for such a use in close proximity to other uses, information would be provided to demonstrate how such smells and odours might be mitigated. This is usually done by the provision of information relating to appropriate extract treatment, thereby avoiding dispersion of odours into the air of the immediate surroundings. Unfortunately, in this case, no such information is before me and I agree with the Council that, if such information is not provided in order to understand the level of impact that a development might have on neighbours or nearby surroundings, a decision needs to be made as to whether to approve with the missing information being submitted as a pre-commencement condition, or to refuse the application.

21. It is also common for the treatment of odours and fumes that a pre-commencement condition be put in place prior to a unit opening and this is particularly the case for 'hot food takeaways'. However, in this case the Council had considered other factors which mitigated against allowing such a conditional approval, and in any case no details were submitted regarding the extract equipment.

22. The appellant had indicated that *'the container contains a new and fully functioning high power canopy which extracts fumes in a safe manner, and that 'near the container is a restaurant which serves food, which creates 'similar food smells and have similar canopies in place. Consequently, the smells (minimised due to canopy) caused by the container are not alien'*. However, the restaurant is a fully contained building which benefits from PP and the external flue and internal extract system would have been inspected and approved by the Council's Environmental Health Team. This is not the case for this proposal and again the Council has referred to the previously received complaints with regard to unacceptable odours and smells from the operation of the container in this unauthorised position adjacent to 'Goodwin Court'.

23. With reference to the previous container being acceptable and thus not being contrary to policy, it is indicated by the Council that this was because *'The unit is small in size and discreet and not untypical for a commercial unit of this type. It is also sited in a location in which there is little uniformity to built forms, as such its visual appearance, is not considered to be detrimental to the wider area.* There is no indication as to why the drainage issue could not have been resolved to allow the container to remain in that position and away from the residential boundary. Instead the unit was simply moved to its current and harmful location.

24. Conditions were also imposed on that earlier PP which restricted opening hours to between 9am and 10pm and required the provision and control of waste receptacles. Thus, because the previous unit was smaller and provided a lot of the information requested by the Council, it was considered acceptable. The Council again stresses that this was not the case for this new position.

25. With regard to unacceptable noise and disturbance, I also agree with the Council that the decking area would most likely encourage congregation of small groups of people. It is a wide enough area and this could result in further noise being generated. This would clearly be to the detriment of the adjacent occupants in 'Goodwin Court'. I acknowledge that the decking does not contain seating and that it is indicated most customers 'pre-order' food for collection. However, the decking area still has the potential for small groups of people to congregate, talk, shelter, and await orders and generate unacceptable levels of noise close to the openable windows of the flats.

26. On this first issue, therefore I conclude that the use of the container in this particular location is contrary to Policy 9 of the DPD in that it also has an unacceptable impact caused by odours, smells and noise on the living conditions and amenities of people living within 'Goodwin Court'. It is also contrary to the NPPF which also seeks to ensure that peoples' living conditions are not harmed by any development.

#### *Highway and Parking matters*

27. The Highways officers were concerned about the loss of 6 car parking spaces and that if customers were *'unable to park safely and within the designated spaces in the car park, they will either park indiscriminately in the car park, or they will park on the nearby highway. Stanley Road is close to the signalised junction with the A62 Manchester Road and additional on street parking will be detrimental to the flow of traffic'*. It was considered, therefore, that there was insufficient parking for this larger scheme.

28. I have noted that the car park can accommodate a total of 15 cars, and it is also clear that the car park serves the restaurant and the HMO for the upper floors of No 324 Manchester Road. The Council granted permission for the smaller container and this too would have resulted in car parking spaces being used, as well as there being a risk of some vehicles parking on the highway. However in that case only 3 spaces would be lost as a result of the container being on the site.

29. With the loss of 6 spaces, I share the Council's concerns. The more spaces taken up by the container unit, the more the risk of indiscriminate parking within the car park and on the adjacent highway. It is also the case that the parking spaces are more likely to be required in the evenings when both the restaurant and the container could both be relatively busy. I also agree with the Council, therefore, that the larger unit is likely to result in issues for parking on and off the site and that this could result in cars parking on the highway near to the traffic-light controlled junction with the A62.

30. On this second issue, therefore, I conclude that this particular operation is contrary to Policies 15 and 22 of the DPD as well as to NPPF policy. It follows that I do not consider that Planning Permission ought to be granted for the *'change of use of the land from land used as a car park to land used as a car park and hot food takeaway by the continued siting and use of a metal container and canopy on the land as a hot food takeaway'*. The appeal, therefore, also fails on ground (a).

#### **Other Matters**

31. In reaching my conclusions I have taken into account all of the other matters raised by the parties and by others. These include the full planning history of the site; the details of the previous application; the detailed appeal submissions and all other documents submitted. However, none of these carries sufficient weight to alter my conclusions on the main issues and nor is any other factor of such significance so as to change my decision that the appeal should be dismissed.

#### **Formal Decision**

32. The appeal is dismissed and the enforcement notice is upheld. The application deemed to have been made under section 177(5) of the Act is refused.

*Anthony J Wharton*

Inspector