



Appeal Decision

Site visit made on 22 August 2023

by K Lancaster BA (hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16th October 2023

Appeal Ref: APP/M2372/W/23/3318776

33 Blackburn Road, Darwen BB3 1EJ

- 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 Mrs Jabeen Kauser against the decision of Blackburn with Darwen Borough Council.
 - The application Ref 10/21/1059, dated 20 August 2021, was refused by notice dated 29 November 2022.
 - The development proposed is the change of use from café which was selling hot food to a hot food takeaway.
-

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The use of the appeal site as a hot food takeaway has already commenced and therefore approval is being sought retrospectively. I have considered the appeal on this basis.

Main Issues

3. The main issues of the appeal are the effect of the development on:
 - the character and vitality of the District Centre;
 - public health, having regard to the proximity of the appeal site to local schools and the concentration of existing takeaway premises; and
 - the living conditions of neighbouring occupiers, with particular regard to odour, noise and disturbance.

Reasons

4. The appeal site, 33 Blackburn Road, is a mid-terrace property comprising a ground floor commercial premises, currently operating as a hot food takeaway. The previous use of the site was as a café, which also served hot food. The site is located within the Duckworth Street District Centre, within the urban area of Darwen.
5. Although within a District Centre, there are residential dwellings in relatively close proximity in all directions, so the area is mixed in character. There is also a self-contained flat directly above the takeaway, which is unrelated to the ground floor commercial use.

Vitality of District Centre

6. Policy 27 of the Blackburn with Darwen Borough Local Plan - Part 2 2015 (LP) states that proposals involving conversion and adaptation of premises or involving changes of use should take place within existing buildings and frontages in order to consolidate and strengthen the vitality of the centre. They should retain or provide shop fronts in order to maintain active frontages and retain the character and vitality of the centre.
7. The appellant argues that the hot food takeaway use will complement the existing offer and increase footfall and activity within the District Centre, which is important given the challenges facing high streets. However, any increased footfall to the District Centre would be limited to evenings, when the full range of businesses on Blackburn Road will be typically closed and only hot food takeaways will be open. Furthermore, it has not been demonstrated that the use of the premises as a café, nor for any other use which falls into Use Class E which would contribute to strengthening the vitality of the centre was no longer viable.
8. Whilst the use of the premises as a hot food takeaway retains a commercial use and appearance, it will by virtue of its use, be typically closed during the daytime. It is also located in an area with a high concentration of similar uses which are also mostly closed during the daytime. This both individually and cumulatively with the other hot food takeaways in the vicinity of the area would fail to provide active frontages and therefore be detrimental to the vitality and viability of the District Centre.
9. I acknowledge that in the late 1980's, planning permission¹ was granted for use of the appeal site as a hot food takeaway. However, the evidence before me suggests that the premises, until recently, has been in use as a café. Since this planning permission was granted there have been changes to both local and national policy. In particular, the current LP was adopted in 2015 and the Planning for Health Supplementary Planning Document (SPD) was adopted in 2016. Whilst the planning history of the site is a material consideration, due to the changes in local and national policy since this application was considered, I afford this limited weight.
10. Paragraph 81 of the National Planning Policy Framework (the Framework) states that planning policies and decisions should help create conditions in which businesses can invest, expand, and adapt. I also recognise that the development would lead to some economic benefits, including the creation of jobs in the local area. However, these benefits are limited and are not considered sufficient to outweigh the unacceptable harm I have identified to the vitality and viability of the District Centre.
11. Consequently, I therefore find on this main issue, that the development results in a closed frontage for long periods during daytime hours which is detrimental to the character and vitality of the District Centre. This is contrary to Policy 27 of the LP which requires, amongst other things, that proposals involving the change of use should strengthen the vitality of the centre.

¹ Appeal Ref: 2305/A/87/75643/A4

Public Health

12. Policy 33 of the LP states that where a form of development is proposed that has the potential to impact on public health, with particular reference to obesity and related disorders, the Council will require the developer to demonstrate how public health issues have been taken into account in formulating the development proposal and how any impacts are to be mitigated.
13. The SPD provides further guidance which seeks to reduce the impact of unhealthy lifestyles, including the consumption of unhealthy food. It requires the submission of a Health Impact Assessment for all developments which would have a potential impact on public health. However, no assessment has been provided by the appellant.
14. Whilst I accept that a premises operating as a hot food takeaway does not necessarily provide unhealthy food choices, in this particular case, the Council's Public Health team assessed the submitted food menu against their own menu analysis tool and concluded that considerable improvements would be required to provide healthier food choices. On this basis, they object to the application. I have not been presented with any compelling evidence that would lead me to reach an alternative conclusion.
15. I have had regard to the appellant's statement that they are looking to review their menu to provide healthier choices and would be willing to work with the Council to achieve this. However, I have not been presented with any evidence to suggest that this will be achieved, nor that a suitable mechanism could be put in place to ensure this was delivered. In any event, this does not address the conflict with Policy 33 of the LP in so far as the appellant has not demonstrated that the use would not negatively impact health of the population of the Borough.
16. Policy 33 of the LP also seeks to restrict hot food takeaway uses around schools. The SPD states planning permission will not be granted for any new Use Class A5 (takeaway), or hybrid uses incorporating such uses, where proposals are located within the 400m exclusion zones around any primary or secondary school, madrassa, nursery or tertiary college; unless there are less than 5 existing takeaways within the 400m exclusion zone and the proposed hours of operation are outside the hours of use of the educational facility, in order to avoid influence.
17. Avondale Primary School is located within 400m of the appeal site, with Crosshill School buildings located just outside of the 400m radius, its grounds fall within the exclusion zone. The evidence provided by the Council indicates that there are already more than 5 takeaways, potentially up to 15, within the 400m exclusion zone. With approximately 8 of these located on Blackburn Road/Duckworth Street, close to the appeal site.
18. The appellant asserts that because Avondale Primary School, is a primary school that pupils will be accompanied by a parent. However, whilst this may be the case, there is no substantive evidence to support this suggestion. Nevertheless, the proposed opening hours of the hot food takeaway would be 16:00hrs to 00:30hrs Mon-Fri, Sundays, and Bank Holidays, 16:00hrs to 01:30hrs Saturdays. This would not conflict with typical school hours but would open shortly after the end of the school day.

19. However, whilst the opening hours of the premises could be controlled by condition so that they meet this requirement of the SPD, the appeal site would still be within the 400m exclusion zone of at least one school and in a location where more than 5 hot food takeaway uses already exist.
20. The appellant cites various studies which consider the link between childhood obesity and proximity to hot food takeaways, including a study by Brighton and Hove City Council which considered the impact of hot food takeaways near to secondary schools. I agree with the appellant in so far as this report, published in 2011, found that there are many factors which influence pupil's behaviours and food choices, but that the policies of the individual schools had the greatest influence in that they decided whether or not pupils are allowed to leave school premises during the day. However, the report also recognised the role of planning policy in influencing these behaviours as part of a collaborative approach. Therefore, whilst I have had regard to its findings it does not alter my findings on this main issue.
21. My attention has also been drawn to an appeal decision² which found that the no evidence was shown that the location of a single takeaway within walking distance of schools has a direct correlation to childhood obesity". I have not been provided with any specific details of this scheme, which would enable me to draw any direct comparable to the appeal scheme.
22. Consequently, in relation to the concentration of existing hot food takeaway premises close to the appeal site and the proximity of the development to local schools, I find that it would be likely to lead to an increase in the consumption of takeaway food by young people, thereby conflicting with Policy 33 of the LP and the guidance contained within the SPD.
23. Accordingly, I therefore conclude on this main issue that the development would have an unacceptable impact on public health, having regard to the proximity of the appeal site to local schools and the concentration of existing takeaway premises. This is contrary to Policy 33 of the LP which states that development will only be permitted where it is demonstrated that it will not, in isolation or in conjunction with other planned, committed or completed development, contribute to a negative impact on the health of the Borough's population.

Living Conditions

24. The hot food takeaway is located directly below an upper floor flat, with the flue for the kitchen extraction equipment situated between two upper floor windows at the rear of the property. Whilst it appears from the evidence provided that the extraction system has been in situ for some time, and prior to the commencement of the current use, no details have been provided to enable an assessment of the acceptability of the unit in relation to its use in conjunction with a hot food takeaway and its effect on the living conditions of neighbouring occupiers. I note that a Noise and Odour Emission Report was requested by the Council but has not been provided. Furthermore, the Council's Public Protection Officer undertook a site visit to assess noise levels and was unable to be satisfied that the living conditions are not being compromised.

² Appeal Ref: APP/E5900/A/10/2141935

25. Whilst I have also had regard to the letter of support from the current occupiers of the upper floor flat, I also have to consider the effect of the hot food takeaway use on the living conditions of any future occupiers.
26. Whilst I have had regard to the appellant's suggestion of imposing a condition requiring further information to be provided such information would usually be required prior to confirming that a use is acceptable. In this particular case, the assessment of the amenity impacts of the takeaway are integral to the acceptability of this application, and based on the evidence before me, I therefore find that this could not be satisfactorily addressed by imposition of a condition.
27. Consequently, in the absence of any detailed technical evidence, the appellant has failed to demonstrate that extraction equipment is designed to achieve a level of no more than 35db when measured 1 metre from the bedroom window of the first floor flat. As such, it has not been demonstrated that the premises would benefit from an acceptable system to prevent the dispersal of cooking odours into surrounding neighbouring properties, or that noise from the unit can be adequately mitigated, particularly in relation to the occupiers of the first floor flat.
28. In terms of general noise and disturbance, Blackburn Road is a busy vehicular and pedestrian route and is subject to a high level of movement throughout the day and into the night, as well as being home to a number of commercial uses nearby. It is also acknowledged that there are already a number of similar premises in the area. There is therefore likely to be a notable degree of background noise in the vicinity of the site, including other neighbouring takeaway uses.
29. However, the opening hours requested by the appellant would permit the premises to remain open until 01:30 on Saturdays and 00:30 on all other days. This would enable the premises to stay open later than many other premises in the local area. The level of noise and disturbance would be difficult to control, including the comings and goings of customers, staff, and delivery drivers both on foot and by vehicle, people conversing both inside and outside, disturbances associated with car doors opening and closing, noise from engines and car music.
30. I accept that given the location of the appeal site, a certain level of noise can be expected by nearby residents and that such uses are not uncommon in this location. I also acknowledge that the appeal premises has a 'modest' area for customers to wait to collect food and that some of the journeys, given the proximity of nearby residential streets could be on foot, reducing some of the noise generated. However, background noise later into the evening and early morning would be lower due to there being less traffic and fewer people around. Therefore, the sudden and intermittent types of noise associated with the use would be unreasonable and excessive in the early hours of the morning in such a setting where residents would expect it to be much quieter.
31. By way of mitigation, the Council has suggested the use of a planning condition to limit the opening hours to 22:30, which would align with other premises in the local area. Whilst I understand the appellant was not previously agreeable to such a restriction, they have now confirmed that they would be willing to accept a suitably worded condition to restrict opening hours in line with nearby premises.

32. Consequently, I am therefore satisfied that a suitably worded planning condition could be imposed to restrict opening of the premises in line with neighbouring business. This would ensure that the scheme would not cause unacceptable harm to the living conditions of neighbouring occupiers in the surrounding area with regards to noise and disturbance.
33. In conclusion, I have found that a suitable planning condition limiting opening hours could be imposed to mitigate the effects of the hot food takeaway use on the living conditions of neighbouring occupiers with regards to noise and disturbance. However, it has not been satisfactorily demonstrated that the use of the premises as a hot food takeaway would not adversely affect the living conditions of the present or future occupiers of the first floor self-contained flat, by virtue of noise and odour emissions associated with the kitchen extraction system.
34. I therefore find in relation to this main issue that it has not been demonstrated that the development does not harm the living conditions of neighbouring occupiers, with particular regard to odour and noise and disturbance. The development is therefore contrary to Policy 8 of the LP which requires, amongst other things, development to demonstrate that it would secure a satisfactory level of amenity and safety for surrounding uses and for occupiers or users of the development itself, with reference to noise, vibration, odour, light, dust and other pollution or nuisance.

Other Matters

35. I have had regard to the appellants assertion that the development constitutes sustainable development which is promoted by the Framework. However, whilst I have had regard to the economic benefits of the scheme, these benefits are limited and therefore not sufficient to outweigh the unacceptable harm I have identified to the character and vitality of the District Centre, the health of the local community and to the living conditions of the occupiers of the upper floor flat.

Conclusion

36. For the above reasons, the development would not accord with the development plan when taken as a whole. There are no material considerations of sufficient weight that indicate the appeal should be determined other than in accordance with the development plan. The appeal is therefore dismissed.

K Lancaster

INSPECTOR