



Appeal Decisions

Site visits made on 20 September 2023 and 25 October 2023

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 31 October 2023

Appeal Ref: APP/E2001/C/23/3320759 (Appeal A)

'Little Italy', 43A Market Place, South Cave, Brough HU15 2BS

- 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 Mohammad Rajabalian against an enforcement notice issued by East Riding of Yorkshire Council.
- The enforcement notice was issued on 22 March 2023.
- The breach of planning control as alleged in the notice is *Without planning permission material change of use of land with a nil lawful use to use as a hot food takeaway*.
- The requirements of the notice are (1) to cease the use of the Land as a hot food takeaway; and (2) to remove from the Land all fixtures and fittings associated with the use of the Land as a hot food takeaway including removal of the kebab machine and pizza oven and chargrills.
- 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 ('the 1990 Act').

Summary Decision: the appeal is dismissed and the enforcement notice is upheld.

Appeal Ref: APP/E2001/C/23/3320760 (Appeal B)

'Little Italy', 43A Market Place, South Cave, Brough HU15 2BS

- 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 Michael Whitehead against an enforcement notice issued by East Riding of Yorkshire Council.
- The appeal concerns the same enforcement notice as Appeal A above.
- The appeal is proceeding only on the ground set out in section 174(2)(f) of the 1990 Act.

Summary Decision: the appeal is dismissed and the enforcement notice is upheld.

Preliminary Matter

1. I conducted an accompanied site visit during the day on 20 September, when the takeaway was not open. Unannounced, I subsequently observed the site for an extended period in the evening of 25 October during its operating hours.

Main Issues

2. The main issue in the case concerns the effects of the development on the living conditions of neighbouring occupiers. In considering potential mitigation measures to be taken, including the installation of an extraction flue, the further question arises of the effects of the development on the character or appearance of the South Cave Conservation Area. In relation to the ground (f) appeals, if planning permission is not granted, the main issue is whether the steps required to be taken exceed what is necessary to remedy the breach of planning control or any injury to amenity caused by it.

Reasons

3. 'Little Italy' is a small hot food takeaway in the village of South Cave, situated on the main road between Market Weighton and the A63. It is located on the ground floor of the southernmost commercial building lying within a terrace on the stretch of road known as the Market Place, in which domestic residences are interspersed with shops and other business premises with some roadside parking to the front. The takeaway's opening hours are presently from 1600 to 2130 between Tuesdays and Saturdays, with a menu including pizzas, kebabs, burgers and fries. I was informed during my first site visit that it is collection-only with no delivery service offered.
4. The premises' history is generally of some commercial use, with past uses including as a bakery and as a tea room, with that latter use having benefitted from a conditional planning permission granted in 1989 and no other permissions granted since. Applications to change the use to a hot food takeaway have previously been refused and dismissed on appeal, most recently in 2018¹.
5. The Council considers that the tea shop permission is now spent, with the site having no lawful use which could be resumed if the notice is upheld. Without deciding that question, I note that the Council has recently entertained (and refused) an application to change the use from a café to the present use. I therefore have regard to the possible use as a café, together with the associated 1989 planning conditions limiting the hours of operation and prohibiting the sale of hot food for consumption off the premises, in reaching my decision on the appeal.
6. The takeaway has been operating since the relaxed planning guidance issued during Covid-19, and in this respect my considerations are different from those of the 2018 Inspector who was then considering a prospective use. Nonetheless it appears that some of the concerns expressed by the previous Inspector about the likely impacts of the change of use on adjoining residents have now materialised. My considerations include the extent to which those impacts could be mitigated, and whether the benefits of the development could outweigh any residual disadvantages to the neighbours.
7. Those neighbours include in particular an occupier of the flat above the takeaway, and the occupiers of the two houses to the south of the premises who have made representations in the case and whose properties I had the benefit of visiting accompanied by the parties to the appeal.
8. Representations include an evident groundswell of opinion in favour of the takeaway remaining open, with a petition in support having been presented to the Council and with the Parish Council being particularly supportive, referring to the business having provided a much-used service during the Covid-19 pandemic, its position as a local employer, and the local need for the service.
9. The relevant policy context is provided by the East Riding Local Plan 2012 – 2029 Strategy Document, adopted in April 2016. Policies cited in the notice by the Council are ENV1, seeking to ensure that development proposals have regard to the amenity of existing properties, and ENV6, seeking to ensure that

¹ APP/E2001/W/17/3188071

pollution is appropriately managed such that development does not result in unacceptable consequences. Other relevant policies cited in the Council's committee report include policies EC1 and EC3, supporting the local economy and the vitality and viability of local centres. Proposals are encouraged where certain criteria are met, including those that contribute to the local economy and strengthen the district's key employment sectors that include food and drink. Thus the overall policy context is supportive of the proposal, but only if the development can be achieved without unacceptable consequences to neighbouring residents.

Noise and disturbance

10. The complaints of noise are mainly concerned with the arrival and departure of the takeaway's customers, whether vehicular or on foot. An increase in footfall is to be expected with a takeaway use, compared with that of a café with lower throughput. The main road is a busy one. Although somewhat quieter in the evenings after the commuter traffic has died down, I observed continuous traffic until around 1930 including HGVs trundling through until well after 2000. The development meets with no objection from the local highway authority who note that the development should not result in a significant increase in vehicle movements particularly at peak times. Nonetheless neighbouring residents say otherwise, and say that they are subject to car doors banging, car radios audible and engines left idling.
11. Although the site lies in a predominantly residential area, I accept that a significant proportion of its customers are likely to live beyond walking distance and to arrive by vehicle, with some of the effects described by the neighbours. I observed that around half of the takeaway's customers arrived by vehicle, with most of those combining their trip with a visit to the grocery store on the corner. Much more traffic was associated with the grocery store alone, and some with the other takeaway premises in the centre. The greater complaint is not of vehicular noise but of noise and disturbance resulting from the use of the takeaway at all. The adjoining property at no. 43 is laid out such that its staircase immediately adjoins the takeaway, with living quarters beyond to the south, but nonetheless its occupiers say they can hear every time the takeaway door opens and closes. People are heard chatting in the queue and some anti-social behaviour has been witnessed.
12. At the time of my visit the maximum number of customers waiting for food at any one time was three. The takeaway's entrance door is somewhat flimsy, on occasion being blown ajar by passing HGVs. It appears the banging could readily be remedied by introducing a hydraulic arm or replacing the door.
13. I witnessed no particular noise or disturbance associated with the takeaway use during my evening site observation. Later in the evening some youngsters were making noise on the street, but outside the grocery store on the corner which is open until 2100. Some noise would be an inevitable consequence of the nature of the use in such close proximity to residential dwellings. However, although in a predominantly residential area the takeaway is nonetheless in an established parade of commercial premises where increased footfall is to be expected. Compared with the noise from passing traffic and with that associated with the other outlets in the centre, I do not consider noise resulting from customers of the takeaway to make a significant difference to the nearby residents' living conditions.

14. Any noise from the cooking itself is not the subject of particular complaint, and this would be unlikely to be significantly different from any café use. However, in order to abate odours it is proposed to install an extraction pipe to the rear of the property. An 'ambient noise assessment' has been submitted, suggesting that when fitted with attenuators the resultant noise level would be 44dBA (I understand this to mean the sound pressure level at 3m away) and that noise would be further reduced as a high level plume would direct noise away from adjacent properties.
15. This assessment is somewhat at odds with the accompanying 'mechanical specification' which suggests different noise levels will result, and it is not explained whether the particular siting of the extraction pipe, located on the rear wall of the appeal property but close to the neighbour's rear outrigger (so effectively in a corner position) could affect the estimated results.
16. The outlet from the pipe is shown on accompanying drawings and superimposed photographs to be above the eaves but below the ridge of the property's roof. It would pass within around a metre of the rear window to the upstairs flat. Its outlet would be at a height commensurate with the rear dormer window to the neighbouring property's upstairs bedroom, around 3m away. Whilst this is not presently used as the principal bedroom to the house, nonetheless on present information I consider that the estimated noise levels from the extractor pipe would be likely to result in unacceptable noise to those neighbours, in the context of usual noise levels of around 20dB in quiet bedrooms and in daytime living rooms of around 40dB.
17. Unfortunately there is no accompanying detailed analysis from the appellant about the likely noise impacts of the development. Test readings were apparently taken in March (on a day when the takeaway would have been closed) but from a point 'on the boundary on the nearest occupied property 6m away'. The nearest occupied property is not 6m away, but immediately adjoins the appeal site. It is not clear whether these readings were taken from the front or the rear, but if the former then the results are unlikely to assist in evaluating the likely impacts of the extraction pipe to the rear. It is not explained whether the estimated noise output is likely to result in acceptable living conditions in the upstairs flat or the adjoining house. Without such an analysis, I am unable to find that the neighbours would not be adversely affected by the noise of the extraction pipe, or therefore that the requirements of the planning policies ENV1 and ENV6 to which I have referred would be met.

Odours

18. Without any extraction pipe, I am in no doubt that the odours emanating from the premises are unacceptable to the neighbouring occupiers. The appellant's own odour assessment finds the odour impact risk to be a high one. Without any present system of dispersal, that assessment would seriously underestimate the dispersion risk and it appears to underestimate the risk posed by the 'cooking type' by classing this as a medium risk despite the availability of burgers and other fried foods on the takeaway's menu. Neighbours say they are unable to open windows or enjoy time outdoors during the summer evenings, and I accept this to be the case.
19. The question then arises whether the proposed extraction system would satisfactorily mitigate these effects. Here, the odour assessment does underestimate the dispersion risk, because the discharge outlet is not proposed

to be 1m above the ridge, but about that height above the eaves. Control measures are proposed to include filtration and regular maintenance, with the proposed ventilation and extract system to employ a 'Plasmaclean Xtract 1500' ozone unit.

20. The odour assessment then asserts that the measures are 'therefore considered appropriate to manage odour from the site'. It is wholly unclear how this conclusion has been reached, with no detailed explanation about how the unit would function or the extent to which odour impacts would be reduced as a result of its installation. Again I therefore cannot be satisfied as to its efficacy in reducing odours to an acceptable level, and therefore I am unable to find that there is compliance with the development plan.

Conservation Area

21. I am bound to have regard to the effects of the development on the Conservation Area in which it lies. Although the appellant's odour control assessment describes an extraction pipe discharging above the ridge line to the property, the pipe shown in the proposed mechanical layout sits below the ridge. Accordingly, any visible impact of the pipe as proposed would be restricted to the rear of the building and as such I find it would not affect the character or appearance of the Conservation Area.

The appeals on ground (f)

22. The appellants consider the notice's requirements to remove all fixtures and fittings associated with the use as a hot food takeaway, to include the kebab machine and pizza oven and chargrills to be excessive, in the light of its former use as a café. The Council's position is that permission would anyway be required for such a use.
23. The notice gives a period of three months in order to comply with its requirements. That would be sufficient time in which to establish whether or not permission is required for a café, and if that use is to resume then to establish which of the present items would be needed for such a use. The Council would have the ability to waive or relax any requirements of the notice accordingly.
24. However in the absence of any information about the likelihood of that use resuming (even if permission is not required) I am unable to conclude that the requirements of the notice as drafted are excessive. The purpose of the notice is to remedy the breach of planning control, and it is commensurate with that aim to require the removal of internal items that facilitate the unauthorised use. There is no reason to allow any of the items potentially to be used by a café to remain if that use is not going to resume, and I have no information to suggest it would be a real prospect whether or not planning permission would be required. Accordingly, the appeals on ground (f) must fail.

Conclusion

25. The appellant has evidently provided a valuable local service to the community particularly during Covid-19 and the takeaway has attracted a great deal of support, including from the Parish Council. I do not find that the noise and disturbance arising from its visiting customers would itself warrant dismissing the appeal, because I do not find these to be significant in the context of a busy road and a commercial parade containing other outlets.

26. However, I have been given insufficient information about the proposed extraction system to be satisfied that it could adequately mitigate what are undoubtedly unacceptable odorous impacts on the neighbouring living conditions as arise at present. I do not have sufficient information about the noise it would produce, or the extent to which it would reduce the cooking smells experienced by the neighbours. Therefore, on the basis of present information, I cannot find that the takeaway use is consistent with the development plan for the area, or that its benefit should outweigh the impacts on the neighbours.
27. For these reasons I must conclude that the appeals should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Formal Decision

28. The appeals are 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 Act as amended.

Laura Renaudon

INSPECTOR