



## Appeal Decision

Site visit made on 17 November 2023

**by C Rose BA (Hons) BTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 21 December 2023**

**Appeal Ref: APP/V1260/W/23/3321057**

**170 Fahren Estate Agents, Old Christchurch Road, Bournemouth BH1 1NU**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for 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 South UK Foods Ltd against Bournemouth Christchurch and Poole Council.
- The application Ref 7-2023-4620-C is dated 3 January 2023.
- The application sought planning permission for Change of Use from Class E(c) Estate Agent to Take-Away (Sui Generis) including modifications to shopfront and install extractor flue without complying with conditions attached to planning permission Ref 7-2022-4620-B, dated 21 October 2022.
- The conditions in dispute are Nos 1, 2, 3, 4 and 5 which states that:  
Condition 1: *'The development hereby permitted shall be carried out in accordance with the following approved plans: 2022-S-1700CR-001B & 002D'.*  
Condition 2: *'The use hereby permitted shall not be open to customers outside the following times 09:00 hours to 01:30 hours'.*  
Condition 3: *'The use shall only operate in accordance with those measures & provisions detailed in the Management Statement & emails dated 18 October 2022 as prepared by Tulesh Vaja and shall be retained for the duration of the use, unless otherwise agreed in writing by the Local Planning Authority'.*  
Condition 4: *'Notwithstanding the details included on the application form the materials and colours to be used in the construction of the modified shopfront shall match the materials and finish of the existing shopfront and the works shall be completed prior to use commencing as granted by this permission'.*  
Condition 5: *'Before development commences, unless agreed in writing by the Local Planning Authority, details of a cycle store for 2 cycles showing the site location, elevations and materials to be used in the construction shall be submitted to and approved in writing by the Local Planning Authority. The approved cycle store shall be completed prior to the occupation of any of part of the development granted by this permission and shall be retained and maintained thereafter unless otherwise agreed in writing by the Local Planning Authority'.*
- The reasons given for the conditions are:
  1. *'For the avoidance of doubt and in the interests of proper planning'.*
  2. *'To safeguard the amenities of occupiers of adjoining and nearby properties and in accordance with Policies CS38 and CS41 of the Bournemouth Local Plan: Core Strategy (October 2012)'.*
  3. *'In the interests of residential and general amenities of the area in accordance with the provisions of policies CS38 and CS41 of the Core Strategy Bournemouth Local Plan (2012)'.*
  4. *'To ensure a satisfactory visual relationship between the existing and the new development in accordance with Policy CS41 of the Bournemouth Local Plan: Core Strategy (October 2012)'.*

5. *'To promote alternative modes of transport and in the interests of amenity in accordance with Policies CS18 and CS41 of the Bournemouth Local Plan: Core Strategy (October 2012)'.*
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## Decision

1. The appeal is allowed and planning permission is granted for Change of Use from Class E(c) Estate Agent to Take-Away (Sui Generis) including modifications to shopfront and install extractor flue at 170 Fahren Estate Agents, Old Christchurch Road, Bournemouth BH1 1NU in accordance with the application Ref 7-2023-462-C dated 3 January 2023, without compliance with condition numbers 3, 4 and 5 previously imposed on planning permission Ref 7-2022-4620-B dated 21 October 2022 and subject to the conditions in the attached schedule.

## Background and Main Issue

2. Planning permission was granted under reference 7-2022-4620-B for the change of use from an estate agent to a take-away at the appeal premises on the 21 October 2022. This permission was subject to the standard time limit and 7 other conditions. These include condition numbers 1 and 4 ensuring that the shopfront and materials were carried out as approved and to match the existing shopfront. It also includes condition number 2 restricting hours of opening to between 09:00 hours to 01:30 hours, condition number 3 to carry out the development in accordance with a submitted management statement, and condition number 5 to provide a cycle store for two cycles.
3. On the 3 January 2023, an application was submitted to vary conditions 1, 2 and 3 and to delete condition numbers 4 and 5. As a result, the proposal sought to provide a different design of shop frontage, longer opening hours on a Friday and Saturday, the relaxation of the requirement for door supervisors within the management statement and to remove the requirement to provide the cycle store. The Council failed to determine the application within the prescribed period.
4. At the time of my site visit, the takeaway use had commenced.
5. In light of the above, the main issues are the effect of varying or deleting the affected conditions on: -
  - the promotion of alternative modes of transport, with particular regard to the provision of cycle parking.
  - the character and appearance of the area including whether the proposal would preserve or enhance the character or appearance of the Old Christchurch Conservation Area;
  - the living conditions of neighbouring occupiers, with particular regard to noise and activity; and,

## Reasons

### *Alternative modes of transport*

6. With regard to the provision of cycle parking, Policy CS18 of the CS states that all new development will provide adequate cycle storage in accordance with adopted standards. Table 29 of the Councils adopted Parking Standards

Supplementary Planning Document (2021) (SPD) requires the provision of 2 cycle spaces for the proposal. As a result of the lack of provision related to the development, the proposal would not comply with the SPD or Policy CS18.

7. I recognise that the previous lawful use of the premises could have included use as a restaurant without provision of a cycle stand, and note the availability of some cycle racks on the opposite side of Old Christchurch Road close to the appeal site. Nonetheless, the existing racks serve a number of businesses, and it is not unreasonable for CS Policy CS18 to relate to all new development and require cycle storage to address existing shortfalls to promote increased opportunities for cycling. In light of this, I find a condition to secure the provision of 2 cycle spaces necessary and meets the tests for conditions. This is in order to promote alternative modes of transport, with particular regard to the provision of cycling.
8. However, the condition as currently worded seeks provision of a cycle store rather than the provision of 2 cycle spaces to reflect the requirements of the SPD. As a result, the wording of the condition needs amending to reflect this and to provide the 2 cycle spaces via the provision of 1 cycle stand. The wording of the condition also requires amending as development has commenced and the condition requires provision before development commences. Furthermore, the wording of the condition needs amending for reason of certainty to remove reference to 'unless otherwise agreed in writing by the Local Planning Authority'.
9. Although the deletion of condition 5 would cause harm to the promotion of alternative modes of transport, with particular regard to the provision of cycle parking, the condition needs to be amended to provide 1 cycle stand to accord with Policy CS18 of the CS and the SPD, to reflect the fact that development has already commenced and for reasons of certainty.

#### *Character and appearance*

10. The appeal site comprises a ground floor commercial unit that was in use as a takeaway at the time of my site visit. The site is located within the heart of a commercial area within the centre of Bournemouth. The immediate area comprises a mix of uses including a number of bars, restaurants and takeaways at ground floor level with some residential properties above.
11. The appeal site is located within the Old Christchurch Road Conservation Area (CA). The immediate area is characterised by terraces of various periods with upper floors originally intended as residences but with the lower floors later converted to a mix of uses. The terraces provide a sense of urban scale to the town Centre with their architectural value reflecting the heart of a prosperous Victorian seaside town. These elements combine to comprise the significance of the CA.
12. Although I acknowledge that the ground floor of the terrace within which the appeal property resides has undergone significant changes since its construction, with no surviving historic shopfronts, a number of the shop fronts retain elements of historic shopfront designs. In particular, these include the provision of fan lights and stall risers. Where the shop frontages have departed from this or are constructed from more modern materials such as aluminium, they are less successful at integrating with the traditional design, appearance and architectural significance of the upper floors and wider terrace.

13. By reason of the loss of the remaining stall risers and provision of a shopfront comprising wide openings and materials that are no longer required to match the timber materials and colours of the existing shopfront, the proposal would result in a modern shopfront at odds with the more traditional existing materials and design that reflects the history and significance of the terrace. This would be the case despite the consented top lights and windows failing to align with the windows above, loss of part of the stall riser already consented and investment in the shop front to date. I give great weight to the conservation of the heritage asset.
14. My attention has been drawn to another appeal decision<sup>1</sup> nearby but I have no detailed plans before me in relation to this appeal. Furthermore, unlike the current appeal property, I note the Inspector refers to the frontage materials being damaged, dated and out of keeping. As a result, I cannot be sure that this appeal is directly relevant to the current proposal. In any case, I am required to consider the current appeal on its merits.
15. It follows from the above that the design of the new shopfront and removal of condition number 4 would result in 'less than substantial harm' to the Conservation Area as a designated heritage asset. It is important to note that 'less than substantial harm' does not equate to a less than substantial planning objection. Paragraph 202 of the National Planning Policy Framework requires that 'less than substantial harm' should be weighed against public benefits of the proposal.
16. While I acknowledge the new shopfront would provide a level of flexibility to the business in how it operates and provide some economic gain, these are mainly private benefits for the appellant. Any wider economic gain to the town centre would be very limited and as such would not outweigh the 'less than substantial harm' to the Conservation Area as a whole.
17. In summary, the variation of condition number 1, and deletion of condition number 4 would cause harm to the character and appearance of the appeal building and to the significance of the CA as a designated heritage asset as a whole contrary to Section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990.
18. As a result, the proposal fails to accord with Policy CS39 and CS41 of the Bournemouth Local Plan: Core Strategy (October 2012) (CS), policies 4.4 and 4.21 of the Bournemouth District Wide Local Plan (2002) (LP) and policies D4 and D6 of the Town Centre Area Action Plan (2013) (AAP). Amongst other things, these seek to protect designated heritage assets from proposals that would adversely affect their significance, seek to ensure that all development is well designed and of a high quality, preserve or enhance the character or appearance of the area and encourage the preservation or enhancement of traditional shopfronts which make a beneficial contribution to the appearance or character of the building or street scene.
19. Despite the conclusions above, the consented wording of condition number 4 requires the materials and finish to match the existing prior to the use commencing. Given my finding under the first main issue that condition 5 requires amending, the wording of condition 4 also requires amending to reflect

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<sup>1</sup> APP/G1250/W/15/3004014

that the use has already commenced by removal of reference to compliance prior to the use commencing.

*Living conditions*

20. In the absence of an assessment of the potential for noise from the development as required by original condition number 7, I cannot be certain that the addition of the bi-fold doors, combined with the extended opening hours on Fridays and Saturdays to 5am, would not result in a harmful impact upon nearby residents by means of increased noise, particularly in the summer months and late at night when other nearby businesses are operating. Moreover, I have been provided with little evidence that the approved shop front or opening hours make the business unviable or uncompetitive. The later opening times for other units does not justify the later opening of the appeal premises in the absence of the assessment for the potential for noise, and given the very late opening times being applied for.
21. I note the submission of the Industrial Noise Impact Assessment with the appeal, but this relates to noise implications from the installation of new plant. Condition 7 requires an assessment for the potential from all noise sources and as such the submitted report does not adequately demonstrate that the proposal would ensure that the living conditions of nearby residents with regard to noise and disturbance would be adequately protected or mitigated. Whilst the proposal may be subject to the licensing regime, the consideration of the effect of the proposal on the living conditions of neighbouring occupiers is also a requirement of local and national planning policy.
22. I now turn to the relaxation of the requirement for door supervisors. I have taken into account the statements from the appellant regarding the shortage of door staff and the potential difficulty in gaining staff for the hours proposed, particularly on the quieter days of the week. I also acknowledge that the hours may require the employment of different door staff across the week. However, there is little evidence to support the statements from the appellant that obtaining staff is impossible to achieve, that there is a shortage of such staff, and that the hours would be unviable. I acknowledge the other measures to be put in place by the appellant with regard to CCTV, notices and information. However, in light of my findings above with regard to the absence of an assessment of the potential for noise, and potential for late night noise and disturbance, the relaxation of the requirement for door supervisors has not been adequately justified. Any benefit from increased litter collection from longer opening hours would not outweigh the harm identified above.
23. The variation of conditions 1, 2 and 3 as proposed by the appellant would cause harm to the living conditions of neighbouring occupiers, with particular regard to noise and activity. As a result, the proposal fails to accord with policies CS38 and CS41 of the CS and Policies D4 and U9 of the AAP. Amongst other things, these seek to minimise potential pollution by way of noise, enhance the amenities of future occupants and neighbouring residents, respect the amenity of existing and proposed residents, and not have an adverse impact on nearby amenities as a result of increased activity or noise.
24. Despite the above and given my conclusions in relation to the other two main issues, in the interest of certainty, the wording of condition 3 needs to be amended to remove reference to 'unless otherwise agreed in writing by the Local Planning Authority'.

## **Other Matters**

25. The appellant raises concerns regarding the lack of engagement and conduct of the Council during their consideration of the planning application and the time taken to consider the application. However, these are not matters which are for consideration in this appeal.

## **Conditions**

26. The PPG makes it clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. I have had regard to the conditions suggested by the Council.
27. As the development has already commenced, there is no need for the standard time condition.
28. In light of my findings above, other than the removal of the reference to 'unless otherwise agreed in writing by the Local Planning Authority' in the interests of certainty from condition 3, the wording of conditions 1, 2, and 3 remain unchanged. I have amended the wording of condition 4 to reflect the fact that development has commenced.
29. In light of my findings above, the wording to original condition 5 is amended to secure provision of one cycle stand, to reflect that development has commenced and to remove reference to 'unless otherwise agreed in writing by the Local Planning Authority' for reasons of certainty. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively worded condition to secure the approval of the cycle stand details. The condition will ensure that the development can be enforced against if the requirements are not met.
30. Original condition numbers 6 and 7 are re-imposed to ensure that the Management Statement and assessment on the potential for noise are submitted, approved and implemented so as to make the development acceptable in planning terms. There is a strict timetable for compliance because permission is being granted retrospectively, and it is not possible to use a negatively worded condition to secure the approval and implementation of the Management Statement and assessment on the potential for noise before the development takes place. The conditions will ensure that the development can be enforced against if the requirements are not met. I have also removed the reference to 'unless otherwise agreed in writing by the Local Planning Authority' from condition number 6 in the interests of certainty.

## **Conclusion**

31. For the reasons given above I conclude that the appeal should be allowed in relation to original condition numbers 3, 4 and 5 being varied to remove the reference to 'unless otherwise agreed in writing by the Local Planning Authority', to reflect the fact that development has commenced, and to require the provision of one cycle stand. The remaining conditions are justified so the appeal fails in respect of condition numbers 1 and 2.
32. I therefore grant a new planning permission with original condition numbers 1 and 2 re-imposed, numbers 3, 4 and 5 varied, and conditions 6 and 7 re-

imposed but with amended wording to reflect the fact that development has commenced.

*C Rose*

INSPECTOR

### **SCHEDULE OF CONDITIONS**

1. The development hereby permitted shall be carried out in accordance with the following approved plans: 2022-S-1700CR-001B & 002D.
2. The use hereby permitted shall not be open to customers outside the following times 09:00 hours to 01:30 hours.
3. The use shall only operate in accordance with those measures & provisions detailed in the Management Statement & emails dated 18 October 2022 as prepared by Tulesh Vaja and shall be retained for the duration of the use.
4. Notwithstanding the details included on the application form the materials and colours to be used in the construction of the modified shopfront shall match the materials and finish of the existing shopfront.
5. Unless within 3 months of the date of this decision, details of cycle facilities for 1 cycle stand showing the siting and design form & material finish are submitted in writing to the Local Planning Authority for approval, and unless the approved scheme is implemented within 3 months of the Local Planning Authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented.

Upon implementation of the approved scheme, the cycle stand shall be retained and maintained strictly in accordance with the approved details for the duration of the use.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limited specified in this condition will be suspended until that legal challenge has been finally determined.

6. Unless within 4 months of the date of this decision details of the following matters referred to in the Management Statement dated 18/10/2022 are submitted in writing to the Local Planning Authority for approval, and unless the approved scheme is implemented within 2 months of the Local Planning Authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented:
  1. Number of door staff attending during times stated in Management Statement
  2. Number and location of waste bins within the premises
  3. Schedule/timetable for litter sweeps in the area
  4. Details/copy of the number & position of advisory/information notices to be posted in the shopfront/premises re: hours of opening and patrons behaviour policy

5. Contact details of responsible person (email and telephone number)
6. Details including layout plan of position and number of CCTV cameras within and external to the premises

Upon implementation of the approved Management Statement, the use shall operate strictly in accordance with the approved details for the duration of the use.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limited specified in this condition will be suspended until that legal challenge has been finally determined.

7. Unless within 4 months of the date of this decision an assessment on the potential for noise from the development affecting residential and commercial properties in the area is submitted in writing to the Local Planning Authority for approval, and unless the approved scheme is implemented within 2 months of the Local Planning Authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented.

The assessment shall include noise from the extract system and will concentrate on both daytime and night time noise. If the assessment indicates that noise from the development is likely to affect neighbouring residential or commercial properties then a detailed scheme of mitigation measures shall be included with the submission to be approved in writing by the Local Planning Authority.

Upon implementation of the approved scheme, the use shall operate strictly in accordance with the approved details for the duration of the use.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limited specified in this condition will be suspended until that legal challenge has been finally determined.

**\*\*\*END OF CONDITIONS\*\*\***