



Appeal Decision

Site visit made on 9 November 2023

by Elaine Gray MA, MSc, IHBC

an Inspector appointed by the Secretary of State

Decision date: 1st February 2024

Appeal Ref: APP/J4525/C/23/3314979

Side House, St. Georges Terrace, SUNDERLAND, SR6 9LX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Adam Cole/Cole Kitchen against an enforcement notice issued by Sunderland City Council.
- The notice was issued on 19 December 2022.
- The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the land from use as a café to use as a hot food takeaway.
- The requirements of the notice are to: Cease the use as a hot food takeaway.
- The period for compliance with the requirement is: One month.
- The appeal is proceeding on the ground set out in section 174(2)(a) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Decision

1. The appeal is dismissed, the deemed planning application is refused, and the enforcement notice is upheld.

Main Issues

2. The main issues are the effect of the development on:
 - the health and wellbeing of the local community; and
 - the living conditions of nearby residents, with particular regard to odours, noise and disturbance.

Reasons

3. The appeal site operated as a café for a number of years until the introduction of the coronavirus pandemic restrictions, at which time it began to offer a hot food takeaway service under the relaxed planning regulations.
4. The appellant found that this change to the business model was successful, and so submitted a planning application, ref: 22/01391/FUL, for 'Change of use from café E(b) to hot food takeaway (Sui Generis)'. This application was refused on 19 December 2022.

Health and wellbeing

5. Policy VC4 of the Sunderland City Council Core Strategy and Development Plan 2015-2033 (CSDP) sets out a number of criteria for the assessment of hot food takeaway developments. Of relevance to this appeal is Section 2, which states that, to promote healthier communities, the Council will i. prevent the development of hot food takeaways (Use Class A5) within a 400m radius of

- entry points to all primary and secondary schools; and ii. prevent the development of hot food takeaways in wards where the prevalence of obesity is more than 21% for year 6 pupils or 10% for reception pupils.
6. There is no dispute between the main parties that the development is not located within a 400m radius of entry points to primary and secondary schools, and so this element of the policy is not engaged. I note the appellant's contention that, when the policy is viewed as a whole, or even criterion 2 in isolation, the wording suggests that if the radius to entry points of schools is adhered to, it is accepted that any proposal would not have an impact on the obesity rates. However, I have not been able to draw this inference from my reading of the policy.
 7. The appeal site is in the electoral ward of Saint Peters. Here, the Council state that, within the latest data from the National Child Measuring Programme, the year 6 childhood obesity figure stood at 21.3 percent and the reception year figure stood at 8.9 percent. The appellant does not dispute these figures. As the year 6 figure exceeds the Council's target, the development conflicts with CSDP Policy VC4.
 8. The business operates between the hours of 0900 – 1500 from Mondays to Sundays. That being the case, the appellant argues that reception and year 6 children would not use the takeaway service as they would remain in school for meals on school days. However, children from the surrounding area would not be in school for meals at weekends or during school holidays. As a result, there would be nothing to stop them buying takeaway food, or having it bought for them, during those times.
 9. I am not persuaded, then, that the current opening hours are sufficient to comply with the Council's aim of tackling childhood obesity in the ward. Furthermore, whilst Policy VC4 refers to children and schools among its assessment criteria, it seeks to promote healthier communities as a whole and is not solely concerned with only the health of children. Allowing the unauthorised hot food takeaway on the site would therefore not promote healthier communities.
 10. With regard to what the small increase above the 21% threshold, I note that there is no leeway within the policy to allow for any exceedance of the 21% figure. Moreover, to set the policy requirement aside because of a marginal increase, and in the absence of any other justification, would render it meaningless and unworkable.
 11. The appellant confirms that previously, the café offered a take-out option for cold sandwiches, coffee and cake. Now, the hot food menu includes breakfast sandwiches, and also options such as beetroot burgers, potato and onion rosti sandwiches and halloumi cheese sandwiches. They argue that these later items, which are permanently on the menu, provide a healthier option. On that basis, they suggest that the development is different to a traditional hot food takeaway, for example a fish and chip shop or a pizza takeaway, in terms of both their menu and opening hours.
 12. Whilst that may be so, once permission was granted for a hot food takeaway use at the premises, there would be little to stop the food offer changing to more traditional takeaway fare. The appellant suggests that a condition restricting the opening hours would be sufficient control. However, if such a

use had become lawful, then it seems to me that the Council would have little basis on which to resist an application to vary the hours of operation.

13. Drawing these threads together, I therefore conclude that the development harms the health of residents in the area. As set out above, it would fail to comply with criterion 2ii. of CSDP Policy VC4. This objective seeks to tackle childhood obesity, which forms a key component of the policy's overall aim to promote healthier communities. Accordingly, I conclude that this criterion carries sufficient importance to result in failure to comply with Policy VC4 as a whole.

Living conditions

14. CSDP Policy HS1 sets out that development must demonstrate that it does not result in unacceptable adverse impacts which cannot be addressed through appropriate mitigation, arising from, amongst other things, noise, odours and traffic.
15. Previously, Environmental Health raised concerns that the planning application contained insufficient and incorrect information relating to noise and odour control. Specifically, the kitchen extraction system needed to be designed to prevent harmful noise disturbance to nearby occupants. They wanted a noise assessment to be undertaken in order to make a full and proper consideration of the development.
16. The appellant submitted an odour risk assessment for consideration. In light of that information, the Council considered that a high level of odour abatement equipment was required. The appellant stated that the only opportunity for improvement was to add to the existing extraction system to control odours. They were prepared to look at an odour control mechanism from a specialist extraction company, or a suitable external ventilation extraction route. However, in the absence of detailed specifications, the Council were not able to reach a conclusion on the suitability of the proposed solutions.
17. I note the appellant's frustration that they feel they were not given enough time to address this matter before the planning application was refused. However, they have now had ample time through the enforcement appeal process to gather the necessary information.
18. Although the appellant acknowledges the need to address the effects of odours from the development, the lack of information remains of concern in this case. I have not been provided with any detailed technical information about the existing extraction system or the additional measures that might be implemented. As a result, I have not been able to make my own assessment of the issue, and for that reason, it would not be appropriate to leave this important matter to be dealt with by condition.
19. The appellant argues that there have been numerous planning approvals for restaurants and hot food takeaways in the same ward where noise and odour assessments have been subject to condition. They give a list of reference numbers, but without any further details of these cases, I cannot be certain that they provide direct parallels to the development before me. This limits the weight I can give to these other examples.
20. I therefore conclude that it has not been satisfactorily demonstrated that the development meets the aim of CSDP Policy HS1, which puts the onus on the

appellant to show how the scheme is, or can become, acceptable in terms of effects on quality of life and amenity.

21. The Council are also concerned that day-to-day comings and goings associated with the appeal site are now significantly more intrusive to nearby residents due to the change of use. The premises has no provision for dedicated parking for patrons. The surrounding area has a mixture of on-street parking and parking restrictions through double yellow lines.
22. I have taken into account the photographs provided by a nearby resident, with the purpose of demonstrating the activities arising from the development. There are a number of vehicles parked on double yellow lines on the far side of St George's Terrace, but I cannot be certain from the images that these are visitors to Cole Kitchen. However, it is more likely that the people shown eating in their cars have bought food from the premises. I also take note of the images of people gathered nearby, the litter, and one car right outside the business.
23. On the one hand, these photographs are time limited, and fall short of demonstrating that the problems alluded to are ongoing. I note also that only two objections were received to the planning application. On the other, the appellant provides little evidence to counter the neighbour's evidence, and the concerns voiced by the Council. Again, this is contrary to CSDP Policy HS1, which clearly requires that development 'must demonstrate that it does not result in unacceptable adverse impacts'.
24. The appellant goes on to suggest that reversion to the previous café use would result in greater harm to amenity, due to customers waiting to be seated within the limited space available. However, there is little evidence before me to show that the previous use was harmful in this way. I therefore conclude that it has not been satisfactorily demonstrated that the development meets the requirements of CSDP Policy HS1 with regard to noise and disturbance.

Other Matters

25. I have taken into account the representations of support for the business, but these have not led me to a different conclusion on the main issues set out above.
26. The appeal site lies in the Roker Park Conservation Area (CA), and so I am required to have special regard to the desirability of preserving or enhancing the character or appearance of the CA. I am satisfied that the development does not affect the character or appearance of the CA, and so this duty is satisfied.

Conclusion

27. For the reasons above, I conclude that the development conflicts with the development plan as a whole. Therefore, the appeal is dismissed, the deemed planning application is refused, and the enforcement notice is upheld,

Elaine Gray

INSPECTOR