



Appeal Decision

Site visit made on 9 January 2024

by A Veevers BA(Hons) DipBCon MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 February 2024

Appeal Ref: APP/M2372/W/23/3326614

84-86 Sarah Street, Darwen BB3 3ET

- 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 Mr Kamaran Salih against the decision of Blackburn with Darwen Borough Council.
 - The application Ref 10/23/0033, dated 17 January 2023, was refused by notice dated 9 March 2023.
 - The development proposed is change of use from cafe/restaurant (Class E) to hot food takeaway (Sui Generis) including retention of extractor flue.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The description of development in the heading above has been taken from the appeal form and the Council's decision notice. While not the same as that on the application form, on 1 September 2020, the use class of a hot food takeaway was amended from an 'A5' use to a 'Sui Generis' use as set out in the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. As such, the description in the banner heading more accurately describes the development. It does not fundamentally alter the development which is the subject of this appeal.
3. Following the refusal of the planning application, the Council adopted the Blackburn with Darwen Local Plan 2021-2037 (Local Plan) on 25 January 2024. Policies 8, 11 and 33 of the Blackburn with Darwen Local Plan Part 2: Site Allocations and Development Management Policies 2015 and Policy CS16 of the Blackburn with Darwen Core Strategy 2011 are no longer part of the development plan. Accordingly, I have determined the appeal against the relevant policies of the new Local Plan. Both parties have had the opportunity to comment on the relevant policies through the appeal process.
4. From the information provided, the appeal property may already be in use as a hot food takeaway. However, there is disagreement between the main parties as to the lawful planning use of the site. While it is not for me, under a section 78 appeal, to determine whether or not a use has subsisted for sufficient time to become lawful, I note two recent Certificates of Lawfulness for the existing use of the property as a mixed café/hot food takeaway have been refused by the Council.¹ The application was submitted to the Council on the basis of a proposed change of use as set out in the banner heading and I have no clear

¹ LPA Refs: 10/20/0759 and 10/20/1028

reason not to consider the appeal on the basis that the appeal property's authorised use is therefore a café/restaurant (Class E).

5. Given the extraction flue referred to in the appellant's submission already exists on the premises, this element of the development is being sought retrospectively. Although the installed extraction flue appeared to be more bulbous at its lower level than the one shown on the application plans, Article 7(1)(c) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 advises that no plans are necessary to determine appeals that are retrospective. For the avoidance of doubt, I have determined the appeal on the basis that the change of use is a proposed development and the extraction flue is retrospective.

Main Issues

6. The main issues are:

- the effect of the extraction flue on the character and appearance of the host property and the surrounding area;
- the effect of the proposal on the living conditions of occupiers of nearby properties, with particular regard to odour, noise and disturbance; and,
- whether the proposed development would accord with the local development strategy for the area with regard to public health.

Reasons

Character and appearance

7. The appeal site is a traditional two-storey end terraced property that sits at the corner of Olive Lane and Sarah Street. The ground floor is currently occupied by a business selling, amongst other things, kebabs, grilled chicken, burgers, pizzas and milkshakes. There is a self-contained flat on the first floor that is unrelated to the ground floor commercial use and is accessed separately from an external staircase at the rear of the property.
8. While the surrounding area is predominantly residential, there is a large warehouse building and car park that accommodates several businesses opposite the site along with some other smaller commercial businesses along Olive Lane and Sudellside Street. The area is therefore mixed in character.
9. The Council have confirmed in their statement that an extract flue of some sort has been in situ at the appeal site for over 10 years. Nonetheless, on the basis of the submitted information, the flue now attached to the building was installed some time between 2018 and 2021.
10. The flue has an industrial appearance and overhangs the pavement. It is visually intrusive on this residential end terrace facing the junction of Sarah Street, Olive Lane and Sudellside Street. Its overall scale, bulk, height and finish gives it a stark and incongruous appearance in this location. Even though there is a commercial building facing the appeal site, a parking area separates this building from Sarah Street and provides a gap in the street scene from which the visual appearance of the flue is highly conspicuous. Its presence detracts from the terrace's simple domestic form and the visual qualities of the surrounding area.

11. I have taken into consideration the appellant's assertion that the flue has been present since 2009. The application form states that the 'work or change of use' started and was completed in 2021, although it is unclear whether this relates to the extraction flue or the use of the property. Nevertheless, the photographs submitted with the appeal clearly indicate that the flue now in situ is more bulbous at the lower level than the previous flue. Even though a flue previously existed on the premises, that is no longer present. It has been replaced with the flue now attached to the building, which I consider, for the reasons given above, harms the character and appearance of the host building and the surrounding area.
12. Even if the painting of the smooth metal finish was possible, which I have no substantive evidence that it would be, the extraction fan unit could not be painted in a colour that would reduce its visual appearance such that it would mitigate its effect on the character and appearance of the building or the street scene. I note the appellant suggests that a condition could be imposed to agree a different design of flue. However, the application has been made on the basis of the retention of the existing flue. Furthermore, having regard to the use of conditions, it would be unacceptable to re-design the extraction flue through the appeal procedure, as it may result in a different form of development and consideration to that applied for. This would be prejudicial to interested parties that would not have the opportunity to comment.
13. The appellant has provided photos of similar developments in the area. None of the extraction flues at these takeaways are located on a side elevation directly fronting a pavement. Neither has any information been provided on whether these examples were granted planning permission. In any event, that there may be other similar sized extraction systems on other takeaway businesses in the Borough would not justify the scale and visual harm that would result from the development before me.
14. I conclude on this main issue that the extraction flue has a harmful visual effect on the character and appearance of the host property and the surrounding area. It therefore conflicts with Policies CP8 and DM27 of the Local Plan which seek to ensure, amongst other things, that development is of a high quality design, responds to local character and enhances the surroundings.

Living conditions – extraction flue

15. The plans indicate that the customer area for the receipt of food and for sitting at a small number of tables would be at the front of the property, accessed from the existing door fronting Olive Lane. The remainder of the ground floor would be used for the preparation, washing, storage and serving of food.
16. The property includes a residential flat at first floor and there is an adjoining residential property. Other terraced houses are located to the rear of the site and across Olive Lane. Part of the extraction flue sits between two windows of the first floor flat facing Sarah Street, although the extraction point is higher than these windows.
17. Even if there has been an extraction flue at the premises for some time, I have no details of the current extraction system to be certain that cooking odours emanating from the premises would be neutralised and extraction fan noise would be at acceptable levels. I note that this information was requested by the Council at the application stage but was not provided.

18. One neighbouring resident has stated that the equipment in use at present is 'quite loud'. Even if there have been no complaints from the occupier of the flat above the ground floor, or few complaints from residents in the surrounding area, including whilst the current business has occupied the premises, this would not be conclusive evidence, in the absence of any technical information regarding the extraction system, of its acceptability.
19. Therefore, the available evidence does not show with a sufficient degree of clarity and precision that the odour or sound emitted from the extraction equipment would be of a satisfactory level that would not unduly harm the living conditions of nearby occupiers, particularly occupiers of the first floor flat, a view reinforced by the objection from the Council's Public Protection team.
20. The appellant would be willing to accept a condition requiring that details of the extraction of cooking odours and fan noise be submitted. However, I cannot be certain that such details would not involve a new extract flue or other external mechanism which could result in a different form of development to that applied for. As stated above, this would be prejudicial to interested parties that would not have the opportunity to comment on any amended scheme.

Living Conditions – general noise and disturbance

21. The information submitted by both main parties demonstrate to me that the ground floor of the appeal property could have operated as a café/sandwich shop for several years. Nevertheless, while previous occupants may have sold some hot food to take away, and installed an extraction flue for this purpose, there is no compelling evidence before me that this element of the business was anything other than ancillary. In planning terms, there is a material difference in use between a sandwich shop/café that has an ancillary element of hot food sales to take away and a hot food takeaway where the primary use is the selling of hot food to takeaway.
22. Furthermore, no conclusive evidence has been provided that the previous café use opened in the evenings. From the information available to me, several local councillors have stated that the previous café businesses at the premises were open until about 15:00 and prior to those uses, the business was a butchers shop.
23. Even if the businesses within the large warehouse opposite the appeal site on Sarah Street open late, other properties surrounding the appeal site, including the flat above and the adjoining property, are predominantly residential. In this context, it is not an area where there would generally be a lot of late night pedestrian activity or where there is a vibrant evening economy.
24. Paragraph 006 of the Planning Practice Guidance: Noise² recognises that the subjective nature of noise means that there is not a simple relationship between noise levels and the impact on those affected. It refers to that some types and level of noise will cause a greater adverse effect at night than if they occurred during the day, as well as where the nature of noise is non-continuous. Hot food takeaways are specifically cited in relation to their often peak hours in the evening, including the noise that may be made by customers in the vicinity.

² Paragraph: 006 Reference ID: 30-006-20190722

25. Although the site lies in a predominantly residential area, a proportion of its customers would be likely to live beyond walking distance and to arrive by vehicle to collect orders, or for local delivery companies to collect food. There are parking restrictions on the corner of Olive Lane and Sarah Street but no parking restrictions directly fronting most residential properties along these streets. It would therefore be likely that customers visiting the takeaway in vehicles would park outside nearby residential properties. This would cause noise and disturbance by engines running, doors slamming and conversations in close proximity to nearby residential properties during quieter times in the evening. Noise from customers coming and going would also not be constant and would in all likelihood fluctuate. Hence, it would also create disturbance in this respect.
26. Moreover, the appeal site includes a small forecourt directly outside the front door and directly adjacent to No.164 Olive Lane (No.164). This, and the presence of a litter bin on it, would provide an additional focal point for the congregation of customers in very close proximity to residential properties. The residents in No.164 and those occupying the first floor flat at the appeal site would be adjacent to this source of noise emanating from the customers outside. When this disturbance would occur in the quieter evening times, it would be of detriment to the living conditions of these residents.
27. I recognise that the authorised use of the appeal premises for a business within Class E such as a shop, café, office, medical practice or gym, would be likely to generate some activity such as the general coming and going of customers, staff and service deliveries. Even so, on the basis of the available evidence, such a business would not be able to open into the evening. The proposed use would operate until 22:00. Consequently, it would be likely to generate noise and activity at a time when most people would be likely to be at home and could reasonably expect quieter conditions within which to relax and enjoy their properties.
28. There are convenience shops and public houses in the surrounding area, nevertheless, little information has been provided about their locations, opening hours or how long they have been in existence. It is likely that they were operating prior to the adoption of the Local Plan and the Framework. Therefore, I am unable to draw similar comparisons with the appeal proposal.
29. I note the appellant's willingness to address the previous refusal of planning permission in relation to opening hours³, and that there have been no complaints to the Council's Public Protection team whilst the current business has occupied the premises. Nonetheless, the activities associated with the use of a hot food takeaway up to 22:00 every day of the week would provide unacceptable living conditions for neighbouring residents. In addition, I have not been provided with any substantive evidence that would demonstrate that a hot food takeaway use with the suggested hours of opening restriction would be less harmful than the premises lawful use.
30. I have been provided with an extract of a tenancy agreement relating to the first floor flat at the appeal property. The appellant argues that the occupier of the flat would not have returned to live in the flat, following a short absence, if they were not content with living conditions. Be that as it may, there are other nearby residents and I have to consider the proposal on its own planning

³ LPA Ref: 10/21/1431

merits in terms of the effect of the living conditions for both present and future adjoining and other surrounding residents with regards to odour, noise and disturbance.

31. The Appellant suggests that a suitably worded condition could be imposed to restrict opening hours. However, I note the appellant has already reduced the proposed evening closing time from the previous refused application referred to above. Moreover, the appellant's final comments suggest that the desired opening hours would be from 16.00 to 22.30, later than that stated in the application. There is therefore no certainty that a further reduction in hours would be acceptable, particularly having regard to the type of business proposed and the late opening time of 16.00.
32. To conclude on this main issue, on the basis of the submitted evidence, the proposed hot food takeaway would be harmful to the living conditions of occupiers of nearby properties with particular regard to odour, noise and disturbance. It would conflict with Policies DM01 and DM02 of the Local Plan which both seek, amongst other matters, to protect the living conditions of nearby residents from harm in relation to, amongst other things, that created by noise, disturbance and odour.

Public health

33. Blackburn with Darwen experiences significantly higher than average levels of poor health among its population. The justification text to Policy DM01 of the Local Plan advises that the Borough is ranked the 13th highest in terms of the density of fast-food outlets in the country and the 4th highest in the North West region⁴. Policy DM01 of the Local Plan seeks to promote healthy lifestyles, particularly of young people and to minimise the effects of an over concentration of hot food takeaways. Part 2 of Policy DM01 states that proposals for hot food takeaways, or of hybrid uses incorporating such uses, will not be permitted in wards where more than 10% of year 6 pupils are classified as obese⁵.
34. Confirmation has been provided by the Council that the prevalence of obesity (including severe obesity) of Year 6 children in the ward within which the appeal site is located (from data combined from the years 2021/22 and 2022/23) is 26%, slightly above the percentage of 22.5% for England overall. Alarming, the prevalence of Year 6 children in the ward who are classed as overweight (including obesity) for the same years is 42% against an England percentage of 36.6%⁶. Both figures are significantly above the 10% set out in Policy DM01 and as such, the proposal would conflict with Part 2 of this policy.
35. Part 3 of Policy DM01 sets out other factors that would also apply for a proposed hot food takeaway if Part 2 was satisfied, which it is not. Of these, only criteria i and iii would be relevant in this appeal because the site is not within a shopping area and both parties agree that the parking and traffic that would be generated by the proposal would not be a danger to other road users, public transport operators or pedestrians and, on the information before me, I have no reason to disagree. Criterion iii relates to the living conditions of nearby residents which I have considered above and found harm.

⁴ Obesity and the environment: density of fast-food outlets, Public Health England 2017

⁵ As defined by Public Health England through the annual National Childhood Measurement Programme

⁶ Office for Health Improvement & Disparities, information obtained 1 February 2024

36. Criterion i requires that there are no more than 3 existing hot food takeaways within 400m of the proposed site. The Council identifies 6 takeaways within 400m of the site, although at my site visit I saw that London Terrace Chippy appeared permanently closed and was advertised to let and Hawthorths Bakery is not a hot food takeaway. On the other hand, I observed Marsh House Chippy on Marsh House Lane was open at the time of my site visit and was just over a 5 minute walk from the appeal site, at the edge of the 400m exclusion zone, as was Lees Cantonese takeaway on Sudell Road and a number of takeaways on Railway Road. As such, any additional provision would contribute to increasing the concentration of these premises within 400m of the appeal site, contrary to criterion i.
37. Part 4 of Policy DM01 sets out the Council's intention to impose conditions to restrict opening hours and impose personal permissions on appropriately located hot food takeaways, that could include restricting menus in order to reduce the likelihood of it being visited by young people or to ensure healthy food choices.
38. The Council's Planning for Health Supplementary Planning Document 2016 (SPD) provides further guidance in relation to seeking to establish healthy eating habits and to reduce the rate of childhood obesity. Key Consideration 2 of the SPD requires the submission of a Health Impact Assessment for all developments which would have a potential impact on public health, with particular reference to, amongst other things, obesity and related disorders. However, no assessment has been provided by the appellant.
39. The appellant contends that, as well as opening outside typical educational school opening hours, the proposal would not provide fried food choices. Nonetheless, the excerpts of the menu provided by both parties indicate that, even though some foods would be grilled, burgers, kebabs, pizzas and fries would be available, which are not all healthy food options. I have had regard to the Council's suggested condition relating to the provision of a healthy menu. Given that the proposal is not for a personal permission, this could not be secured through the imposition of a condition. Neither have I been presented with an indication that the appellant would be willing to sign up to the 'Recipe 4 Health' scheme referred to in Policy DM01 of the Local Plan.
40. Consequently, whilst the opening hours of the premises could be controlled by condition, there is no compelling evidence before me to be certain that the proposal would comply with Part 4 of Policy DM01 or Key Consideration 2 of the SPD with regards healthy food.
41. I acknowledge that other types of food outlets also sell food of low nutritional value, some of which appeals to children. From the evidence before me, the appeal property could be used for any business within Class E without the need for planning permission. Cafes and/or shops could sell food deemed as unhealthy as that of a hot food takeaway for consumption on or off the premises. Nevertheless, I have not been provided with sufficient evidence to demonstrate that such a use has a greater than theoretical possibility of being implemented or if any such interest has been shown in the premises, nor do I have any evidence before me that this would result in a similar level of harm to the proposal.
42. In addition to the above, Key Consideration 3 of the SPD sets out school exclusion zones within which new hot food takeaways would be resisted. While

the Council have provided details of existing hot food takeaways within the exclusion zone of the appeal site, no similar information from either party has been provided relating to the 400m exclusion zone around nearby schools.

43. However, the main parties agree that the appeal site would be located within the 400m exclusion zone of Sudell Primary School and Darwen St James' CE Primary Academy. These schools are located further from the hot food takeaways on Railway Road than the appeal site and are outside the 400m exclusion zone of both schools. There is no information before me to indicate that there would be 5 or more existing takeaways within the 400m exclusion zone of each school. Indeed, from my observations on site, I observed that there would be fewer than 5, even if the appeal proposal was taken into account. Therefore, the proposal would comply with Key Consideration 3 of the SPD.
44. Taking the above into account, while the hours of opening could be controlled by condition and there would be fewer than 5 hot food takeaways within the 400m exclusion zone of nearby schools, there would still be more than 3 existing hot food takeaways within 400m of the proposed site, there are already more than 10% of year 6 pupils classified as obese in the relevant ward, and there would be harm to the living conditions of nearby residents having regard to noise, disturbance and odour.
45. For the reasons given, I conclude on this main issue that the proposal would not accord with the local development strategy for the area with regard to public health. It would conflict with Policy DM01 of the Local Plan and also with guidance in the SPD which both seek to manage the location and type of hot food takeaway premises to improve the health outcomes of the local population. There would also be conflict with paragraph 96 c) of the Framework which similarly seeks to promote healthy places which enable and support healthy lifestyles, especially where this would address identified local health and wellbeing needs.

Other Matters

46. I recognise that there are many examples of hot food takeaways in residential areas in the Borough and elsewhere. In support of the proposal, my attention has been drawn by the appellant to several planning permissions and appeal decisions relating to hot food takeaways.
47. Limited information has been provided by the appellant about the specific circumstances for each of the examples. Nevertheless, I have been provided with a copy of the Council's officer report and decision notice in relation to the example at 1 Hurstwood Avenue, Blackburn⁷. This is a semi-detached property with an adjoining commercial premises and an extraction flue to the rear partially screened by vegetation, therefore this site is materially different to the appeal proposal. The appeal examples at 2A Morris Street and 67 Burnley Lane are in Oldham and the example at 390 Derby Street is in Bolton⁸ and therefore would have been determined a considerable time ago against different development plan policies. Furthermore, from the information provided, the Bolton case is located in a district centre close to other businesses.

⁷ LPA Ref: 10/21/1026

⁸ Appeal Refs: APP/W4223/A/13/2195936, APP/W4223/W/16/3152715 and APP/N4205/W/17/3169584

48. Of more relevance is the example at 262 Whalley Range, Blackburn.⁹ However, I note that the appeal was allowed in the context of the location of the site along a busy road with a commercial character and a high level of pedestrian footfall and passing traffic. This is not the case in the appeal before me.
49. Bringing all the above examples together, while some include conditions relating to hours and extraction flues, it is clear that the circumstances of these permissions vary and are not sufficiently similar to the appeal before me to weigh in its favour. Moreover, the existence of development elsewhere does not represent an appropriate reason to find in favour of a proposal that would cause harm in this case, a case I have considered on its own merits.
50. Although there were few objections to the proposed development, a lack of objection is not a reason to approve unacceptable development. Moreover, the existence of other hot food establishments within residential areas of the Borough does not represent an appropriate reason to find in favour of a proposal that would cause harm in this case, a case I have considered on its own merits.
51. Paragraph 85 of the Framework states that planning policies and decisions should help create conditions in which businesses can invest, expand, and adapt. The site is in an accessible location and the proposal would provide economic benefits including the creation of jobs in the local area. Nevertheless, it has not been shown the appeal development is the only way of achieving this. In any event, the benefits advanced in this case are not considered sufficient to outweigh the harm I have identified. Accordingly, the presumption in favour of sustainable development does not apply.
52. I recognise that the appellant has incurred time and significant expense in establishing the business at the appeal premises and that many customers are satisfied with the choice and quality of the food provided. The appellant argues that refusing permission would lead to the closure of the business and would leave a vacant property. However, I have assessed the scheme on the basis of a proposed change of use as set out in the application and there is no substantive evidence that the property would remain vacant should the appeal be dismissed. While I am sympathetic of the appellant's concerns regarding these matters, they do not weigh in favour or against the proposal when assessing its planning merits.

Conclusion

53. The development conflicts with the development plan when considered as a whole. There are no other considerations, either individually or in combination, that outweighs the identified harm and associated development plan conflict.
54. The appeal is therefore dismissed.

A Veevers

INSPECTOR

⁹ Appeal Ref: APP/M2372/A/14/2217424