



Appeal Decision

Site visit made on 6 June 2024

by J D Clark BA (Hons) DpTRP MCD DMS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 August 2024

Appeal Ref: APP/A0665/W/24/3338136

9 Marina Drive, Ellesmere Port, Cheshire West and Chester CH65 0AL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
 - The appeal is made by Mr Zeeshan Rashid against the decision of Cheshire West and Chester Council.
 - The application Ref is 23/00715/FUL.
 - The development proposed is retrospective planning for Class E (restaurant) to have additional use class sui generis (takeaway) and late closure. Previous application: Application Number: 21/02613/FUL.
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Decision

1. The appeal is allowed and planning permission is granted for retrospective planning for Class E (restaurant) to have additional Use Class sui generis (takeaway) and late closure at 9 Marina Drive, Ellesmere Port, Cheshire West and Chester CH65 0AL in accordance with the terms of the application, Ref 23/00715/FUL, subject to the following conditions:
 - 1) The development hereby permitted relates to the drawing dated 21 February 2023 - 1:500 block plan; 1:100 proposed ground floor plan and elevations.
 - 2) The hours of operation of the use hereby permitted shall be limited to 1100 to 2300 hours on any day.

Preliminary Matter

2. The description of development refers to late closure and the application form states opening times of 1100 to 0300. However, the Council suggest a condition that would limit the hours to 1100 to 2300 which the appellant has agreed to. Furthermore, the reference to late closure in the description is not specific and no case has been put forward for opening until 0300. As both parties accept 2300 as an acceptable time I have taken the same approach.

Main Issues

3. The main issues are the effect of the proposed take-away use on:-
 - the vitality and viability of the town centre; and
 - the health of occupiers in the locality.

Reasons

Vitality and Viability

4. The appeal site is a single unit in a row of ground floor commercial properties. Planning permission was granted in 2021 to change the use from retail to restaurant (Class E) with associated extraction and condensing equipment¹. A condition restricts take-away sales to no more than 20% of total sales turnover.
5. Rather than being ancillary, the proposal would allow a greater portion of the business to trade as a take-away as well as a restaurant. This would mean that the appeal unit would be outside Class E of the Use Classes Order². Class E (Commercial and Business Service) allows a broad range of uses and incorporates what was previously the A Classes, Class B1 and some Classes D1 and D2 uses.
6. The appellant states that other restaurants have closed down in the town centre. Reference is made to The Task Force but no explanation of what this is has been given. Nonetheless, vacant units and reduced pedestrian footfall are not consistent with a viable centre. Whilst at the time of my site visit there were just two vacant units in this parade of shops, I noted other vacancies in the wider area.
7. Given that the approved restaurant could include some take-away sales and the location of the appeal site within the town centre, changing the use to a *sui generis* one involving a larger proportion of take-away sales is unlikely to be of a scale to undermine the commercial vitality and viability of the parade or the wider town centre. I do not therefore consider that the centre's pedestrian footfall would be lessened by the proposal.
8. The proposal would not conflict with Local Plan Part One³ Policy ECON 2 or Local Plan Part Two⁴ Policy DM 15 which collectively seek to ensure the long term vitality and viability of the borough's centres and avoid the loss of uses that would harm that vitality and viability. Whilst Policy DM15 specifies the avoidance of the loss of A1 retail uses and an over-concentration of non-A1 uses (now Use Class E), for the reasons set out above, I do not consider that the removal of this unit out of Use Class E would cause harm in relation to the vitality and viability of the town centre.

Health

9. The appeal site is a pizza shop/restaurant and the appellant states that it does not produce unhealthy food (no deep fryer for example) and the menu offers a number of vegetarian options and salads. The proposed take-away use however would not be restricted to the type of food sold and therefore it is appropriate to consider the use in its broader sense. This could therefore include food types that are more traditionally considered less than healthy options.

¹ Planning Application Ref: 21/02613/FUL.

² Town and Country Planning (Use Classes) Order 1987 (As Amended).

³ Cheshire West & Chester Council Local Plan (Part One) Strategic Policies, Adopted 29 January 2015.

⁴ Cheshire West & Chester Local Council Local Plan (Part Two) Land Allocations and Detailed Policies, Adopted 18 July 2019.

10. The permitted use of the property is a restaurant and a percentage of sales as a take-away is accepted under its current planning approval. Whilst the proposal would allow a greater percentage of take-away sales, there is no substantive evidence that the proposal would increase the consumption of take-away food in this area. Also due to the scale of the appeal site and its location within the town centre, where there is already a choice of hot food take-away outlets, it is unlikely that this proposal would represent an identifiable increase in hot food consumption or any related health issues.
11. The Council has produced a guidance note for hot food take-aways⁵. This sets out criteria to assess proposals in terms of health considerations. The proposal scores unfavourably against these criteria in that the location of the proposal is described as being within 400m of a school; it lies in an area of high deprivation; the location of the appeal site is within a ward of a higher than average childhood obesity; and there are already five hot-food take-aways within a five minute walk (0.3miles), and 12 within a one mile radius. The Council consider that cumulatively, these factors contribute to poor health, especially in children.
12. I have no reason to question the evidence that the guidance is based upon in terms of the link between fast food consumption and obesity and the subsequent health problems, especially amongst children. The guidance notes the complexity of this issue and sets out the Council's combined approach to address it. One aspect of this is to control hot food take-aways around schools in order to manage the temptation of unhealthy food for school children. This is consistent with the aims in Chapter 8 of the National Planning Policy Framework (the Framework) which supports developments which promote healthy lifestyles, including access to healthy food.
13. I appreciate that the appeal site is located in an area where health is an issue. Local Plan Part One Policy SOC 5 and Local Plan Part Two Policy DM 29 seek to support the health and well-being of residents in the borough and assess the health implications of new development. However, I do not find that the proposal would conflict with them or the Framework and the case that the health of occupiers in the locality would be harmed is not convincing in this case.

Other Matters and Conditions

14. The proposal includes an intention to open from 1100 until 0300 the next day, every day. This would be a longer opening time than the existing permission for the restaurant which is limited to 1100 to 2300 by a condition on that approval. The appellant does not explain why opening to 0300 is required. However, the Council suggest a condition that the opening hours should be 1100 to 2300 which the appellant has agreed to. Given that there are residential properties nearby, and in the absence of any justification for later hours, I intend to impose the condition. As there is no distinction between any day of the week in the suggested condition I have applied these hours to any day for the avoidance of doubt.
15. The Council suggest a condition requiring the development to be maintained in accordance with the information submitted with the application. However, this is imprecise and is likely to lead to confusion as to what is required. However, I

⁵ Hot food takeaway guidance note – January 2023.

sought clarification of the plans as two internal layouts were marked as proposed. For the avoidance of doubt therefore it is necessary to impose a condition specifying the approved plans as clarified by the appellant.

16. The Council's Environmental Protection Officer recommends conditions in relation to plant and odour control but the Council's Planning Officer report states that these would not be necessary as the proposal is retrospective and details were approved under the previous application for a restaurant. The report further states that a condition may be necessary if additional plant is installed but no condition is suggested. Given that the restaurant/take-away is already operating, I do not consider any further conditions necessary.

Conclusion

17. For the reasons given above the appeal should be allowed.

J D Clark

INSPECTOR