



Appeal Decision

Site visit made on 23 July 2024

by L C Hughes BA (Hons) MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15th August 2024

Appeal Ref: APP/J2373/W/24/3339071

388 Vicarage Lane, Blackpool FY4 4LP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 (as amended) for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Dr Anar Suriya against the decision of Blackpool Council.
 - The application Ref is 23/0752.
 - The application sought planning permission for use of premises within use class A3 (food and drink) without complying with a condition attached to planning permission Ref 03/0436 dated 27 June 2003.
 - The condition in dispute is No 2 which states that: The use of the premises shall not operate between 1630 hours and 0800 hours on the following day.
 - The reason given for the condition is: To safeguard the living conditions of the occupants of nearby residential premises, in accordance with Local Plan Policy E13.
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Decision

1. I decline to determine the appeal and propose to take no further action.

Reasons

2. Planning permission¹ was granted on 27 June 2003 for the use of the appeal premises within Use Class A3 ('the 2003 permission'). At that time, The Town and Country Planning (Use Classes) Order 1987 defined Use Class A3 as 'Use for the sale of food or drink for consumption on the premises or of hot food for consumption off the premises'. This included a wide range of food and drink uses, including cafes, restaurants, and hot food takeaways.
3. The s73 application subject to this appeal seeks to amend the operating hours on the 2003 permission by varying condition no.2. The dispute between the parties lies in whether the original planning permission is extant, as it would not be possible in law to vary a condition on a permission that has lapsed.
4. There is no dispute that the 2003 permission was implemented. However, the Council considers that the premises were never intended to be used as a takeaway, but rather the use proposed was a café. It draws my attention to the original Officer Report and a letter from the original applicants which indicated that there was no intention to fry food.
5. The appellant contends that the 2003 permission has not expired, rather it was implemented, is still extant and therefore the disputed condition can be varied, and the premises used as a hot food takeaway with the new hours sought.

¹ Council Ref. 03/0436

6. The Council refused the s73 application as it considers that the 2003 permission is no longer extant and could not be relied upon to use the premises as a hot food takeaway. Such uses were given their own use class in 2005 (Class A5), with planning permission being required for a change from A3 to A5.
7. The Council contends that at some point after 2003, the use of the premises changed from a café to a sandwich shop and consequently the A3 use is no longer subsisting. A sandwich shop would have fallen within Use Class A1(d) which was 'for the sale of sandwiches or other cold food for consumption off the premises'. The change from A3 to A1 would have occurred under permitted development rights, without the appellant needing to apply for that use.
8. In 2020 the Use Classes Order was again amended. The Regulations² state that any land that was in use on the 31 August 2020 for a purpose falling within existing Classes A1, A2, A3 or B1 is to be treated, as of 1 September 2020, as falling within the new Class E (Commercial, Business and Service), thus permitting changes in the use of that land to any other use within that class as of that date.
9. If the Council's version of events is correct, and the premises were in use as a sandwich shop at this date, the premises would automatically fall within the new Use Class E. Hot food takeaways are not included within this Use Class and therefore require permission (they are classed as *sui generis*). For this reason, the Council considers that the original permitted A3 use, including use as a hot food takeaway, has expired and thus s73 of the Town and Country Planning Act 1990 cannot be used to vary condition no.2 attached to the 2003 permission.
10. The appellant disputes that the premises were not in use as a takeaway. She states that there has been a wide variety of hot food cooked in the premises over the years, including fried foods for takeaway. As such, she does not consider that the premises have fallen into Use Class E, nor that the 2003 permission is not still capable of implementation.
11. My attention has been drawn to a menu from 2003 which details the food that was being sold from the premises and refers to the property as a shop. Photographs have also been submitted by the Council to demonstrate that the premises were in use as a sandwich shop. The appellant has produced documents from 2003 (after the decision on the 2003 application) which reference the use of the premises as a hot food takeaway.
12. Based on the evidence provided, which is conflicting, there is insufficient clarity over whether the site benefits from a lawful use as a hot food takeaway authorised by the 2003 permission. Consequently, I am unable to determine an appeal relating to the variation of a condition on a permission that may or may not be extant. The effect of allowing the appeal, had I been minded to do so, would have been to create a new planning permission for a hot food takeaway. Had it subsequently transpired that the premises did not benefit from a lawful use as a hot food takeaway, it could have caused injustice to interested parties who would have been deprived the opportunity to comment on the change of use. This risk means that it would be inappropriate for me to proceed to determine the appeal without the lawful use having been first established.

² Regulation 7 of the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020

13. It is not for me, in the context of a s78 appeal, to make a formal determination on matters of lawfulness. The appellant would need to use the statutory provisions under s191 or s192 of the Town and Country Planning Act 1990 to apply for a Certificate of Lawfulness. The alternative, in the absence of a Certificate, would be to make a planning application for a change of use of the premises to a hot food takeaway. However, the decision on which course of action to take is a matter for the appellant.

Conclusion

14. For the reasons given above, I conclude that I am not in a position to progress matters and so proceed to consider the planning merits of the case. Accordingly, I decline to determine the appeal and propose to take no further action.

L C Hughes

INSPECTOR