



Appeal Decision

Site visit made on 15 October 2024

by C McDonagh BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 October 2024

Appeal Ref: APP/P4605/W/23/3336073

156 Bordersley Middleway, Birmingham, B11 1BN

- 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 T Zielinschi against the decision of Birmingham City Council.
 - The application Ref is 2023/06975/PA.
 - The development proposed is a 'Change of Use to Shisha Lounge'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. On 30 July 2024, the Government published a consultation draft of proposed reforms to the National Planning Policy Framework (the Framework). As the proposed changes do not affect the main issue of this appeal, I have not sought the views of the main parties in coming to my decision.

Main Issue

3. The main issue is the effect of the proposal on the provision of employment land.

Reasons

4. The appeal site comprises a currently vacant building which was last in industrial use. The site is within designated employment land and the appeal proposal seeks to change the use of the building to incorporate a shisha lounge and café.
5. Policy TP20 of the Birmingham Development Plan (adopted January 2017) (BDP) seeks to protect employment sites and premises by a variety of means. However, it recognises that there may be occasions where employment land has become obsolete and can no longer contribute towards the portfolio of employment land outside of Regional Investment Sites and Core Employment Areas. In such cases, change of use proposals from employment land to other uses will be permitted where it can be demonstrated that either the site is considered to be a non-conforming use, or the site is no longer attractive for employment development having been actively marketed. This is normally for a minimum of two years, at a price which accords with other property of a similar type in the area.
6. My attention is drawn to the 'Loss of Industrial Land to Alternative Uses' Supplementary Planning Document (February 2006) (SPD) which clarifies that 'non-conforming' uses will mostly consist of small isolated industrial sites

within predominantly residential areas. Moreover, sites which are adjoined by other industrial uses, and are part of a larger industrial area, would not be considered 'non-conforming.' I saw on my site visit that the appeal site is located in a commercial and industrial area. Therefore, it is clear to me that the appeal site is not a non-conforming use. I note this is not disputed.

7. The Council does not dispute that the price was set at a commensurate level for the area, nor that the agent who marketed the property was suitably experienced and knowledgeable. As such, the key consideration is therefore whether it has been demonstrated that the site is no longer attractive having been actively marketed. In this regard, the Council does not dispute the methods as described in the letter from a Chartered Surveyors and Estate Agent¹. I have had due regard to this letter, which advises that 9 viewings took place in the period between November 2019 and July 2022 as a result of email campaigns and online advertising. I note the Council does not dispute the methods described were appropriate.
8. However, there is little substantive evidence of the active marketing being carried out for a period of two years. While I have no reason to doubt the competency of the author, the letter is a brief description rather than evidence of the means of marketing taken. While policy TP20 may not give prescriptive guidance on how a marketing exercise should be demonstrated, the onus is on the appellant to satisfy this criterion. Although there may be similar businesses in the general area, a two-page letter that describes the actions taken without showing any evidence of them falls somewhat short of demonstrating active marketing for two years in my judgement.
9. I note the appellant believes that the SPD should be considered out of date due to its age and advice on how to market a site as being obsolete. This is particularly the case with regards to the 'Locate in Birmingham' website no longer being active. However, age alone is not a reason to consider the SPD out of date and its advice was largely followed by the appellant.
10. I have had regard to the Financial Viability Assessment² (FVA) which concludes that the refurbishment of the building is not financially viable. However, the proposal would be contrary to policy TP20 as per my findings above. This section of the policy relating to commercial viability also requires investigations into the potential for public sector funding to overcome site constraints, which the FVA does not include. As such, this would not outweigh the conflict with policy TP20 based on the evidence before me.
11. The proposal would bring forth some benefits. There would be an economic boost to a contractor for any refurbishment works while there would be a minor benefit to the local area with a new business. The proposal would also utilise an existing building, although there is no evidence before me that the structure could be at risk of 'ruin'. There was some evidence of graffiti on the building, and it being brought back into use may alleviate this, but there is nothing before me to indicate other action has been taken to stop this behaviour occurring. Taken together, these considerations are worthy of some weight in favour of the scheme, albeit this is limited and not outweighing the conflict with the development plan.

¹ Stephens McBride – ref RWAT/GSL.

² Falque – 10 August 2023.

12. Accordingly, on this main issue, I conclude that the loss of the employment land would result in unacceptable harm to the provision of employment space and as a result the proposal would conflict with TP20 of the BDP due to the lack of supporting evidence that active marketing was undertaken for a period of two years. It would also be contrary to the SPD and relevant provisions of the Framework.

Other Matters

13. A Sequential Test³ (SQ) was also included in the proposal. This was to meet the requirements of policy TP21 which sets out a hierarchy of local and district centres in the city. The policy, along with the general aims of the Framework in this regard, seeks to maintain and enhance the vitality and viability of these centres. However, the SQ acknowledges that the appeal site is not located within any of these centres and the Council did not refuse the application against policy TP21 or the relevant sections of the Framework. I have not considered this further as a result.
14. The appeal site is located in proximity to the Grade II* listed building⁴ known as 'The Bordesley Centre', a former school of red brick construction dating from 1883. It was designed by renowned Birmingham architects Martin and Chamberlain and is listed for its historic and architectural interests. Although the Council did not refuse the application based on impacts to the setting of the listed building, as per section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 I have a statutory duty to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.
15. The proposal involves minimal external alterations, with the existing signage removed which would lead to a more reserved façade to the appeal building. Based on this, I find there would be no harm to the setting of the adjacent listed building caused by the proposal, thereby preserving its special interest and significance.

Conclusion

16. Taken together, the harm and conflicts that I have identified are such that the proposed development should be considered as in conflict with the development plan when taken as a whole. Material considerations, including the Framework, do not indicate to me a decision should be made other than in accordance with the development plan. The appeal is therefore dismissed.

C McDonagh

INSPECTOR

³ AddisonRees Planning Consultancy Ltd – February 2023.

⁴ List Entry Number: 1210202