



Appeal Decision

Site visit made on 7 August 2024

by Elizabeth Jones BSc (Hons) MTCP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 November 2024

Appeal Ref: APP/P4605/C/23/3329125

57-63 Alfred Street, Birmingham, B12 8JP

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr Rajeeb Choudhury, Chaii Garden Ltd against an enforcement notice issued by Birmingham City Council.
- The notice was issued on 8 August 2023.
- The breach of planning control as alleged in the notice is material change of use of part of the premises to provide a takeaway café.
- The requirements of the notice are to:
 - i) Cease the unauthorised use of any part of the Premises as a takeaway café.
 - ii) Remove any fixtures and fittings associated with the unauthorised use of the Premises.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a) and (g) 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.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with variation.

Preliminary Matters

1. Since the appeal was made, the Government published the revised National Planning Policy Framework (the Framework). Policies material to this decision have not fundamentally changed. Therefore, I have not sought the main parties' views on this.

The appeal site and background

2. The appeal site comprises a takeaway café building with an associated car park area comprising 8 drop-off/click and collect parking bays. The site lies within an existing car park. There is an office building to the west and a light industrial warehouse to the east. The Alfred Road car park and a church are located opposite the appeal site. Residential properties along Alfred Road are located east of the application site.
3. The Chaii Garden operates as a takeaway café and a 'park and dine' facility. Customers arrive in their vehicles, park in one of the 8 customer parking bays and whilst remaining in their vehicles place a 'click and collect' order. The orders are delivered to the vehicles by Chaii Garden employees. The business employs four full time staff and four part time staff and is open daily from midday to midnight.
4. The Chaii Garden opened in 2021 and the business model as a 'park and dine' facility was set up at the time, in order to be compliant with the COVID-19

pandemic. There is no seating provision to allow for dining at the site. Customers either leave and eat elsewhere or they eat in their cars. Thus, it is argued by the appellant that the provision of a car park area is intrinsic to the success of the business.

Main Issues

5. The main issues are:

- Whether there is a sequentially preferred location for the appeal development; and
- the effect of the appeal development on the living conditions of nearby residents with particular reference to noise and disturbance.

Reasons

Location

6. Policy TP21 of the Birmingham Development Plan (2017) (BDP) sets out a hierarchy of centres as the preferred locations for retail, office and leisure developments. Proposals for main town centre uses outside the boundaries of the network of centres will not be permitted unless they satisfy the requirements set out in national planning policy.
7. Paragraph 91 of the Framework states that Local Planning Authorities should apply a sequential test to planning applications for main town centres uses which are not in an existing centre. Main town centre uses should be located in town centres, then in edge of centre locations; and only if suitable sites are not available (or expected to become available within a reasonable period) should out of centre sites be considered.
8. It is undisputed by the parties that the appeal site is in an edge of centre location and thus, the appeal development is contrary to local and national planning guidance. The Sequential Assessment (TSA) submitted by the appellant considered the availability of premises within the Ladywood Road Local Centre and the local centres of Balsall Heath, Sparkbrook and Sparkhill.
9. Whilst the TSA identified alternative site availability (Appendix 2 of the TSA), none of the sites were considered suitable predominantly because they could not accommodate the required 'whole range of uses', that is, they did not provide sufficient space, a car park area and suitable access arrangements to accommodate the business. Whilst the appellant considers a car park is an essential business component, there is a dispute between the parties, as to whether there is a need for alternative sites to provide a car park area. The Council maintains that the takeaway business is not a unique business model fully reliant on car parking and could be provided without the car park facility.
10. My attention has been drawn by the appellant to the cases of *Tesco Stores Ltd vs Dundee City Council* (2012) (Tesco 2012), and *Rushden Lakes* (appeal ref: APP/G2815/V/12/2190175). It is argued that these cases define the word 'suitable' as being "suitable for the development as proposed by the applicant and not whether the appeal development can be altered or reduced to fit an alternative site" (paragraph 29, Tesco 2012). However, the same case makes it clear that the appellant is "expected to have had regard to the circumstances of the particular town centre, to have given consideration to the scope for

accommodating the development in a different form, and to have thoroughly assessed sequentially preferable locations on that footing”.

11. At paragraph 92 the Framework states that applicants and local planning authorities should demonstrate flexibility on issues such as format and scale, so that opportunities to utilise suitable town centre or edge of centre sites are fully explored. The Planning Practice Guidance (PPG) (paragraph:011 Ref ID: 2b-011-20190722) says ‘...is there scope for flexibility in the format and/or scale of the proposal? It is not necessary to demonstrate that a potential town centre or edge of centre site can accommodate precisely the scale and form of development being proposed, but rather to consider what contribution more central sites are able to make individually to accommodate the proposal’. Neither the Framework nor the PPG define the level of flexibility deemed appropriate. What is clear though, is that the term ‘precisely’ does not allow for flexibility.
12. In this case, I interpret the Framework reference to flexibility to include whether the appeal development could operate without the provision of a car park, particularly given that the provision of the ‘park and dine’ facility was based on social distancing restrictions in place during the pandemic. Circumstances have now changed, and these restrictions are no longer required. Submissions indicate that approximately 95% of customers visit the site by car but no information is provided regarding how many customers park and dine rather than collect their order and leave to eat elsewhere.
13. Notwithstanding comments in relation to its accessibility and impact on the local highway network, no cogent evidence has been provided to show that the appellant exercised any degree of flexibility in the TSA. Moreover, albeit the business has received favourable press reviews, the appellant’s evidence has failed to demonstrate that the ‘park and dine’ facility at this edge of centre location is necessary to ensure business viability. On this basis, the scope of the TSA, would appear limited in order to adhere to the appellant’s own business model, in my view, this does not accord with the expectations of the Framework. Also, sites should not be rejected on the strength of self-imposed requirements or preferences of a single operator.
14. Overall, the appellant’s TSA has not demonstrated sufficiently that there are no suitable and available sites in a sequentially preferable location. Thus, I cannot be satisfied that the site is an appropriate location for the appeal development, having regard to local and national planning policy. Thus, I conclude that the appeal development conflicts with Policies PG3 and TP21 of the BDP, the Council’s Shopping and Local Centres Supplementary Planning Document (2012) and the Framework which reflect the sequential test approach.

Living conditions

15. It is undisputed that the appeal site is located in an area comprising a mix of residential and industrial/commercial premises. Thus, I accept that given the location, the noise environment is unlikely to be particularly quiet during the day. There appears to be a discrepancy between the parties regarding the business operating hours. The appellant’s statement indicates the business operates between 12:00-00:00 daily. The Council considers the business operates until 1 am which is the time also referred to in the appellant’s final comments document dated 8 January 2024. Notwithstanding this discrepancy, it is clear that the appeal development is likely to result in greater activity later

into the evening/night and at weekends when residents ought to be able to enjoy a quieter environment.

16. Reference has been made to a number of food outlets within the Ladywood Local Centre which are open until 1am or later (Appellant's final comments). Policy DM6 of the BDP states that "hours of operation and servicing will be taken into account when assessing development proposals". Whilst I do not have the exact details, I have no reason to believe that these businesses were not assessed accordingly. Moreover, the locations of premises within a Local Centre are not directly comparable with the appeal site which is in an edge of centre location. I have not been provided with any information regarding late-night opening taking place outside of the Local Centre, in the immediate vicinity of the appeal site. I note comments in relation to a wedding venue, being open until 2300 hours. From the information provided it would appear that the temporary planning permission for the wedding venue expired in 2023. Thus, operating until 1am appears out of character with the mixed use commercial environment in the immediate vicinity of the appeal site. It may be possible to impose a planning condition restricting the hours of operation. However, the imposition of such a condition would not overcome the reasons above for dismissing the appeal in relation to the first main issue.
17. The provision of an effective one way 'in and out' traffic system is disputed. However, whether or not customers adhere to a one-way traffic system, the appeal development is likely to result in some noise and disturbance, particularly through the revving of engines and closing of car doors by customers.
18. Notwithstanding the boundary treatment, the location of industrial units and the support of an Alfred Street resident, given the proximity of the appeal site to residential properties I conclude that the appeal development is harmful to the living conditions of neighbouring residents with regard to noise and disturbance. Thus, there is conflict with Policy PG3 of the BDP, Policies DM2 and DM6 of the Birmingham Development Management Plan (2021), the Birmingham Design Guide (2022), Shopping and Local Centres SPD (2012) and the Framework which seek to provide a good standard of amenity for all occupiers of land and buildings.

Other Matters

19. I acknowledge the supporting comments expressed by an Alfred Street resident in relation to neighbourliness and community support and the creation of jobs. However, these matters are not sufficient justification to allow the appeal development.
20. Comments regarding the lack of objections and lack of formal action by the council in relation to statutory noise nuisance are noted but are insufficient to influence my decision. In any event, in cases concerning noise and disturbance, a use can cause unacceptable harm before it is classed as a statutory nuisance.

Conclusion

21. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act (as amended).

Appeal on ground (g)

22. The ground of appeal is that the time given to comply with the requirements of the notice falls short of what should reasonably be allowed. In this respect, three months has been given. The appellant initially contended that a one-year compliance period is required to allow them to find an alternative location. However, I note in their final comments the appellant suggests a compliance period of six months.
23. Whilst I appreciate the appellant's desire to secure an alternative location to enable the continuity of the business, given the identified harm, I consider that a compliance period of one year is unnecessarily long.
24. From all I have seen and read there is a balance to be struck. This is between the conflicting interests of complying with planning policy in terms of appropriate location and residents' living conditions and giving the appellant sufficient time to look for an alternative location. In my view, three months would be insufficient given the difficulties of securing alternative premises.
25. Having regard to the submissions from both parties, I consider a period of six months would represent a more reasonable length of time which would strike the appropriate balance between the legitimate interests of enforcing planning control and the interests of the appellant and would not place a disproportionate burden on the appellant. To that extent, the appeal on ground (g) succeeds.

Formal Decision

26. It is directed that the enforcement notice be varied: by the deletion of the words "3 months" and the substitution therefor of the words "six months" as the time for compliance.
27. Subject to this variation, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Elizabeth Jones

INSPECTOR