

Appeal Decision

Site visit made on Monday 2 September 2013

by **Alan Langton DipTP CEng MRTPI MICE MCIHT**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 17 October 2013

Appeal ref: APP/A5270/13/2195221
73 Western Road, Southall UB2 5HQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the London Borough of Ealing.
- The appeal is made by Mr Ghulam Husain Awan.
- The Council's reference is COM/2012/00558.
- The notice was issued on 18 February 2013.
- The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised change of use of the ground floor retail unit (use class A1) to hot food take away (use class A5).
- The requirement of the notice is: Cease the use of the ground floor retail unit as hot food take-away (A5 Use).
- The period for compliance with the requirement is 12 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c) and (e) of the Town and Country Planning Act 1990 as amended. Since the prescribed fee has been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.

Summary Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

Preliminary matters

1. The Council did not attend the pre-arranged site visit. My internal inspection of the premises was undertaken alone, so far as circumstances permitted, and I looked at the wider area unaccompanied. There was of course no discussion regarding the appeal and the Council has since accepted the procedure.
2. The appeal form as initially submitted indicated ground (c) (that there has not been a breach of planning control) and gave some indication of an intention to appeal on ground (a) (that planning permission should be granted) albeit with no directly supporting submissions. As the fee has been paid the deemed application is before me and the Council has addressed the planning merits in the terms of ground (a). Prompted by the Planning Inspectorate's Case Officer in the light of submissions made on the appeal form, the appellant's agent added grounds (e) and (b) and I shall address these at the outset.

The appeal on ground (e)

3. Ground (e) concerns whether the enforcement notice was properly served on everyone with an interest in the retail unit at 73 Western Road. The submissions made actually questioned whether correspondence from the Council prior to issue of the notice had been properly addressed. That is not of itself a basis for a challenge to the notice under ground (e) and there is nothing to suggest that copies of the notice were not properly served. Also, and in any event, Section

176(5) of the amended 1990 Act means that I may disregard any failure to serve the notice provided that this would not substantially prejudice the person concerned. In this case, even were there a question regarding service of the notice, the appellant has not been substantially prejudiced since an appeal was duly made within time, and accordingly I would in any event disregard the question of service. The appeal fails on ground (e).

The appeal on ground (b)

4. To succeed on Ground (b), it is necessary for the appellant to demonstrate, on a balance of probabilities that as a matter of fact hot food take-away sales have not been made from the unit in question. This has not been demonstrated, rather the reverse, the submissions refer only to the difficulty in preventing customers from taking hot food (perhaps partly consumed) off the premises. The appeal fails on ground (b).

The appeal on ground (c)

5. To succeed on ground (c) it would be necessary for the appellant to demonstrate, on a balance of probabilities, that hot food sales fall within the scope of the premises' lawful use. Planning permission for a change of use from a sandwich shop (Class A1) to a restaurant (Class A3) was granted in November 2011 (P/2011/3822). The primary use of a restaurant (Class A3) is to serve food for consumption by customers on the premises. Occasional take-away sales (unless prohibited by a planning condition) or customers occasionally choosing to take rather than complete the end of a dish, would not necessarily be incompatible with the primary restaurant use. In this case, there is only limited evidence from either party as to whether hot food take-away sales are at a scale so as to amount to a primary use of the premises. In essence, the Council says that they are and the appellant says no.
6. I saw little tangible evidence either way. Displayed price lists and promotions made no reference to take-away sales, nor did I see any significant stock of food containers. Conversely, neither did I see anything by way of table cutlery, condiments or sauces. More tellingly, there were only two tables and a short 'breakfast' bar with a total of 8 chairs and 2 high stools, with little or no space for more while a significant proportion is given over to a glass fronted serving counter. In my view, the business as laid out would simply not be viable without take-away sales, and I feel bound to add also that during my visit, from 13.00 hrs, more than one apparent customer was turned away from the counter. The evidence is not clear cut either way but on balance it appears more probable than not that take-away sales occur to a degree that amounts to a breach of planning control. The appellant has not discharged the onus on him to demonstrate otherwise, and accordingly the appeal fails on ground (c).

The appeal on ground (a) and the deemed planning application

7. The appeal premises is one of a few somewhat separated from the nearby designated shopping frontage, and the Council raises no objection relating to retail impact or policies in their current development plan. The Council's objection stems from the proximity of the entrance to Featherstone High School, which has Health Schools Status and a Healthy Eating Policy. The Council has an unadopted policy within its Draft Development Management Development Plan Document (June 2012) which proposes that fast food outlets (together with amusement arcades) are not permitted within a 10 minute walk (which will

normally equate to a 400 metre radius) of existing schools. Also that each new such unit must be separated from any similar unit or group of units by at least 2 units of other uses. The Council recently refused 2 applications on this basis for hot food take-ways in the locality, including one next door at 71 Western Road.

8. The main issue therefore concerns the likely effect of take-away sales at the appeal premises on the diet of pupils at the school.
9. I have considered this very carefully. Problems of unhealthy eating and childhood obesity are well attested, but the Council has said very little about the draft policy or any supporting reasons, and nothing regarding public or specialist consultation or the outcomes if this has been undertaken. The Draft Document as a whole was submitted in February this year for independent examination but, so far as I am aware, the outcome of that remains to be seen. I therefore accord limited weight to this draft policy pending the outcome of its examination, because it might be refined as a result of that process. I also have no information regarding any complementary actions at the school by way of rules governing pupils' behaviour during lunch breaks, and neither is it clear whether "fast food outlets" are intended to be synonymous with all hot food take-away outlets.
10. I saw that there are 2 existing hot food take-way outlets within easy walking distance, so that as things stand the enforcement notice could actually lead to a more restricted range of meals for any pupil who regularly consumes such food. Nor do I accept the suggestion that there is in some sense too great a concentration of hot food take-way outlets locally. I saw just the two others, both within easy walking distance but considerably more than the 2 units separation from No 73 as sought in the Draft Policy.
11. I should add here that there is no suggestion that either the appeal premises or the others serve unhealthy meals in a food hygiene sense (which would be subject to separate controls). The concern is that an unbalanced diet, perhaps combined with insufficient exercise, over-reliant for example on meals with high fat and salt content, will be unhealthy, even dangerous, over a period of time. This consideration needs to be balanced against the desirable ability for individuals, including adults, to have a range and choice of eating options which might include occasional take-away meals, saving them time and causing them no harm. Upholding the notice would probably lead to the closure of the appellant's business and, in my view, and solely with regard to the present appeal, insufficient justification has been demonstrated.
12. This leads to consideration of planning conditions. Neither party has submitted a copy of the November 2011 permission for the restaurant use, but in any event a permission now for use as a take-away business (A5) would be a new one, not governed by the terms of the previous permission. The Council has submitted 5 suggested conditions in this eventuality, which have not been questioned by the appellant or his agent. These concern equipment noise, odour abatement, opening times, deliveries and refuse storage.
13. Bearing in mind nearby residents, including on upper floors to the business premises, I have found no reason not to accept the Council's conditions as generally reasonable and necessary. They do, however, require some redrafting to reflect the fact that the take-away use has already commenced. Also, I do not accept the need, or practicality, of seeking to limit deliveries to once a day although the suggested hours within which deliveries may be made are

reasonable. From what I saw, it may be that some of these conditions, perhaps regarding equipment and fume extraction, have already been achieved. But that is something for the appellant and Council to consider. I will specify times for all the conditions to be fully met, and draw attention to the Council's ability to issue a Breach of Condition Notice if they are not, against which there is no right of appeal. Subject to these considerations, the appeal succeeds on ground (a) and permission will be granted.

Formal Decision

14. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Act as amended for the development already carried out, namely the use of the ground floor retail unit to include hot food take-away sales (use class A5) at 73 Western Road, Southall UB2 5HQ as shown on the plan attached to the notice, subject to the following conditions.
1. Unless within 3 months of the date of this decision a scheme to demonstrate that the rating noise level emitted from the existing or proposed external plant and machinery (as assessed under BS4142:1997) shall be lower than the existing background noise level by at least 5 dBA as measured at 3.5 m from the nearest ground floor sensitive façades during the relevant periods of operation is submitted in writing to the local planning authority for approval, and unless the approved scheme is implemented within 3 months of the local planning authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented.
 2. Unless within 3 months of the date of this decision a scheme for the installation of odour abatement equipment is submitted in writing to the local planning authority for approval, and unless the approved equipment is installed and thereafter operated and maintained in accordance with the manufacturer's instructions within 3 months of the local planning authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented.
 3. Unless within 3 months of the date of this decision a scheme for refuse storage and a refuse management plan is submitted in writing to the local planning authority for approval, and unless the approved storage and management plan are implemented and thereafter retained within 3 months of the local planning authority's approval, the use of the site shall cease until such time as a scheme is approved and implemented.
 4. If schemes in accordance with conditions 1, 2 and 3 above are not approved within 12 months of the date of this Appeal Decision, the use of the site as a hot food takeaway outlet (A5) shall cease until such time as each of the schemes approved by the local planning authority is implemented.
 5. The use hereby permitted shall not be open to customers outside the following times: 10.00 hrs to 22.00 hrs on any day, and all activity shall cease 60 minutes after closing to customers.
 6. No delivery from a motor vehicle shall take place outside the following times: 10.00 hrs to 17.00 hrs Monday to Saturday; and 10.00 hrs to 16.00 hrs on Sundays and Bank Holidays.

Alan Langton
Inspector