The Planning Inspectorate

WR100-073-616

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Appeal Decision

Site visit made on 26 July 2011

by Michael J Hetherington BSc(Hons) MA MRTPI

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

Decision date: 2 August 2011

Appeal Ref: APP/W1715/A/11/2149972
54a High Street, West End, Southampton, SO30 3DR

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Mr Enser Yilmaz against the decision of Eastleigh Borough Council.
- The application ref. X/10/67644, dated 27 July 2010, was refused by notice dated 24 September 2010.
- The application sought planning permission for a change of use from class A1/A2 (shop, financial/professional services) to use class A3/A5 (restaurant, cafés, hot food takeaway) (to include revised hours to that permitted under F/08/63891) without complying with conditions attached to planning permission ref. F/09/66121, dated 2 December 2009.
- The conditions in dispute are Nos. 3 and 5 which state that:
  Condition No. 3: Only shallow frying shall take place at the premises and the equipment installed must include an odour extraction system which must, [as] long *(sic)* as the use continues, be operated in such a manner as will effectively suppress the emission of fumes or smell. Details of the equipment must be submitted to, and approved by, the Local Planning Authority and the equipment must be installed and in working order to the satisfaction of the Local Planning Authority prior to the commencement of the use.
  Condition No. 5: The use hereby permitted shall not be open to customers outside the hours of 0700 to 2300 Mondays to Saturdays and 1000 to 1600 on Sundays without the prior written consent of the Local Planning Authority.
- The reasons given for the conditions are:
  Condition No. 3: To protect the amenity of the occupiers of adjoining properties.
  Condition No. 5: To protect the amenity of occupiers of adjoining properties.

Decision

1. The appeal is allowed and planning permission is granted for a change of use from class A1/A2 (shop, financial/professional services) to use class A3/A5 (restaurant, cafés, hot food takeaway) at 54a High Street, West End, Southampton in accordance with the application ref. X/10/67644, dated 27 July 2010, without compliance with Condition Nos. 3 and 5 previously imposed on planning permission ref. F/09/66121, dated 2 December 2009 but subject to the other conditions imposed therein, so far as the same are still subsisting and capable of taking effect and subject to the following new conditions:

   3) The odour extraction equipment approved by planning permission ref. X/10/68080 shall be retained and maintained in accordance with the manufacturer's specification.

5) The premises shall not be open for customers outside the following hours:-

1200 (Midday) – Midnight Mondays – Saturdays

1200 (Midday) – 2300 Sundays.

7) The door to the rear of the application premises shall remain closed, except for access and egress.

Preliminary Matter

2. Although the application form lists the appeal premises as no. 54 High Street, it is clear from other documentation (including the Council's decision notice) that the proposal relates to no. 54a. I have determined the appeal on that basis.

Main Issue

3. The main issue in this appeal is whether Condition Nos. 3 and 5 are reasonable and necessary to protect the living conditions of nearby occupiers.

Reasons

4. The appeal property is located on a parade of commercial premises within the village centre of West End. A public house and car park lie opposite. To the rear of the premises, separated by a service road, are residential properties in Upper New Road.

5. Subsequent to the refusal of the appeal application, the Council granted a new planning permission (ref. X/10/68080, dated 10 December 2010) permitting deep fat frying within the appeal premises. This has now been implemented. As such, the reference to shallow frying in disputed Condition No. 3 serves no planning purpose. It fails the test of necessity and should therefore be deleted. Nevertheless, in order to prevent harmful odour emissions, it is necessary that the installed odour extraction equipment is retained and maintained in accordance with the manufacturer's specification. I have amended Condition No. 3 accordingly.

6. Disputed Condition No. 5 allows the premises to be open for customers 0700 - 2300 hours, Mondays to Saturdays, and 1000 - 1600 hours on Sundays. This represents an extension of the hours of operation (0700 - 1700 hours, Mondays to Saturdays) required by an earlier planning permission (ref. F/08/63891) for class A3/A5 use in the premises. The present appeal seeks to enable the premises to be open for customers from 1200 (midday) to midnight, Mondays to Saturdays and 1200 (midday) to 2300 on Sundays.

7. The 2300 Sunday closing time has now been allowed in the 2010 planning permission referred to above (ref. X/10/68080). As such, the requirement to close for customers at 1700 on Sundays imposed by Condition No. 5 serves no planning purpose: this fails the test of necessity and should be amended in line with the more recent planning permission.

8. However, the principle of opening until midnight (rather than 2300) on Mondays to Saturdays remains in dispute. Two other hot food takeaways lie within the same parade as the appeal premises. One of these, the West End Tandoori, appears to be subject to no planning restriction relating to hours of operation. The other, the Peony Chinese Hot Meals Take Away, was granted planning permission in 2006 for class A5 use with trading hours of 1200

(midday) to midnight on any day (ref. F/05/54984). The opening hours that are now proposed for the appeal premises would not therefore extend the period during which activities presently take place within the parade.

9. I accept that the time period between 2300 and midnight is significant in respect of the sensitivities of residents in the locality. Nevertheless, customer access to the appeal premises is through its High Street entrance, which is well separated from residential properties on Upper New Road. Condition No. 6 of planning permission ref. F/09/66121 already restricts customer parking within the rear service road. A condition has been imposed in respect of the more recent planning permission (ref. X/10/68080) that requires the property's rear door to remain closed (except for access and egress). I agree with both main parties that this is also necessary in the present appeal in order to reduce levels of noise, disturbance and odours to the rear of the property.

10. In the circumstances, it has not been demonstrated that extending the opening hours of the appeal premises to midnight on Mondays to Saturdays would materially worsen residents' living conditions. Drawing the above matters together, I conclude that, as presently worded, Condition Nos. 3 and 5 are neither reasonable nor necessary to protect the living conditions of nearby occupiers. The amendment of Condition Nos. 3 and 5 and the introduction of a new condition, all as described above, would accord with policies 32.ES and 59.BE of the Eastleigh Borough Local Plan Review.

11. Given that the use in now in operation, and the odour extraction equipment has now been installed, there is no need to require compliance with the original drawings. A new condition in this respect would serve no planning purpose.

12. I have considered all the other matters raised, including the views of local residents, but none change my overall conclusion that the appeal should be allowed. I will grant a new planning permission amending Condition Nos. 3 and 5, introducing a new Condition No. 7 in respect of the rear door of the premises as described above, and restating those undisputed conditions that are still subsisting and capable of taking effect.

M J Hetherington

INSPECTOR