

TOWN AND COUNTRY PLANNING ACT 1990 SECTION (AS AMENDED)

WRITTEN REPRESENTATIONS PLANNING APPEAL

LOCAL PLANNING AUTHORITY (LPA): MANCHESTER CITY COUNCIL

LPA REF NO: 133584/FO/2022

LOCATION: 1176 ROCHDALE ROAD, BLACKLEY, MANCHESTER, M9 6ER.

APPELLANT: MR ALI CAN ERDOGAN

INTRODUCTION

The appeal proposal relates to the change of use of ground floor to hot food takeaway (sui generis).

On the 5th August 2022 the LPA served an Enforcement Notice under ref no: ENF/15371/22 and an appeal has been lodged with the Planning Inspectorate in this regard.

The LPA issued a planning refusal notice in respect of the retrospective planning application dated 9th August 2022 and the appellant Mr. Ali Can Erdogan appeals this refusal notice and it is considered that planning permission ought to be granted for the following reasons;

The appellant is using the subject property as a hot-food take-away as alleged on the ground floor.

The use started without consent although the appellant did not realise a change of use was required.

The property has been leased by the appellant for a period of 5 years with a 2 year break clause – (please see copy attached).

The LPA requested the submission of a retrospective change of use planning application in 2022.

THE PLANNING APPLICATION

A planning application was subsequently submitted to the LPA as requested and this was validated on the 13th June 2022 under planning reference 133584/FO/2022.

This culminated in a refusal notice being issued by the LPA on the 9th August 2022.

THE REFUSAL NOTICE

The refusal notice issued by the LPA cites one reason for refusal and these will now be examined as follows;

REFUSAL NO.1

The Council considers that the addition of a further hot-food takeaway would undermine the aim of achieving an appropriate balance of uses in this Local Centre and further erode the retail and daytime function of the parade. The cumulative impact of a further hot-food takeaway would in turn be detrimental to the vitality and viability of the centre.

The development is considered to be contrary to policies SP1, DM1, C1, C8 & C10 of the core strategy and contrary to guidance contained in the National Planning Policy Framework. It is also contrary to Saved Policy DC10 of the Unitary Development Plan for the City of Manchester and Policy 1 of the Hot Food Takeaway Supplementary Planning Document.

These planning policies were also referred to in the refusal of planning consent issued by the LPA on the 9th August 2022 under planning reference number: 133584/FO/2022.

In addition, the refusal of planning permission also cited Policy 1 of the Hot Food Takeaway Supplementary Planning Document.

LOCAL PLAN POLICIES

The titles of these policies referred to by the LPA are as follows;

Policy SP1 – Spatial Principles (*In this regard, the site is in a sustainable and accessible location).

Policy DM1 – Development Management (*The scheme is of an appropriate siting, scale and layout).

Policy C1 – Centre Hierarchy (*Takeaway use with tables / chairs is an appropriate local centre use).

Policy C8 – Local Centres (*This states; “The provision of new small scale retail facilities will be encouraged where they would provide for local every day needs and would not be harmful to the vitality and diversity of nearby centres. Careful consideration will be given to the impacts of new commercial development on residential amenity, which is particularly an issue for food and drink uses. Development proposals in local centres which would not reflect the local role of these centres will be assessed according to policy C9” [Out-of-centre development]). In this regard, the small scale development subject of this appeal serves local needs during the day and evening, is not harmful to the vitality and diversity of nearby centres (and the LPA have not provided any empirical evidence as to how they consider this is happening), whilst the take-away use has no greater impact on the residential amenity than the former café with flue serving hot food and drinks and an element of takeaway provision. Indeed, the LPA did not raise ‘residential amenity’ as a reason for refusal in decision notice ref no: 133584/FO/2022 or as a reason for issuing the Enforcement Notice ref no: ENF/15371/22, so we thus conclude residential amenity is not an issue in this appeal proposal. As regards the role of the local centre, the development is considered to conform and we also note that the LPA made no reference to Policy C9 of the Manchester Core Strategy in the above documents.

Policy C10 – Leisure and the Evening Economy (*Section 1 refers to Cumulative impact, but a survey has revealed that of the 19 units, only 4 are being used for sui generis use takeaway businesses).

Development Control Policy 10. Food and Drink Uses (*DC10.2 states; “The Council will normally accept the principle of developments of this kind in the City Centre, Industrial and commercial areas, in shopping centres and, at ground level, in local shopping parades of more than 8 shops or offices”).

Hot Food Takeaway Supplementary Planning Document March 2017 (*This states; “Where there is evidence of no demand for a preferable use, hot food takeaways could be considered favourably even if this would increase the proportion of hot food takeaways to above 10% of ground floor frontages”. In this instance, the unit was already a café with a kitchen serving hot food and an element of take away food and therefore, there is no material loss of any ‘preferable uses’ and will thus have little impact on the vitality and viability of the local centre which has only 4 takeaways).

NATIONAL PLANNING POLICY GUIDANCE

The latest Central Government Guidance is contained within the Ministry of Housing, Communities & Local Government National Planning Policy Framework NPPF (July 2021).

It is considered that paragraph 38 of the NPPF is particularly relevant to the determination of this appeal which states;

“Local planning authorities should approach decisions on proposed development in a positive and creative way. They should use the full range of planning tools available, including brownfield registers and permissions in principle, and work proactively with applicants to secure developments that will improve the economic, social and environmental conditions of the area. Decision-makers at every level should seek to approve applications for sustainable development where possible”.

Given the sustainable location of the appeal site, the potential alternative uses available to the appellant following the introduction of the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 which came into force on the 1st September 2020, it is considered that the LPA have not reasonably considered the fall-back position in refusing the application when there are no sustainable grounds for the reasons for refusal cited.

It is also relevant to consider that the subject site was already in a use Class E commercial use as a restaurant with flue and therefore the effect of a takeaway which also offers sit down tables / chairs on the vitality and viability of the area is considered to be a positive one and not a negative one.

Indeed, given the recent closure of many restaurants, cafes, public houses, bars and hot food takeaways due to Covid 19, and the estimated number of business that have not reopened after the pandemic due to business failure, it is considered that the appeal proposal should be welcomed and not dismissed.

In this current appeal case the proposed change of use from Class E to sui generis use is considered an appropriate form of development for the area and it is considered that the LPA have failed to conform to paragraph 47 of the NPPF titled ‘Determining applications’ which states;

“Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise”.

In this case, it is considered that there is a significant number of material considerations as follows;

- It is a material consideration that the appeal site was already being used for restaurant / café use with a small element of take-away under use class E – Commercial, Business and Service under the new use classes order. Indeed, the appeal proposal retains an element of restaurant use with tables and chairs provided as shown on the attached internal photos.
- The new Use Classes Order (which has significantly expanded the types of uses that can be allowed under the former A1 retail use classification, has superseded the LPA’s old policies).
- The site already has planning permission for ‘Installation of a external flue to rear of existing café’ at the appeal site under planning ref no: 130230/FO/2021 dated 27th July 2021.
- Interestingly, the LPA stated in the legal decision notice that; “The scheme is considered to be in accordance with the guidance contained within saved policy DC10 of the Manchester Unitary Development Plan and to policies SP1, DM1, C8 and C10 of the Core Strategy”.
- The dividing line between takeaways and restaurants is becoming more blurred as restaurants have always been allowed to serve a ‘De minimis’ percentage of take-away food to walk in customers. This was extended during the pandemic with restaurants allowed to serve takeaway food. However, with the advent of mobile phone apps such as Deliveroo, DoorDash, Just Eat, Uber Eats etc., this line has become increasingly blurred as many people order food online to be delivered to them (as these apps serve both restaurants and takeaways alike and are considered a very important key to a sustainable business model).

- The appellant has advised that his business is currently running very successfully and also, that many customers include the emergency services including Fire Brigade, NHS, Police etc. thus providing an important contribution to keeping the local emergency worker community fed and providing them with sustenance and drinks during long shift patterns and evenings.
- The appellant provides some seating / tables within the appeal site for people to sit inside the unit and eat / drink in a similar manner as a restaurant – (please see photos attached).
- The appellant has advised us that many other takeaways in the area have closed down including one which was taken over by an existing pound shop operation and now incorporated into a larger retail unit (so this unit is no longer in the sui generis use class).
- Notably, the food being offered by Alibaba is Turkish Cuisine (please see copy of food offering attached) which is not widely available in the local area by other food outlets.
- Finally in this regard, in the refusal notice ref no: 133584/FO/2022 dated 9th August 2022, the LPA have stated, “The addition of a further hot food takeaway (sui generis) use, would undermine the aim of achieving an appropriate balance of uses in this Local Centre and further erode the retail and daytime function of the parade. The cumulative impact of a further hot food takeaway would in turn be detrimental to the vitality and viability of the centre”. Notably, this was the only reason for refusal. However, given that the current appeal site was already being used as a café with a cooking flue before the sui generis hot-food takeaway use was started in error, on balance, it is considered that the overall impact on the ‘retail and daytime function of the parade’ has not been materially affected (as the site was already being used for cooking foodstuffs and not being used a shop for example). Indeed, now as a Class E use – the unit could be used as a children’s crèche or day nursery (which again emphasises the changing and shifting nature of appropriate local centre uses).

The National Planning Policy Framework (NPPF) July 2021 section 11 is titled ‘Making effective use of land’ and paragraph 119 states;

“Planning policies and decision should promote an effective use of land in meeting the need for homes and other uses, while safeguarding and improving the environment and ensuring safe and healthy living conditions. Strategic policies should set out a clear strategy for accommodating objectively assessed needs, in a way that makes as much use as possible of previously developed or ‘brownfield land’”.

In this regard, the appellant operates and runs the business himself as his only livelihood has signed a 5 year lease on the subject site beginning 12th August 2021 and ending 11th August 2026 (with a 24 month break clause – please see copy of the lease agreement attached). The site was previously in use as a café with take-away element / flue and the appeal proposal operation has therefore created investment, jobs, improved local services and increased vitality and viability of the local centre.

HOURS OF USE

The hours of use of the unit are as follows;

Monday-Sunday/Bank Holidays 12 noon-11pm (7 days per week)

Whilst the appellant would prefer to operate these stated opening hours (in line with other such establishments in the local area), should the appointed Planning Inspector be minded to approve the appeal proposal with lesser hours, the following would also be acceptable only if deemed necessary;

Monday-Saturday 12 noon-11pm

Sundays/Bank Holidays 12 noon-10pm or;

Sundays/Bank Holidays Closed.

PLANNING CONDITIONS

The appellants former agent submitted the original planning application and thus, the appellant was willing to work with the LPA in a positive and proactive manner and if deemed necessary, to accept the imposition of appropriate planning conditions set out by central government which are as follows;

- Necessary
- Relevant to planning
- Relevant to the development to be permitted
- Enforceable
- Precise
- Reasonable in all other respects

We can confirm that the appellant would be willing to accept any such planning condition in the interests of good planning if deemed necessary.

It is therefore respectfully considered that the development proposed subject of this appeal should be allowed with conditions that are reasonable in the circumstances of the case and which conform with the latest government guidance contained within the NPPF paragraphs 55 and 56 which state;

“Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition”.

“Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is clear justification”.

To conclude, the appellant is willing to accept planning conditions in line with government guidance on the use of planning conditions.

We will leave the matter of appropriate conditions to be imposed on any grant of planning permission to the appointed Planning Inspector should this current planning appeal be allowed.

CONCLUSIONS

According to the National Planning Policy Framework issued in July 2021, Chapter 2 paragraph 7 states; “The purpose of the planning system is to contribute to the achievement of sustainable development” and it is considered that the appeal scheme is indeed such a sustainable proposal.

It is contended that the ‘small-scale’ nature of the appeal proposal will not result in any material harm as envisaged by the LPA. It is the only Turkish cuisine takeaway and it also adjoins Class E uses.

All attempts have been made by the appellant to submit a change of use scheme that is acceptable in terms of location, principle of development, improvements to the building, appearance and all relevant considerations given to the discharge of cooking smells which is the same for the approved café and flue as it is for the use of the site as a hot food takeaway use under the sui generis category.

It is considered relevant that the appeal premises are located within a busy mixed use area and adds to the vitality and viability of the centre, which was the only reason cited by the LPA in the legal refusal notice reference number: 133584/FO/2022 dated 9th August 2022.

It is also considered relevant to consider the fall-back position in this case as The Town and Country Planning (Use Classes) (Amendment) (England) Regulation 2020 Class E – Commercial Business and Service (in this former A1 retail unit), allows other uses including restaurants, financial and professional services, indoor sport and recreation or fitness, not involving motorised vehicles or firearms, health or medical services, crèche, nursery or day centre principally to visiting members of the public, an office, research and development, or any industrial process that can be carried out in any residential area without detriment to amenity.

Such alternative uses could have the potential to result in a greater detriment to the vitality and viability of the centre (which the LPA are seemingly trying to protect with older planning policies).

It is considered that the proposal is an acceptable land-use and accords generally with both local plan policy, the National Planning Policy Framework 2021 and the Planning Practice Guidance of 2016 (as amended).

In summary, it is considered that the LPA have not demonstrated that the change of use undertaken has undermined the aim of having an appropriate balance of uses in this Local Centre and nor does it further erode the retail and daytime function of the parade being the only Turkish cuisine takeaway.

Further, it is considered that the LPA have not demonstrated that the change of use undertaken due the cumulative impact of a hot food takeaway has in turn demonstrably harmed or is detrimental to the vitality and viability of the centre or other local centres.

If the appointed Planning Inspector considers the use unacceptable in this location, it is considered reasonable given the particular circumstances of the case for a temporary consent to be issued,

It is considered that a reasonable temporary consent time period would be one of the following dates;

1. Six months from the date of the Planning Inspectors decision notice on the planning appeal.
2. 12th August 2023 (being the date of the twenty four month break clause).
3. 11th August 2026 (being the date of the end of the signed lease agreement).

The appellant opened the unit in good faith believing consent was already granted for the desired use and has subsequently invested a considerable amount of time, effort and money in the current business venture which is also his sole means of income in this particular instance and thus, his livelihood and investment is at stake should the appeal be dismissed.

We therefore respectfully request that this planning appeal be allowed with any reasonable and appropriate planning conditions deemed necessary in the circumstances of this case.

Thank you for your consideration of this appeal.

Mr. Raymond Henry Ashall BA Hons DIP EP MRTPI

Principal - Ashall Town Planning

August 2022

DOCUMENTS LIST

- Copy of enforcement notice ref no: ENF/15371/22 dated 5th August 2022
- Copy of approval notice ref no: 130230/FO/2021 – Installation of a external flue to rear of existing café dated 27th July 2021
- Copy of refusal notice ref no: 133584/FO/2022 – Change of use of ground floor to hot food takeaway (sui generis) dated 9th August 2022
- Copy of lease agreement dated 12th August 2021
- Copy of Alibaba Turkish Cuisine Food Menu
- Photographs showing inside appeal site unit and location of seating / tables

END.