



Appeal Decision

Hearing held on 2 February 2011
Site visit made on 2 February 2011

by L Rodgers BEng CEng MICE MBA

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

Decision date: 3 March 2011

Appeal Ref: APP/Q1445/A/10/2136372

41 Ladies Mile Road, Brighton, BN1 8TA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Domino Pizza Group Ltd against the decision of Brighton & Hove City Council.
 - The application Ref BH2010/01132, dated 20 April 2010, was refused by notice dated 26 July 2010.
 - The development proposed is a change of use from A2 to A5, erection of rear extension, new shopfront and extract duct.
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Application for costs

1. At the Hearing an application for costs was made by Domino Pizza Group Ltd against Brighton & Hove City Council. This application is the subject of a separate Decision.

Decision

2. I allow the appeal, and grant planning permission for a change of use from A2 to A5, erection of rear extension, new shopfront and extract duct at 41 Ladies Mile Road, Brighton, BN1 8TA in accordance with the terms of the application, Ref BH2010/01132, dated 20 April 2010 subject to the conditions in Annex A.

Main Issues

3. I consider the main issues to be the effect of the proposed development on the living conditions of local residents; and its effect on their health and well being, particularly pupils and users of the local schools and community facilities.

Reasons

Background

4. The currently vacant appeal property is part of a parade of commercial premises situated opposite to the playing fields associated with Patcham High School. It is close to the High School entrance as well as to another school and community facilities. There are already a number of food outlets in the area, both within the parade itself and further along Ladies Mile Road, some of which offer hot food takeaways. The parade includes residential accommodation above the ground floor commercial premises.
5. The Appellant has submitted evidence based on the operation of the premises as a Domino's Pizza outlet. However, planning permissions normally run with

the land, not with the occupier. Circular 11/95 advises that conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated and where the alternative would normally be refusal. Therefore, whilst I have considered the arguments directly related to use of the site by the Appellant, I have also had in mind the potential for other A5 users.

Living conditions of local residents

6. In terms of living conditions, the local residents likely to be most affected are those living above the parade. Despite the former use of the premises as a betting shop it is likely that the proposal would lead to increased levels of noise and disturbance as a result of the arrivals and departures of delivery drivers and customers, particularly into the evening period. It is also likely that any new extraction equipment and other plant would generate additional noise and the potential release of odours should also be taken into account.
7. However, it must also be recognised that the appeal property is in a commercial parade in which hot food takeaways can already be obtained. As such, it would be unrealistic of residents to expect to benefit from the kind of noise levels that might occur in a wholly residential area.
8. I saw on my late afternoon visits to the area that Ladies Mile Road was busy and congested, an observation supported by the submissions of local residents. It is therefore clear that residents already experience appreciable traffic noise and disturbance at certain times of the day. Whilst the area is likely to be quieter at other times, including later in the evenings, the parade is located close to a crossroads and has an appreciable number of parking spaces and a recycling point nearby. In these circumstances I do not consider that the noise and disturbance likely to be generated by any customers and deliveries associated with an A5 use would be exceptional.
9. Concern has nevertheless been raised that the particular operation proposed is likely to require a larger number of delivery vehicles than might normally be associated with an A5 use. However, the transportation and noise assessments submitted by the Appellant conclude that the proposed operation would not have a material impact on noise or traffic in the area. Whilst the Council's officers noted that these reports were based on experiences from other Domino's outlets, the officers nevertheless agreed that the proposed use would not cause significantly increased disturbance to neighbouring residents or generate a material increase in traffic flow.
10. Although there was some debate at the hearing as to the basis of the operation and the actual numbers of delivery vans likely to be in use at any one time, given the ambient noise levels identified in the noise assessment, even a significant increase over the assumed number of arrivals and departures would be unlikely to increase noise levels, measured in terms of L_{Aeq} , by an unacceptable amount. Whilst L_{Aeq} may not fully reveal the impact on residents of sharp noises, such as a car door slamming, I note that the peak hours for deliveries and collections tend to be earlier in the evenings when the area is likely to be busier. In any case, noise in the early evening is likely to be less disturbing to residents than noise late at night.
11. Local residents also claim that the area has been designated as an Anti-Social Behaviour Control Area. However, I was given no substantive evidence to support this assertion and although the Council referred to historic problems

with anti social behaviour in the vicinity of the site I was also told that this had since moved away. Whilst the Appellant acknowledged an awareness of anti-social behaviour issues, the information sheet submitted by the Appellant indicated that the Ward was in the lowest category of police recorded incidents of social disorder. In any event, Sussex Police have raised no objections to the proposal and the suggested opening hours mean that the use would cease at 23.00. This would reduce the potential for late night disturbance and particularly for any that might be associated with drinkers leaving the nearby pub at or after 23.00. Subject to the proposed restriction on hours, which would not be unusual for an A5 outlet and which could be controlled by condition, I do not consider material harm would arise.

12. The Appellant has submitted a proposal for a ventilation system. Based on the submitted details the Council's Environmental Health section considers that any impacts would be mitigated to an acceptable level. The location, despite its proximity to residential accommodation, would not be unusual for an A5 use and modern ventilation systems should be capable of effectively mitigating odour. According to the noise assessment, no material harm would arise and in terms of the ventilation being proposed I see no reason to take a different stance to that of the Council's officers.
13. Against this background I find that the proposed development would not result in material harm to the living conditions of neighbouring residents and in this respect there would be no conflict with Policies SU9, SU10 and QD27 of the Brighton and Hove Local Plan 2005 (LP).

Health and well being

14. Despite reference to the amount of fat and salt contained in a Domino's pizza I heard no cogent evidence to demonstrate that a Domino's pizza was any more or less healthy than any other pizza nor that pizzas, consumed as part of a balanced diet, were intrinsically unhealthy. In any case I have already noted that it is not usually reasonable to seek to control the occupier of the premises and I must also consider other potential A5 users. It would also not be reasonable to argue in the context of this appeal that, as an accepted use class, hot food takeaways should not be permitted. In terms of any effect on health and well being of pupils and users of the local schools and community facilities, the key issues must therefore be location and opening times.
15. The appeal site is close to both the High School entrance and the community facilities and it is suggested that in this location the proposed use is likely to prove attractive to pupils, particularly when leaving school in the afternoons. I was made aware of Patcham High's Healthy School Status and the efforts being made to encourage healthy eating as part of the National Healthy Schools Programme. All parties agreed that this was a material consideration for me to take into account.
16. My attention was also drawn to some general and high level objectives aimed at improving health and well-being across the City. These are contained in a document entitled 'Creating the City of Opportunities' – A sustainable community strategy for the City of Brighton & Hove (third edition) (Brighton & Hove Strategic Partnership). However, the Council accepted that this was not a statutory planning document and it is unclear as to the level of any public consultation that may have been carried out. In my view this document can carry little weight. The Council confirmed that there are no adopted local plan policies dealing with hot food takeaways in the vicinity of schools.

17. The Appellant's view is that its products are aimed at family consumption and because of the high transaction cost and the cooking and waiting time the product would not be attractive to school pupils. Whilst these matters were challenged at the hearing, I have in any case already noted that any permission would run with the land and it would be possible for another operator to offer a cheaper and more readily available alternative - even if this too were pizza.
18. I am in no doubt that a hot food takeaway in the proposed location would prove attractive to pupils of the High School. In consequence it could, by making readily available whatever food was on offer, lead to an unbalanced diet and undermine the school's efforts to promote a healthy lifestyle for its pupils. Notwithstanding the lack of any directly applicable development plan policy I consider this a matter deserving of substantial weight. However, the Appellant has suggested that any permission could be subject to a condition such that no counter service could take place before 16.00 hours - thus assuaging the concern that pupils would be able to use the facility on schooldays. Telephone and internet sales would be unaffected.
19. Enforcement of such a condition would prevent over the counter sales to pupils at lunchtimes and immediately after normal school times. It would not stop all sales of hot food takeaways to pupils, as some may leave school later, nor would it prevent sales to users of the community centre. However, it would remove the immediacy and easy availability from a large number of pupils, the factor most likely to undermine the school's healthy eating aims. If such a condition were to be imposed I see no reason to believe that the proposed development would result in material harm to the health and well being of pupils or indeed to local residents or users of the community facilities.
20. I am conscious that there are already a number of other food outlets in the area and whilst I saw on my visits that some were closed at school leaving times, I also noted that others were open. However, those which were open were either further from the school entrance or were not solely takeaways. In any case I have not been made aware of their planning history, nor of the considerations taken into account in the grant of any permission. I have therefore considered the proposed scheme on its own merits.

Other matters

21. Local residents object to the increase in traffic and the anticipated congestion. However, whilst the Council is also concerned that there would be increased traffic flow and increased pressure on parking, the Highway Authority has not objected in terms of highway safety or the flow of traffic. The Appellant's transportation assessment concludes that there would be no material harm in terms of traffic flows and that adequate parking would be available. Notwithstanding the debate over vehicle numbers I am not persuaded that, in normal circumstances, the proposed use would lead to material harm.
22. However, I saw on my visits, made around school leaving times, that the area around the parade was congested and that there was a clear shortage of parking spaces. This in turn resulted in a significant degree of potentially hazardous parking as some children were collected from school. Albeit that the congestion was only for a short period of time, in my view it is likely to be made appreciably worse if the proposed hot food takeaway were to offer counter sales at the same time. Notwithstanding that a small volume of deliveries may still take place during this busy traffic period, the prevention of

counter sales before 16.00 hrs is also likely to avoid material harm to highway safety.

23. Although the matter of unfair competition has been raised in the submissions of third parties, the planning system does not exist to protect the private interests of one person against the activities of another. Whilst public and private interests may sometimes coincide I am not, in this case, persuaded to change my earlier views. It has also been suggested that alternative, and potentially more suitable, premises may be available elsewhere. I must, however, consider the proposal before me.

Conditions

24. The Council has suggested a number of conditions which it considers would be appropriate were I minded to allow the appeal. I have considered these, and those suggested by the Appellant and third parties, in the light of Circular 11/95.
25. In order to ensure that there would be no material harm to the living conditions of neighbouring residents, conditions governing opening hours and the installation, operation and maintenance of a ventilation system would be required. In seeking not to undermine the High School's approach to promoting a healthy lifestyle for its pupils, and in the interests of highway safety, amending the suggested opening hours condition to prevent counter sales before 16.00 hrs would be both reasonable and necessary and would meet the other tests of Circular 11/95.
26. To preserve the privacy of neighbouring residents and to avoid harm in terms of noise and disturbance a condition would be needed to control the use of the flat roof to the rear. In the interest of sustainability a condition would be required to provide cycle parking. Notwithstanding the existing litter bins in the area the nature of the development is such that a condition requiring the provision of a further litter bin would be needed. Proper planning also requires a condition listing the drawings.
27. Whilst it was suggested that a condition should be imposed to prevent cars from parking on the pavement, this area does not fall within the appeal site and such a condition would not be appropriate. Although the Appellant has also suggested that the type of food being sold could be controlled by condition I do not consider that necessary. Excepting the standard timeliness condition I see no need for any others.

Conclusion

28. Subject to the conditions above the proposed development would not conflict with the development plan nor would it have an unacceptable effect on the living conditions, health or well being of local residents and pupils. It would, however, provide some local employment and investment which must weigh in its favour. Against this background, and having had regard to all other matters before me, including the petition presented on behalf of local residents, I conclude that the appeal should succeed.

Lloyd Rodgers

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr R Unwin FRICS	Chartered Surveyor
Mr R Gregory MCIHT	Mayer Brown Ltd
Mr N Jarman C Eng, MIOA, MCIBSE	Cole Jarman Associates
Mr D Cox	SNR Denton
Mr T Poulton	Domino Pizza Group Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Cllr L Hyde	Chair, Planning Committee
Cllr C Theobald	Deputy Chair, Planning Committee

INTERESTED PERSONS:

Cllr B Pidgeon	Representing Patcham residents
Mr Z Solomon JP	Local resident
Mrs L McRae	Local resident
Mr N Poyner	Chairman Patcham Utd FC and local resident
Mr J McKee	Deputy Head Teacher, Patcham High School
Mr B Dodd	Glawood Ltd (on behalf of building owner)

DOCUMENTS HANDED IN AT THE HEARING

- 1 Notification of the hearing. Submitted by the Council.
- 2 Copy of a permission to develop land in respect of 56 London Road, Brighton (Ref BH2010/02854). Submitted by the Appellant.
- 3 Written representation. Submitted by Cllr Pidgeon.
- 4 Information sheet in respect of Anti-Social Behaviour including analysis of incidents by Ward April 08 – March 09. Submitted by the Appellant.
- 5 Copy of OS Sitemap showing the red line site boundary. Submitted by the Appellant.

Annex A

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The use hereby permitted shall not take place outside the following times: 09.00 to 23.00 on Mondays to Saturdays and 10.00 to 23.00 on Sundays and Bank Holidays excepting that, prior to 16.00 hours on Mondays to Fridays during Patcham High School term time the use hereby permitted shall consist only of an order and delivery service and there shall be no counter service and no customer shall be permitted to be on the premises.
- 3) The use hereby permitted shall not commence until the ventilation system detailed in 'Proposed Ventilation System Statement Revision A', 'Standard Specification for ventilation and air conditioning system' and manufacturer's brochure submitted on 4 May 2010 has been installed and is fully operational. Such approved equipment shall thereafter be operated at all times when cooking is carried out and shall be maintained in accordance with the manufacturer's instructions.
- 4) Other than the railed walkway hereby approved, access to the flat roof over the rear extension shall be for maintenance or emergency purposes only and the flat roof shall not be used as a terrace, patio, roof garden or similar amenity area.
- 5) The development hereby permitted shall not commence until details for the provision of secure cycle parking facilities have been submitted to and approved in writing by the local planning authority. The use hereby permitted shall not commence until the approved cycle parking facilities have been provided. The approved facilities shall thereafter be retained.
- 6) The development hereby permitted shall not commence until details of an outdoor litter bin have been submitted to and approved in writing by the local planning authority. The use hereby permitted shall not commence until the approved litter bin has been provided. The litter bin shall thereafter be retained.
- 7) The development hereby permitted shall be carried out in accordance with the following approved plans: 4462-A5-01, 4462-A5-02 Rev C, 4462-A5-04 Rev A, 4462-P03, 4462-BP04, Existing and Proposed Shopfront Sections Dated 12.3.09 (Unnumbered).

