



# Appeal Decision

Site visit made on 3 August 2023

**by C Shearing BA (Hons) MA MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 11 September 2023**

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**Appeal Ref: APP/A2280/W/22/3304737**

**153 Fairview Avenue, Wigmore, Gillingham, Kent ME8 0PX**

- 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 Mrs D Kaur against the decision of Medway Council.
  - The application Ref MC/22/1002, dated 22 April 2022, was refused by notice dated 6 July 2022.
  - The development proposed is change of use from butcher's shop to takeaway pizza shop (sui generis) together with the provision of a rear service yard area for staff parking and deliveries.
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## Decision

1. The appeal is allowed and planning permission is granted for change of use from butcher's shop to takeaway pizza shop (sui generis) together with the provision of a rear service yard area for staff parking and deliveries at 153 Fairview Avenue, Wigmore, Gillingham, Kent ME8 0PX in accordance with the terms of the application, Ref MC/22/1002, dated 22 April 2022, subject to the conditions set out in the schedule below.

## Application for Costs

2. An application for costs was made by Mrs D Kaur against the decision of Medway Council. This application is the subject of a separate decision.

## Main Issues

3. The main issues are the effect of the proposal on (i) the vitality and viability of the Local Centre and health of local residents, and (ii) highway safety through additional parking demand.

## Reasons

### *Local Centre and Health*

4. The appeal site lies within the Fairway Avenue Local Centre as defined by Policy R10 of the Medway Local Plan 2003 (the MLP), which states it comprises nos.151 to 169 (odds). This extends across the northern side of Fairview Avenue and comprises two terraces of shops with a detached commercial garage between. Another hot food takeaway currently exists within the Local Centre.
5. Policy R18 of the MLP permits uses including take-away hot food shops outside the defined retail core areas provided that specified criteria are met. This includes that the presence of any similar uses in the locality, and the combined effect that any such concentration would have, would be acceptable in terms of

environmental impact and highway safety. This is expanded upon in the 'Hot Food Takeaways in Medway' Guidance Note 2014 (the Guidance Note), which describes how a concentration of uses will be assessed. This varies according to whether the Local Centre is considered 'larger' or 'smaller', which is not defined by the guidance. I note the discrepancies in the Council's approach in this respect. As 'Hoath Lane- Fairview Avenue' is one of those listed by the Guidance Note as having been one of the largest recently classified as a neighbourhood centre, it is reasonable to assume it should be treated as 'larger' for the purposes of the assessment.

6. The appellant has provided figures and calculations which make reference to the frontage lengths and conclude that 13% of the total frontage would comprise hot food takeaways as a result of the proposal. There is not substantive evidence before me which would lead me to dispute this figure. I note the comments of the Public Health Project Officer, who found the frontage would comprise 17% hot food takeaways. However, this is not supported by calculations and excludes no.169, which policy R18 confirms is part of the frontage. For this reason, I do not consider the proposal would amount to an unacceptable overconcentration of hot food takeaways.
7. Policy R10 of the MLP resists the loss of existing shopping facilities within Local Centres unless an improvement to local amenity or the provision of community facilities occurs that outweighs the loss. There is little evidence before me of how the proposal would conflict with this policy.
8. I have had regard to the comments of the Public Health Project Officer, which focuses on obesity trends from national to ward level. While noting the importance of these issues, the appeal before me should be assessed on its own merits. To apply a broad-brush approach to resisting new hot food takeaways would be in conflict with the aims of the National Planning Policy Framework (the Framework) which refers to significant weight being placed on the need to support economic development. Given my findings above in respect of the concentration of hot food takeaways, and in the absence of evidence of a policy conflict in this regard, I find the proposals to be acceptable in terms of their health implications.
9. In addition, the officer's report quotes an earlier Inspector's decision of 2020, which related to a similar proposal at the same address, and which was subject to consideration under the same development plan policies. The Inspector states '*I have found there would be no harm to health, vitality and viability and that the proposal would broadly accord with the overall strategy which seeks to avoid an over-abundance of hot food within the primary retail function of the local centre*'. Given the absence of any significant change in circumstances since that time, I afford these comments significant weight and find that this remains the case for the appeal before me.
10. In conclusion on this main issue, the proposal would not cause harm to the vitality and viability of the Local Centre nor unacceptable harm to health. The proposal would comply with policies R10 and R18 of the MLP, as well as the aims of the Framework relating to vibrant and healthy communities.

#### *Highway Safety*

11. This particular terrace of commercial uses is served by an off-street parking area to the front, which provides parking spaces for 8 vehicles for upto 20

minutes between the hours of 8am and 6pm Monday to Saturday. Parking restrictions also exist on Fairview Avenue, which is also a bus route, and for some distance around the site. The application was accompanied by traffic surveys and analysis. This included a survey of the parking bays outside the site and in the surrounding area on both a weekday and weekend, during daytime and evening hours. This noted length of stays and monitored visitors to and from the other nearby hot food takeaway. Information on the traffic generation for the current use of the appeal site has also been provided. These suggest that a takeaway would create less demand for car parking and would operate over a shorter timescale. The appellant concludes that there would be adequate capacity in the car park and additional capacity on the road after 6pm. I have no reason to believe this could not therefore accommodate any associated overspill and delivery drivers.

12. While this is based in part on assumptions, based on the information before me there is not substantive evidence to the contrary and I have no strong reason to dispute the appellant's findings. On this basis I am satisfied that the parking demands created by the proposal could be accommodated safely.
13. Insofar as this main issue is concerned, the proposal would have an acceptable effect on highway safety. It would comply with policies BNE2, R18, T1 and T13 of the MLP insofar as they relate to highway safety, traffic and parking. The proposal would also comply with the Framework in respect of highway safety.

### **Other Matters**

14. I have had regard to the issues raised by third parties. Issues relating to extraction and operating hours can adequately be dealt with by planning conditions as set out below.
15. There is not substantive evidence that the proposal would give rise to an unacceptable increase in anti-social behaviour or litter-dropping, and should these occur, they would be matters to be dealt with by the management of the unit and the Council. I appreciate the concerns regarding the loss of the existing butchers, which is clearly a valued local facility. However its loss or relocation could occur in any event, irrespective of the outcome of the appeal. I am not aware of any requirement to consider whether there is a need for the proposed takeaway pizza shop.

### **Conditions**

16. The Council has provided a list of suggested conditions that it considers would be appropriate. I have reviewed these in light of the Planning Practice Guidance. In addition to the standard time limit condition, it is necessary to ensure that the development is carried out in accordance with the approved plans to provide certainty.
17. To protect the living conditions of nearby residents, conditions are necessary to restrict the operating hours and details of extraction and treatment of cooking fumes. The latter would need to be satisfied prior to commencement to ensure its appropriate consideration from the outset and I have used the opening hours given in the Council's suggested conditions, on which the appellant has had the chance to comment.
18. The Public Health Project Officer has suggested a financial contribution be secured. However it is not clear how it has been calculated or how it would be

used. As such it would not meet the necessary tests for a planning obligation or condition.

### **Conclusion**

19. For the above reasons, having taken account of the development plan as a whole, the approach in the Framework, along with all other relevant material considerations, the appeal is allowed.

*C Shearing*

INSPECTOR

### **Schedule of Conditions**

- 1) The development hereby permitted shall begin not later than three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: 1310-SK01, 1310- SK02, 1310- SK04, 1310-SK06, 1310-SK07.
- 3) The use hereby permitted shall operate between the hours of 11:30 and 14:00 and 17:00 to 22:00 Monday to Friday, and between 11:30 and 22:00 on Saturdays, Sundays and Public Holidays.
- 4) Prior to the commencement of the use hereby permitted, a scheme for the extraction and treatment of cooking fumes, including details for the control of noise and vibration from the system, shall be submitted to and approved in writing by the Local Planning Authority. Noise from the extraction system (LAeq,T) shall be at least 10dB(A) below the background noise level (LA90,T) at the nearest residential facade, when assessed in accordance with BS4142:2014. The approved scheme shall be implemented prior to the commencement of the use and thereafter maintained in accordance with the approved details.

**End of Schedule**



## Costs Decision

Site visit made on 3 August 2023

**by C Shearing BA (Hons) MA MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 11 September 2023**

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### **Costs application in relation to Appeal Ref: APP/A2280/W/22/3304737 153 Fairview Avenue, Wigmore, Gillingham, Kent ME8 0PX**

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Mrs D Kaur for a full award of costs against Medway Council.
  - The appeal was against the refusal of planning permission for change of use from butcher's shop to takeaway pizza shop (sui generis) together with the provision of a rear service yard area for staff parking and deliveries.
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### **Decision**

1. The application for an award of costs is allowed in the terms set out below.

### **Reasons**

2. Parties in planning appeals normally meet their own expenses. However, the Planning Practice Guidance (PPG) advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The applicant raises a number of concerns arising from the Council's consideration of the planning application and subsequent need to appeal.
3. The Planning Committee were entitled to take a different view to its officers and consultees, and that in itself does not amount to unreasonable behaviour. The Council's case refers to a document 'Hot Food Takeaways in Medway' Guidance Note 2014 and an Inspector of an earlier appeal cast doubt over its status<sup>1</sup>. While this appears not to have been clarified by the Council, I nonetheless do not consider that the use of this guidance was unreasonable given its reference to the associated adopted policies.
4. The applicant alleges that the Council's determination of the application was not consistent with the previous planning decisions on the site. The last application, and subsequent appeal<sup>2</sup> related solely to the matter of highway safety. An Inspector's decision prior to that<sup>3</sup>, relating to a similar proposal on the same site, found the development to be acceptable in respect of the vitality of the local centre and health. The officer's committee report highlighted these important aspects of the planning history. It is not apparent why matters relating to health and vitality of the centre were then raised again as a reason for refusal of the appeal scheme.
5. The PPG states that behaviour which may give rise to a substantive award of costs against a local planning authority can include persisting in objections to a

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<sup>1</sup> APP/A2280/W/21/3269403

<sup>2</sup> Ref MC/20/3082 and APP/A2280/W/21/3274592

<sup>3</sup> Ref 19/2316 and W/4000391

scheme which an Inspector has previously indicated to be acceptable, and not determining similar applications in a consistent manner. For the above reasons, both these occurred in respect of the first reason for refusal, and caused the applicant to incur unnecessary expense in respect of this issue at appeal.

6. In respect of the matter of highway safety, while the appellant had submitted additional information to address the earlier appeal decision, the Committee were not bound to accept that information and were entitled to reach their own view. As such, the proposal should not necessarily have clearly been permitted. However, there is not substantive evidence of the reasons why the Committee chose to disagree with the appellant's substantive evidence. The minutes of the Committee meeting state only that members considered that nothing had really changed since the last decisions, rather than considering the application documents. As such, the Council's decision appears to have been based on vague and generalised assertions about the proposal's impact, which were not substantiated. This is also an example of the unreasonable behaviour described by the PPG, which led to the need for the appeal.
7. Given these findings, it is clear that unreasonable behaviour occurred in respect of both reasons for refusal, which caused the applicant to incur unnecessary or wasted expense in the appeal process. Accordingly, the application for costs is allowed.

### **Costs Order**

8. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Medway Council shall pay to Mrs D Kaur the costs of the appeal proceedings described in the heading of this decision. Such costs shall be assessed in the Senior Courts Costs Office if not agreed.

The applicant is now invited to submit to Medway Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*C Shearing*

INSPECTOR