

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Planning Court

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 01/11/2018

Before :

HHJ DAVID COOKE

Between :

Richard William Stroud
- and -
North West Leicestershire District Council
DPSK Ltd

Claimant

Defendant

Interested

Party

Richard Wald (instructed by **Roythornes**) for the **Claimant**
Cain Ormondroyd (instructed by **Bevan Brittan**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing date: 26 September 2018

Judgment Approved

HHJ David Cooke:

1. The claimant, who lives at 11 Bondgate Castle Donington, challenges the decision of the defendant planning authority taken on 13 April 2018 to grant permission for change of use of a property at 10 Bondgate from a shop (Class A1) to a hot food takeaway (Class A5). The premises have for many years been used as a local shop, currently under the "GoLocal" brand, and the intention subject to grant of permission is to reopen as a Domino's pizza outlet. The claim proceeds by virtue of permission I gave on 4 July 2018.
2. The application was made on 10 January 2018. It attracted a considerable number of representations from local residents, mostly opposed, which were summarised in an Officer's Report presented to members of the planning committee. A very great number of points were made by the opponents; simply summarising them in bullet point format takes up 3 pages of the report.
3. Committee members made a site visit on 10 April and met to consider the application later that day. After hearing various speakers including a number of objectors they voted by a majority to grant permission, the formal decision document being issued on 13 April.
4. It is contended that the decision unlawfully failed to take account of two local plan policies known as "Ec12- Local Centres" and "IF2- Community and Cultural Facilities", which I set out below. The defendant accepts that these policies were not considered but contends that, on their proper construction, they had no application. There is also an allegation of breach of the Public Sector Equality Duty in s 149 Equality Act 2010 by reason of allegedly inadequate consideration of the effect of the closure of the local shop on local residents with one of the protected characteristics, ie the elderly. In relation to this it is accepted the PSED was not specifically referred to in the Officer's report or at the meeting but contended that in the context of the site visit and discussion the relevant issues were sufficiently addressed to constitute the required "due regard".
5. None of the written representations appears to have referred explicitly to these two policies, but the claimant argues that the substance of the points made was such that they were plainly relevant and ought to have been considered nonetheless.

Policy Ec12

6. Policy Ec12 is in these terms:

"Policy Ec12- Local Centres

Planning permission will only be granted for the loss of shopping and other main town centre uses within the defined local centre if the premises have been vacant for at least six months with evidence of marketing. The following factors will also be taken into account:

- (a) The need to maintain an appropriate balance between the main town centre and non-main town centre uses; and

(b) The contribution the unit makes to the function of the centre in terms of its size and location within the centre; and

(c) The nature and characteristics of the proposed use and the type and characteristics of other uses within proximity of the application site; and

(d) The impact of the proposal on the shopping and service character and function of the local centre—for example, would it create an active frontage, would see you spring visitors to the centre? ...”

7. One of the speakers at the meeting was a Mr Kernahan. There is a partial transcript of the proceedings at the meeting including the following remarks by him:

“The development... is not within the planning policy. Policy ... states that planning permission will only be granted for loss of shopping... if the premises has been vacant for six months. This is an ongoing concern. Why is it not dismissed on these grounds alone?”

8. This was plainly intended to be a reference to policy Ec12. The transcript does not include the policy number, but the ellipsis at the relevant point suggests that Mr Kernahan probably gave the number but whoever was taking notes or making the transcript did not properly catch it. In any event, it must be assumed that the planning officer at least would have been aware from the reference to loss of shopping only being acceptable after six months of vacancy that this was the policy being referred to. Nevertheless, this particular point was not responded to either by the planning officer or by any of the councillors who spoke.

9. It is common ground that the proper construction of local planning documents including written policies such as this is a matter of law for the court and not one of planning judgment to be exercised by the authority. It is accepted that Castle Donington is a "local centre" for the purposes of the policy, but Mr Ormondroyd's submission is that there is no "loss of" a main town centre use such as would engage the policy because the new use as a hot food takeaway is also a "main town centre use". Mr Wald's submission is (i) hot food takeaway is not a main town centre use for these purposes, but (ii) even if it is, the policy applies to the loss of one main town centre use (shopping) even if replaced by another (takeaway).

10. "Main town centre uses" is a phrase taken from the National Planning Policy Framework (NPPF), where it is defined in the glossary as follows:

“**Main town centre uses:** Retail development (including warehouse clubs and factory outlet centres); leisure, entertainment and more intensive sport and recreation uses (including cinemas, restaurants, drive-through restaurants, bars and pubs, night clubs, casinos, health and fitness centres, indoor bowling centres and bingo halls); offices; and arts, culture and tourism development (including theatres, museums, galleries and concert halls, hotels and conference facilities).”

11. The definition is not repeated in terms in the Local Plan, but Mr Ormondroyd referred me to two passages that mention it in explanatory wording. The first is at para 8.56 of the Plan, which contains this:

“The NPPF... also requires that in considering proposals for development of what are termed main town centre uses (i.e. retail uses, leisure and entertainment facilities) that a sequential test be applied...”

Paragraph 8.65 reads as follows:

“The main town centre and local centre uses as referred to in the NPPF are those uses listed below (as defined by the Town and Country Planning (Use Classes) Order 1987 (as amended))

- A1 Shops
- A2 Financial and Professional
- A3 Restaurants and Cafes
- A4 Printing Establishments
- A5 Hot Food Takeaways
- B1 offices
- D2 Assembly and Leisure Uses, recreational uses (including nightclubs and casinos) and arts, culture and tourism development (including theatres, museums, galleries and concert halls, hotels and conference facilities) .”

12. Mr Ormondroyd naturally relies on the specific reference to class A5 in Para 8.65. Mr Wald submits that these are explanatory provisions not part of the plan itself, and that insofar as they purported to interpret "main town centre uses" as including class A5, they are wrong. In his skeleton he submitted that it was "immediately apparent" that the NPPF definition did not include class A5 use.
13. I agree with Mr Ormondroyd however that the NPPF definition is broadly framed and does not set out to track the wording of the various classes set out in the Use Classes Order or build up the uses it refers to from a combination of those classes. The fact that hot food takeaway use is not specifically mentioned does not therefore necessarily mean that class A5 use is excluded. In my view, paras 8.56 and 8.65 are attempts to summarise or explain the definition in the NPPF, and are not to be regarded as modifying it or adopting a stand-alone meaning for the purposes of the Local Plan. The first of them is obviously a very condensed summary; the second is more expanded but nonetheless an interpretation rather than an exhaustive analysis or definition. For instance, insofar as paragraph 8.65 refers to class D2 it goes on to give an expanded explanation that includes "nightclubs", which are in fact specifically excluded from class D2 in the Use Classes Order but specifically included as a main town centre use in the NPPF definition.

14. It is necessary to look therefore at the NPPF definition itself. In my view, hot food takeaway may either be regarded as a retail use (in that it involves the sale of goods, i.e. hot food, in detail to members of the public) or as a leisure or entertainment use (since it is plainly similar to others that are specifically described such as restaurants, drive-through restaurants, bars and pubs). This should not be surprising to anyone; takeaway food outlets are a very regular feature of most town centres and it would be odd if they were not regarded as a normal or "main" use in a town centre setting. I note in passing that one more frequent objections raised by those opposed to this application was that there were already a number of other hot takeaway outlets nearby.
15. Indeed in closing Mr Wald conceded, on instructions, that hot food takeaway could be regarded as a species of retail use, although it was one which, as he rightly pointed out, attracted its own considerations in planning terms. That is evidenced by the fact that it is separated out into a use class of its own and is the subject, in this Local Plan and I dare say most others, of specific additional planning policies.
16. I conclude therefore that the proposed use was a "main town centre use". The next issue is therefore whether policy Ec12 is engaged by loss of use of particular premises as a shop, even if that use is replaced by another main town centre use. I granted permission on this ground on the basis that it seemed to me arguable that the expression "loss of shopping and other main town centre uses" could be construed as referring to the loss of one main town centre use, such as shopping, whatever replaced it.
17. Mr Ormondroyd conceded that, read on its own, the language of the opening paragraph of this policy was ambiguous and could have the meaning that the claimant contended for. However, he submitted, the plan must be read as a whole, and when this policy is read in conjunction with others it is sufficiently clear that it is intended to refer only to a change of use from a main town centre use to a non-main town centre use.
18. He relies in particular on policy Ec10 and its supporting text. That provides as follows:

“Town and Local Centres: Primary Shopping Areas – Non-Shopping Uses

(1) Shops (Use Class A1) will be the predominant ground floor use within the defined Primary Shopping Areas of our Town and Local Centres... Development for other main town centre uses within the Primary Shopping Area will be acceptable where all the following criteria are met at the time that an application is determined;

- (a) They make a positive contribution to the diversity of uses on offer; and
- (b) The proposal... does not undermine the shopping element within the immediate area of the site; and
- (c) It would not result in a cluster or over-concentration of non-shop uses; and

(d) It would not lead to a negative impact on the retail character and vitality and viability of the Primary Shopping Area.

(2) ...”

The explanatory text at paragraph 8.76 reads as follows:

“In considering applications for a change of use from shopping to non-shopping regard will be had to various factors including:

- The need to maintain an appropriate balance between shopping and non-shopping uses;
- The type and characteristics of other uses within proximity of the application site;
- Where the property is vacant the length of time that the premises have been vacant and marketed for retail purposes.”

19. While it might be argued that "development for other main town centre uses" could be read as referring only to development of sites that are not presently shops, rather than including redevelopment of existing shops, on balance I do not consider that to be correct. The list of criteria set out in the policy includes consideration of whether the proposal would "undermine the shopping element" of the area or "lead to a negative impact on the retail character and vitality and viability" of the shopping area. Though it is not impossible that a new development for a non-shopping use, or a change from one non-shopping use to another, might be said to have these effects, in my view the more natural reading is that these criteria are aimed at circumstances in which an existing shopping use is changed into a non-shopping use.
20. Further, it is legitimate to look at the supporting and explanatory text of the plan document as an aid to construction, although not of course to arrive at an otherwise impermissible construction of the wording of the plan policies themselves. When this is done, paragraph 8.76 makes it clear beyond doubt that policy Ec10 is intended to govern applications for change from shopping to non-shopping uses, and that in such circumstances although regard will be had to the period of vacancy and marketing if the premises are in fact vacant, such applications are not intended to be the subject of the compulsory six month vacancy and marketing provided for in policy Ec12.
21. Policy Ec10 was referred to in the application and expressly considered in the Officer's Report. No challenge is made to that consideration. I conclude therefore that there was no error in failing to address policy Ec12 either originally or when raised by Mr Kernahan at the meeting.

Policy IF2

22. This policy provides as follows:

“Policy IF2-Community and Cultural Facilities

The loss of key services and facilities will be resisted unless an appropriate alternative is provided, or there is demonstrable evidence that the facility is no longer required and/or viable and that suitable alternative community uses have been considered. Community and cultural services and facilities should be retained and wherever possible improvements facilitated to the quality, accessibility and levels of provision by:..."

The supporting text includes the following that Mr Wald relies on:

"9.10 Local shops, community facilities, pubs, cultural buildings, places of worship and other services provide the infrastructure required to meet the everyday needs of communities, which reduces the need to travel and provides opportunities for social interaction helping to maintain active and socially inclusive communities. Generally a community facility is a building or space where community led facilities for community benefit is the primary use. They can include cultural facilities such as public libraries and museums....

9.12 The loss of local services or facilities can have a serious impact upon people's quality of life and the overall vitality and sustainability of communities. With an ageing population access to locally based services will become increasingly important. The council will require that proposals demonstrate that a particular facility or service is no longer viable and explain the options that have been investigated to maintain the facility or service. In relation to commercial services, such as public houses and shops, marketing of the property for a minimum six months with an appropriate price will be required..."

23. Mr Wald submitted that the GoLocal shop amounted to a "community facility" for the purposes of this policy, because of the reference to "local shops" in the opening words of paragraph 9.10. He pointed to the following matters that were included in the summary of representations made in the Officers Report:

"... The existing shop is thriving and is an integral part of the community; loss of community facility and local service should be avoided..."

The existing's shop staff check that its customers are okay and deliver a lifeline to people who do not have anyone else; replacing the local shop would make it more difficult for the aged population to shop

The existing shop operates the only newspaper delivery service in town...

Will result in the loss of the ATM machine...

Loss of shop and amenity, particularly to the elderly members of the community. [This was contained in a standard form letter signed by 144 people]"

24. Mr Ormondroyd however submitted, in my view correctly, that none of these matters was realistically capable of constituting the shop a "community facility" for the purpose of this policy. That term is explained in para 9.10 as referring to a building space primarily used for "community led facilities for community benefit". That is not apt to refer to a shop even if, as Mr Wald sought to argue, customers conversed with each other in the shop and one of the objectors considered that the shop staff took a kindly interest in the welfare of their customers.
25. I do not however consider that that is the end of the issue. The policy itself although entitled "Community and Cultural Facilities" refers in its operative wording to "the loss of key services and facilities". This wording, in combination with the explanatory paragraphs which refer not only to "community facilities" but to other things including "local shops... pubs... and other services" and the importance of "access to locally based services" makes it clear in my view that it extends beyond premises for organised community activities. Mr Wald's argument was in my view misplaced in seeking to shoehorn the matters he referred to into the definition of "community facilities"; the real issue is whether, by reason of any failure to consider the matters the claimant relies on, the defendant erred in failing to identify the shop as a "key service".
26. It cannot be the case that every shop would be regarded as a "key service", even if it could be characterised as a "local shop". What is important, as the supporting text recognises, is the potential impact of the loss of such services or facilities near to where people live, which "can have a serious impact upon people's quality of life and the overall vitality and sustainability of communities." It goes on to refer particularly to the importance of local services to an ageing population. Whether a change of use of one property leads in fact to such an impact on local people that it amounts to loss of a key service will depend not only on the nature of the existing use but also the alternative sources of provision of similar services available in the area.
27. The claimant has sought in his evidence for the purpose of these proceedings to emphasise what he sees as the importance of the shop to the local community, providing a map showing three other food shops in the area, one of which is a convenience store situated about 275m away on foot. Another, slightly further away, is a larger Co-Op shop. He makes his own submissions about why these might not be convenient for some residents and has attached letters from others who share his views. This material post-dates the decision, and of course what is relevant to the legality of the decision taken is the material and arguments presented to the council at the time the decision was taken, and their assessment of that material must be considered in light of what reasonably appeared to them to be the main issues arising on the basis of that material.
28. In this respect, having reviewed the Officer's Report and transcript, it does not appear to be the case that any substantial point was being made by objectors to the effect that there were no reasonably convenient alternative providers of those services offered by the GoLocal shop. The only matter mentioned that appears to have been said to be unavailable elsewhere was the newspaper delivery service. Whether that particular representation was correct or not I cannot tell, but it seems to have been a minor

matter mentioned by one person, and not anyway within the power of the planning authority to ensure that the GoLocal shop continued to offer that facility.

29. In other respects, it is true that there was mention of the shop being "thriving" (disputed by the owner who said its operation was uneconomic despite his best efforts and by one of those who wrote in support, saying it was "barely used") and reference to the "loss of local service" and "loss of local shop, particularly to the elderly", but while these no doubt point to the cessation of shop services at this particular location, they do not go on to say that there are no alternatives, or that the alternatives involve material inconvenience or disadvantage to residents, elderly or otherwise. Nor can this be inferred: it is a point that objectors could be expected to emphasise, if they thought it had substance.
30. The officer's report notes that "objections have also been made on the grounds that the proposal would be in conflict with the relevant policy criteria and specifically that the proposal would result in the loss of the only retail unit within the area." She goes on to give figures as to the percentage breakdown of uses within the Primary Shopping Area, showing that 32 of them (38%) were in class A1 and concluding "that retail uses are the predominant ground floor use and this would not alter if this application were approved... The proposal would result in the loss of a retail unit but there would be inadequate grounds to resist the proposed change of use on this basis, given that retail use [is] currently and would continue to be the main use within the area. Overall, the use proposed is not considered to have a negative impact on the retail character of the area... The proposal is therefore in conformity with policies...Ec10... of the adopted Local Plan and is considered acceptable in principle...".
31. Although a substantial part of this focuses on the number of A1 uses of all kinds and whether they would remain the predominant use in the shopping area, I do not consider that it can be said that the officer lost sight of any potential issue arising from the fact that the particular type of shop operating at this location would no longer do so. She referred to an objection that the proposal "would result in the loss of the only retail unit within the area"; given that she had identified a total of 32 A1 uses this must have been a reference to the particular site and not the whole shopping area. She cannot however have considered that any significant issue arose from this, given that she concluded that there would not be a "negative impact on the retail character of the area".
32. Further, at the meeting itself it is apparent that most of the speakers were minded to oppose, and presumably emphasised the points that appeared to them and those they represented to be the strongest. For the most part, these related to matters such as the perceived proliferation of takeaway outlets and objections based on traffic, parking, noise, odour, litter and the like. There is mention of the loss of retail uses, but that is put in relation to the number of units in the area within use class A1 (Shops) rather than the type of shops available, still less any allegation of lack of convenient alternative availability of the items sold by the GoLocal shop. That appears to have been directed at an argument raised that the change to A5 use would be contrary to the policy that the predominant use in the town centre should be for shops, an issue the Officer's Report examined and rejected.
33. I referred above to the points made by Mr Kernahan; most of his speech as recorded was devoted to issues of traffic, parking, the similarity of the proposed use to existing takeaway or restaurant businesses and the unhealthy nature of takeaway food. Insofar as he spoke about the loss of shopping use, he put his objection on the basis (mistaken

as I have held) that there should have been a mandatory rejection of any loss of a shop unless it had been vacant and marketed for six months, not that residents would lose access to retail facilities because there was no convenient alternative shop.

34. The Ward member, Cllr Sapple, spoke against the application. He said he was opposed to it, hoped that it would be refused and was concerned that "the officers I intend to work closely with have enough ammunition to successfully defend an appeal". He did refer to the loss of a food shop, saying "This will also mean the loss of another food shop. If this goes ahead there will only be two food shops in the designated central area". He did not however go on to say that the others were not convenient alternatives, but only to make a point on the technical issue whether A1 use (which he noted "includes all shops and a number of other uses") remained predominant.
35. Mr Ormondroyd points out that all of the councillors involved in the meeting knew the local area well and had had the benefit of a site visit that day. He invites me to find, based on the later material that the claimant himself has filed and the council's response to it, that there is in any event no substance in the objection that is being made because the alternative shops available are in fact equally convenient, or alternatively that it must have been obvious to the councillors because of their local knowledge that this was the case.
36. It is not of course for this court to come to any conclusions of fact on this issue. But what can be said, in my view, is that it must be the case that neither the officer nor the committee members considered that either the objections made, or their own observations, raised any significant issue about lack of convenient alternative provision. There is nothing before me that shows any error in that conclusion at the time.
37. In those circumstances, no issue arose before them as to whether the GoLocal shop should have been considered to be a "key service". It is well accepted that neither the officers advising the councillors nor the councillors themselves need to refer in detail to every point that is made in favour of or against an application, but only to address those that reasonably appear to them to be the main issues. In this case, given the number of objections, it would have been a practical impossibility to have addressed all the points made individually, let alone to have considered any such as this that might have been, but were not, urged upon them.
38. I conclude, therefore, that although a shop might in principle amount to a "key service" such as would engage Policy IF2, on the facts of this case no such issue had been raised and accordingly no error was committed by failure to consider that policy.

Public Sector Equality Duty

39. It is accepted that there is no explicit reference to the PSED either in the Officer's report or in the discussion at the meeting. On the other hand, Mr Wald accepts that it is not necessary in all cases that there should be any such reference, still less that every decision requires to be accompanied by any form of structured assessment of whether there is or is not any implication of the decision for persons with one or other of the protected characteristics.
40. It is important, in my view, that the courts in interpreting and applying this duty should not do so in a way that introduces unnecessary and cumbersome formality and

box ticking. A duty to have "due regard" to matters does not require the decision taker in all cases to go looking for possible implications for any or all of the protected characteristics, but only to consider them properly where they are substantively raised on the facts.

41. In this case, I accept Mr Ormondroyd's submission that this was not a decision relating to ceasing a service provided by the authority itself, and the planning authority had no power to secure that even the existing permitted use was so exercised as to continue to operate the sort of local shop presently there. In the circumstances the duty was sufficiently discharged by recording the fact that among the objections raised references had been made to elderly users of the shop, but it was not necessary to take the matter any further in circumstances in which those representations did not appear to be putting any case (and neither the officer nor the decision takers themselves considered that any issue arose) that such persons would be unable to make use of, or materially affected by having to make use of, the alternative shops that were available.
42. In the result, therefore, the claim is dismissed.
43. I will list a hearing at which this judgment will be handed down. It will be in London to ensure it is done at the earliest date, but in order not to inconvenience the parties there need be no attendance on that occasion and I invite the parties to submit an agreed order. If there are any matters arising that cannot be dealt with by agreement, parties should contact my clerk with an agreed time estimate for a later hearing in Birmingham to deal with them.