



APPEALS AND LOCAL REVIEW BODY DECISIONS

Report by Head of Communities and Economy

1 PURPOSE OF REPORT

- 1.1 This report informs the Committee of notices of reviews determined by the Local Review Body (LRB) at its meeting in April 2016; and an appeal decision received from Scottish Ministers.

2 BACKGROUND

- 2.1 The Council's LRB considers reviews requested by applicants for planning permission, who wish to challenge the decision of planning officers acting under delegated powers to refuse the application or to impose conditions on a grant of planning permission.
- 2.2 The decision of the LRB on any review is final, and can only be challenged through the Courts on procedural grounds.
- 2.3 Decisions of the LRB are reported for information to this Committee.
- 2.4 In addition, this report includes a decision on an appeal which has been considered by Scottish Ministers.

3 PREVIOUS REVIEWS DETERMINED BY THE LRB

- 3.1 At its meeting on 26 April 2016 the LRB made the following decisions:

	Planning Application Reference	Site Address	Proposed Development	LRB Decision
1	15/00158/DPP	Land at Shewington, Rosewell	Formation of a temporary test piling facility The LRB received an update report regarding requirements set by the LRB at its meeting in January 2016	The LRB reinforced its decision taken at its meeting in January 2016 and were minded to grant permission subject to appropriate conditions and a financial bond being secured before the grant of

				permission being issued.
2	15/00794/DPP	Land north of 22 Tipperwell Way, Howgate	Change of use of agricultural land to residential garden	Review upheld Permission granted
3	15/00948/DPP	Land adjacent Rosebank North Cottage, Roslin	Demolition of outbuilding and erection of new building	Review upheld Permission granted

4 APPEAL DECISIONS

- 4.1 An appeal against a refusal to grant planning permission (15/00737/DPP) for the formation of a hot food takeaway and installation of a flue at 5 Staiside Court, Bonnyrigg has been upheld. The application was refused on grounds of its impact on the vitality of the local centre, its impact on the amenity of nearby local residents and it being contrary to the Council's healthy eating objectives. The Scottish Government Reporter upheld the appeal on the basis that the proposed development did not have a detrimental impact on the vitality of the local centre or on local residents' amenity and that the Council's healthy eating objectives were not a material consideration in the assessment of a planning application. An application for costs, submitted by the applicant, was not awarded. A copy of the appeal decision accompanies this report.

5 RECOMMENDATION

- 5.1 The Committee is recommended to note the decisions made by the Local Review Body at its meeting on 26 April 2016.

Ian Johnson
Head of Communities and Economy

Date: 24 May 2016
Contact Person: Peter Arnsdorf, Planning Manager
 peter.arnsdorf@midlothian.gov.uk
Tel No: 0131 271 3310

Background Papers: LRB procedures agreed on the 26 November 2013.

Appeal Decision Notice

T: 01324 696 400
F: 01324 696 444
E: dpea@scotland.gsi.gov.uk



Decision by Don Rankin, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: PPA-290-2035
- Site address: 5 Staiside Court, Bonnyrigg, EH19 3PZ
- Appeal by Mr Ghulam Dean against the decision by Midlothian Council
- Application for planning permission 15/00737/DPP dated 2 September 2015 refused by notice dated 8 December 2015
- The development proposed: Formation of a hot food takeaway and installation of a flue
- Application drawings: 629/2, 629/3, 629/5, 629/6, 629/7
- Date of site visit by Reporter: 5 May 2016

Date of appeal decision: 23 May 2016

Decision

I allow the appeal and grant planning permission subject to the 6 conditions listed at the end of the decision notice. Attention is also drawn to the 3 advisory notes at the end of the notice. The appellant considers that the council has acted unreasonably in refusing permission. My conclusion on their claim for expenses is made in a separate letter.

Reasoning

1. I am required to determine this appeal in accordance with the development plan, unless material considerations indicate otherwise. Having regard to the provisions of the development plan the main issues in this appeal are (1) whether the proposal is contrary to Midlothian Local Plan (MLP) Policies DP7, Shop 6 and Shop 7 with respect to maintaining the vitality of the local shopping centre; (2) whether the location of a hot food takeaway would be contrary to MLP Policies RP20 and DP7 with regard to residential amenity and (3) whether other material considerations warrant the grant or refusal of planning permission, in this case whether the proximity of the proposed hot food takeaway to the local Lasswade High School would have an adverse impact on local policies for healthy eating.

2. Looking firstly at the issue of maintaining the vitality of the shopping centre the original permission for the shopping development at Staiside Court, planning permission 13/00206/DPP, was conditioned to restrict the number of retail units to limit any adverse impact on the adjacent existing parade of shops. Retail was initially restricted to units 1 & 2 though unit 2 was subsequently given permission as a bookmakers, presumably as the council no longer considered retention as a retail unit necessary to retain vitality of the centre. The proposal is to utilise unit 5, one of those previously restricted by consent to financial, professional and other services and food and drink. The proposed use as a hot

food takeaway would not conflict with the planning restrictions imposed by condition on the original permission. It cannot therefore be considered to be restricting the availability of retail space to the detriment of the vitality of the centre. Indeed, the remainder of the local centre appears to be thriving, offering a variety of retail services. The only problem area appears to be the two vacant units at Staiside Court.

3. MLP Policies Shop 6 and Shop 7 relate to the location of minor retail facilities and the development of retail in new developments. The proposal is to utilise a shop in a recently completed shopping parade. The council's concerns about loss of centre vitality are not evidenced and the proposed location within an established shopping parade does not raise any significant new issues of vitality not already taken into consideration when planning permission 13/00206/DPP was granted. I find therefore that the proposal is not contrary to MLP Policies Shop 6 and Shop 7.

4. The proposal is to use a currently vacant shop unit, one of the two such vacant units, as a hot food takeaway. As noted in the council's submitted Report of Handling (para 7.3) the proposed hot food takeaway fulfils all of the locational requirements for a hot food takeaway specified in MLP Policy DP7, namely in a town centre, local or neighbourhood shopping centre or a predominately commercial or business area. There are no issues arising from the cumulative effects of additional hot food takeaways on the viability or vitality of the centre. Issues related to the generation of noise or litter within the centre can be controlled through the provision of litter bins and restrictions on opening hours. The location is not therefore inappropriate for a hot food takeaway and in this respect the proposal is not contrary to MLP Policy DP7.

5. Turning to the second reason for refusal, the impact on the living conditions for nearby residents, the building is a single storey custom built shopping parade. There are no residents living above or in the immediate vicinity. It occupies the site of a former public house where a degree of noise from evening and late night customers would have been normal. In any case a restriction on opening hours to prevent late night opening can control this potential adverse impact on local residential amenity.

6. The council notes that the closest residential property is only 10 metres from the site. There is no reason to assume that with appropriate restrictions on opening hours this would be a problem. I note the view of the environmental health services that the proposal would be acceptable both in terms of noise and, subject to appropriate emission control, free from unwanted smell. There are no local objections with respect to any adverse effect on amenity. There is therefore no clear evidence which would lead me other than to conclude that the proposal complies with the amenity requirements of MLP Policy DP7.

7. The shopping centre is already built. There are no compelling reasons with respect to locational criteria or amenity considerations against the location of a hot food takeaway in one of the vacant units. The proposal would be a natural part of the shopping centre and not therefore in my view adversely affect the character and appearance of the area. It would not therefore be contrary to MLP Policy RP20.

8. Turning to the last reason for refusal, the proximity of the Lasswade High School and the impact of a hot food takeaway on the implementation of the council's corporate objectives for healthy eating, the key issue is whether this is an appropriate material consideration. The promotion of healthy eating habits, particularly amongst the young, as

part of a programme to tackle obesity and generally improve health, is government policy. I accept that it also forms one of the council's corporate objectives. A material consideration as defined in planning regulations must however relate to the site and the specific impact of the development on planning related matters. In terms of the policies of the development plan there is no clearly established relationship between healthy eating and the location of hot food takeaways. In the absence of such criteria I cannot give weight to it as a material planning consideration. Similarly, in the absence of such criteria a restriction of opening hours to prevent use by lunchtime school students would not be reasonable under the requirements of Circular 4/1998 *The Use of Conditions in Planning Permissions*.

9. I therefore conclude, for the reasons set out above, that the proposed development accords overall with the relevant provisions of the development plan and that there are no material considerations which would still justify refusing to grant planning permission.

Don Rankin

Reporter

Conditions

1. Prior to the commencement of development, details of the extract ventilation system shown on drawing number 629/07 shall be submitted to and approved in writing by the planning authority. The ventilation system shall:

- a) Provide adequate ventilation to the cooking area to eliminate the need to leave doors and windows open;
- b) Prevent the emission of cooking odours likely to cause nuisance to neighbouring properties; and
- c) Terminate at sufficient chimney height to expelled with suitable upwards velocity to permit the free disposal of exhaust fumes.

The use hereby approved shall not begin until the approved ventilation system is installed and operational. The ventilation system shall thereafter remain operational, as approved, whilst the unit is used as a hot food takeaway.

(Reason: These details were not submitted with the original application and are required in order to ensure the proposed development does not have an adverse impact on the amenity of occupiers of nearby properties).

2. The extract ventilation system shall be designed to achieve 30 air charges per hour.

(Reason: To ensure a satisfactory standard of amenity.)

3. The design and installation of any plant, machinery or equipment shall be such that any associated noise complies with NR25 when measured within any living accommodation and NR40 within any adjacent office accommodation.

4. All music shall be controlled to be inaudible within any neighbouring residence.

(Reason for conditions 3 and 4: To minimise the potential impact on the amenity of nearby residents from noise generated.)

5. A litterbin shall be provided at the front of the premises during the opening hours of the hot food takeaway. (Reason: To ensure a satisfactory standard of amenity and to safeguard the appearance of the neighbourhood shopping centre.)

6. The use hereby approved will not open to the public outwith the following hours:
Mondays – Saturdays inclusive: 11am to 12midnight,
Sundays: 11am to 11pm.

(Reason: To ensure a satisfactory standard of amenity in the neighbourhood shopping centre).

Advisory notes

1. **The length of the permission:** This planning permission will lapse on the expiration of a period of three years from the date of this decision notice, unless the development has been started within that period (See section 58(1) of the Town and Country Planning (Scotland) Act 1997 (as amended)).

2. **Notice of the start of development:** The person carrying out the development must give advance notice in writing to the planning authority of the date when it is intended to start. Failure to do so is a breach of planning control. It could result in the planning authority taking enforcement action (See sections 27A and 123(1) of the Town and Country Planning (Scotland) Act 1997 (as amended)).

3. **Notice of the completion of the development:** As soon as possible after it is finished, the person who completed the development must write to the planning authority to confirm the position (See section 27B of the Town and Country Planning (Scotland) Act 1997 (as amended)).

Decision by Don Rankin, a Reporter appointed by the Scottish Ministers

- Appeal reference: PPA-290-2035
- Site address: 5 Staiside Court, Bonnyrigg, EH19 3PZ
- Claim for expenses by Mr Ghulam Dean Appellant against Midlothian Council

Date of decision: 23 May 2016

Decision

I find that the council has not acted in an unreasonable manner resulting in liability for expenses and, in exercise of the powers delegated to me, I decline to make any award.

Reasoning

1. The claim was made at the appropriate stage of the proceedings.
2. The appellant claims that the council's third reason for refusal is not based on any material planning consideration. It is in their view unreasonable and as such the matter should not have had to be referred to Scottish Ministers by appeal. Unreasonable actions by the council are defined in Circular 6/1990 where there are six tests of unreasonable behaviour.
3. The council had three reasons for refusing the application. The first two of these were firmly rooted in their interpretation of the policies of the Midlothian Local Plan (MLP). They firstly considered that the proposed change of use would affect the viability of the local shopping centre. This had clearly been an issue of concern when the mix of shop types was being considered with the planning application in 2013. That mix was subject to a complex planning condition to avoid damage to the retail element of the existing parade of shops adjacent. The council referred to Policies DP7 and Shop 6 and Shop 7 of the MLP and directly to compliance with the planning condition on the original permission for the shopping parade. They related their conclusion to the need for the continued vitality of the whole district shopping centre.
4. Despite the officers' report advising that the proposal was not in conflict with these policies, the council were at liberty to reach a different conclusion on those policies and their action was, with respect to the tests in Circular 6/1990, not unreasonable.
5. Secondly the council objected to the impact on amenity of the proposed hot food takeaway. Amenity issues with respect to this use are often contentious and open to

interpretation. The council referred to the criteria for hot food takeaways in MLP Policy DP7 and explained this further by reference to the proximity to nearby residential property. Neither the council planners, the environmental health services nor myself agreed with the council's conclusions with respect to MLP Policy DP7, but again they were entitled to reach a different conclusion based on their own local knowledge and experience. Their action was not therefore inherently unreasonable with respect to the tests in Circular 6/1990.

6. The council's third reason for refusal was not directly related to the policies of the development plan. Instead it relied on their corporate objective to improve healthy eating amongst the young to establish a material planning consideration which would add weight to their other conclusions with respect to the suitability of the hot food takeaway in the proposed location across the road from the Lasswade High School. This has clearly been a contentious local issue with objection from the local councillor leading to the transfer of the decision from the scheme of delegation to decision by committee.

7. The council's healthy eating objective does not form part of the development plan. It is not one of the criteria laid out in MLP Policy DP7 with respect to the location of hot food takeaways. The council were advised by their officers that this was not therefore a material planning consideration. Despite this no significant further evidence was provided either in explanation of the reason for refusal nor in submissions to this appeal to justify its inclusion as a material consideration other than its existence as a council corporate objective. In this respect the council's actions did not meet the criteria in Circular 6/1990 for reasonable behaviour.

8. I did not give weight to the case for healthy eating as material planning consideration and in consequence dismissed the third reason for refusal of permission. This was not however the sole reason for refusal. The main reasons (1 and 2) were firmly related to the policies of the development plan and clear reasons provided. I consider the relevance of the healthy eating issue to have been marginal to the planning case presented by the council and insufficient reason, on its own, for an award of expenses.

Don Rankin
Reporter