

The Application seeks to remove condition 14 of planning permission 16/00724/FUL for the construction of 22 affordable dwellings. Condition 15 as worded in the decision notice is as follows:

Prior to the first occupation of the dwellings an odour abatement system to the kitchen ventilation system of the hot food takeaway adjoining the site on Lower Ash Road has been installed in accordance with full and precise details that have been submitted to and approved in writing by the Local Planning Authority beforehand. The system shall be designed to operate in full accordance with the approved details before any of the dwellings hereby permitted are occupied and shall thereafter be maintained in accordance with the approved details. The kitchen ventilation system shall be regularly maintained to ensure its continued operation and the cooking process shall cease to operate if at any time the extraction equipment ceases to function to the satisfaction of the Local Planning Authority.

The reason given for the condition within the decision notice was “*in the interest of residential amenity.*”

The 13 week period for this application expires on 23th July 2017.

RECOMMENDATION

(a) REFUSE the *removal* of condition 14 for the following reason:

In the absence of the provision of a suitable odour abatement system to the kitchen ventilation system of the hot food takeaway adjoining the site on Lower Ash Road odour arising from that premises is highly likely to adversely affect the living conditions of the occupiers of the development. It is therefore considered that if the condition is removed as proposed the residential development is not appropriate for this location, contrary to the aims and objectives of the National Planning Policy Framework;

and

(b) APPROVE the *variation* of the condition in question so that it now reads:

Prior to the first occupation of the dwellings an odour abatement system to the kitchen ventilation system of the hot food takeaway adjoining the site on Lower Ash Road *shall have been* installed in accordance with full and precise details that have been submitted to and approved in writing by the Local Planning Authority beforehand. The system shall be designed to operate in full accordance with the approved details before any of the dwellings hereby permitted are occupied and shall thereafter be maintained in accordance with the approved details. The kitchen ventilation system shall be regularly maintained to ensure its continued operation and the cooking process shall cease to operate if at any time the extraction equipment ceases to function to the satisfaction of the Local Planning Authority.

Reason for Recommendation

The removal of the condition as proposed would mean that odours from the adjoining hot food takeaway is highly likely to adversely affect the living conditions of the occupiers of this development as appropriate mitigation of such odours would not be achieved. However it would be appropriate to vary the wording of the first sentence of the condition, purely in the interests of clarity.

Statement as to how the Local Planning Authority has worked in a positive and proactive manner in dealing with the planning application

It is considered that the proposal to remove the condition is unacceptable and does not conform to the core planning principles of the National Planning Policy Framework and it is considered that the applicant is unable to overcome the principal concerns in respect of the removal of this condition.

Key Issues

Full planning permission was granted in 2016 for the construction of 22 affordable dwellings, reference 14/00767/FUL. A condition of that permission required the provision of an odour abatement system to the kitchen ventilation system of the hot food takeaway adjoining the site on Lower Ash Road in accordance with details agreed beforehand and prior to the commencement of the development. The condition was imposed in the interests of residential amenity. That condition was subsequently varied, in response to application reference 16/00326/FUL, so that the requirement to provide the odour abatement system is prior to occupation of any of the dwellings within the development rather than prior to the commencement of the development. That amended requirement was subsequently imposed on a later permission 16/00724/FUL which is the permission the development is proceeding under.

The applicant is now seeking the removal of the condition. The applicant advises that in preparing the requirements of the condition advice and a quotation to install an odour abatement system was obtained which established that high costs are involved in both installing equipment and in its future maintenance. The indication is that such costs are well in excess of what the applicant envisaged and they are mindful of the potential effect of the costs of future maintenance on the tenants of the unit and the future viability of their business. This has caused them to revisit the planning condition, including whether its requirements are justified and a case has been advanced by the applicant seeking to demonstrate that the requirements are not justified.

The applicant is of the opinion that the condition does not meet at least 3 of the tests for planning condition as set out in paragraph 206 of the National Planning Policy Framework (NPPF) as it is not necessary, relevant to the development to be permitted or reasonable in all other respects.

The case presented by the applicant indicates that the committee reports for the original planning application, and the subsequent application to vary the condition requirement for the provision of an odour abatement system, refer to concerns that odours from the fish and chip shop adjoining the site will adversely affect the living conditions of the residents of the new homes. However they say that the source of such concerns is unclear and the absence of such concerns within formal comments on the original planning application is reflective of a lack of justification for the requirements of this condition. In response to this point, it is acknowledged that the formal consultation response from the Environmental Health Division (EHD) on the original application did not identify any concerns however it is the case that they did identify this as an issue in discussion with the planning officer and did, and continue to, endorse the imposition of the condition as evidenced by their objection to the removal of the condition. It could not be concluded that the absence of this concern being raised within EHDs formal comments suggests that there is a lack of justification/necessity for this requirement.

The applicant's case goes on to highlight that there is no record of complaints from local residents regarding odour impact of the hot food takeaway. They consider that this is an important factor that is reflective of the lack of justification for an odour abatement system particularly as there are flats above the hot food takeaway and the parade of flats that it is within and other dwellings including immediately to the north east of the parade of shops, on the opposite side of Lower Ash Road and to the west of the application site. In addition no material adverse odour impact was perceptible when the applicant met with the EHD on site, and the EHD acknowledged that this remained the case when EHD undertook a subsequent site visit. The applicant advises that EHD indicated that they had originally asked for this planning condition as they could foresee a potential odour problem in future, rather than having any evidence of any existing issues. The applicant considers that given that the EHD agreed that there was not an odour issue on their two visits to the site the planning condition is not necessary. It appears to them that the impact on/risk for existing local residents in the immediate vicinity is minimal and that there would be no greater impact on future occupiers of the new dwellings under construction and consequently it is not considered reasonable or necessary to impose the condition

They go on to say that the EHD have confirmed in recent discussions that, should problems associated with odour from the takeaway be encountered in future, there are pollution controls available outside of the planning system that could be used to address them. This, in the applicant's opinion, provides further justification to remove the condition on the grounds that it is not necessary, particularly mindful that the NPPF at paragraph 122 requires LPA's to *"focus on whether the proposed development itself is an acceptable use of the land, and the impact of the use, rather than the control of process or emissions themselves where these are subject to approval under pollution control regime."*

In response it is acknowledged that there are other residential properties in the area and it is of some note that there have not been any recorded complaints about odours arising from the hot food takeaway to date. The dwellings within the permitted development are, however, located closer to the hot food takeaway than existing properties (with the exception of the flats above the parade of shops where the EHD advise, it would not be uncommon for occupiers to not experience odours) and some are directly to the rear where the odours are likely to disperse/ ie more widespread. The absence of complaint to date is not, therefore, a clear indication that odours from the hot food takeaway will not adversely affect the amenity of residents of this development as suggested by the applicant.

In addition whilst it is the case that the NPPF, at paragraph 122, does state that LPA should not focus on the control of processes or emissions themselves where these are subject to approval under pollution control regimes as quoted above the applicant is incorrect in stating that there is a pollution control regime that applies in this case. There is no control regime in respect that hot food takeaways have to operate within with regard to odours, but there are enforcement powers where a statutory odour nuisance is identified. The point at which there is a statutory nuisance and enforcement action can be taken is, however, higher than the point at which residential amenity is adversely affected i.e. odours may unacceptably affect the living conditions of the occupiers of this development but no action could be taken as it is not deemed a statutory nuisance. The EHD advise that where a statutory nuisance is identified the operator of the hot food takeaway can at best seek the employment of Best Practicable Means which does not necessarily equate either to an absence of odour or event and absence of impact on amenity.

Having had regard to the applicant's case it is considered that the condition does meet the tests of conditions and most specifically the requirement to provide a suitable odour abatement system on the adjoining hot food takeaway is necessary as in the absence of such a system the living conditions of the occupiers of the development is likely to be unacceptable. It is concluded that residential development would not be appropriate for this site, and it would have been appropriate to refuse planning permission, without the requirements of this condition. In light of this the application to remove this condition should be refused.

APPENDIX

Policies and proposals in the approved development plan relevant to this decision:-

[Newcastle-under-Lyme and Stoke-on-Trent Core Spatial Strategy \(CSS\) 2006-2026](#)

None relevant

[Newcastle-under-Lyme Local Plan \(NLP\) 2011](#)

None relevant

Other Material Considerations include:

[National Planning Policy Framework \(NPPF\) \(2012\)](#)

[Planning Practice Guidance](#) (March 2014) including guidance on the use of conditions

[DEFRA "Guidance on the Control of Odour and Noise from Commercial Kitchen Exhaust Systems. \(2005\)](#)

Relevant Planning History

14/0767/FUL Permit – construction of 22 affordable dwellings on the site of the former Woodshutts Inn. Condition 15 of that permission relating to the requirement to provide odour abatement equipment at the adjoining property was varied under application reference 16/00326/FUL and subsequently condition 24 of that permission relating to the provision of affordable housing was varied under application reference 16/00724/FUL.

Views of Consultees

Kidsgrove Town Council have indicated that they are to investigate further, however as no further comments have been received by the due date it is assumed that they have no comments to make.

The **Environmental Health Division** having visited the site and seen the relationship between the properties and the chip shop and taken into account the guidance within the 2005 DEFRA publication "Guidance on the Control of Odour and Noise from Commercial Kitchen Exhaust Systems" and the Odour Risk Assessment in annex C, they are of opinion that the condition should stand. The completed risk assessment indicates that a high degree of odour control is required and also advises that chip shops have a high odour and grease loading. The system as currently installed is a very basic system and relies on high velocity discharge and dispersion without any capture or treatment of the odour laden air stream. In such circumstances it would not be uncommon for those within the flats directly over to not experience odours, however as the plume cools it would be brought back down to ground level. The concern is that odours from the fish and chip shop are likely to adversely affect residential amenity and may potentially constitute an actionable statutory nuisance under Part III of the Environmental Protection Act 1990 against the operator of the fish and chip shop. The best that can be hoped for through retrospective control under the EPA 1990 statutory nuisance regime is the employment of Best Practicable Means, this does not necessarily equate either to an absence of odour, or even an absence of impact on amenity.

Representations

None received.

Applicant's/Agent's submission

The letter in support of the application has been submitted which is available for inspection at the Guildhall and on the website that can be accessed by following this link <http://publicaccess.newcastle-staffs.gov.uk/online-applications/PLAN/17/00324/FUL>

Background papers

Planning files referred to
Planning Documents referred to

Date report prepared

6th June 2017