

OUR REF RHS.MAL96.1

YOUR REF LRB/10/0689/PP

Bill Walkinshaw
Head of Democratic Services
East Ayrshire Council
Council Headquarters
London Road
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26 July 2011

Dear Mr Walkinshaw

**65 HIGH STREET, STEWARTON
REVIEW OF APPOINTED OFFICER'S DECISION TO REFUSE PERMISSION FOR HOT FOOD
TAKEAWAY
RESPONSE TO FURTHER WRITTEN SUBMISSIONS**

We refer to the further written submissions received from Alan Neish, Head of Planning and Economic Development, and William Gilchrist, Team Leader of the Pollution Control / Corporate Enforcement Unit, both dated 30 June 2011.

1 Mr Neish's letter

1.1 We are surprised at the tone of Mr Neish's letter. He bases it chiefly on supposition about the existence of risks connected with the development (that residual odour will affect neighbouring properties, that the takeaway will be a magnet for trouble). He does not quantify the risks. If this approach was adopted generally, it would make any development, and particularly any development of local facilities such as shops or cafes next to impossible. It seems to be an approach aimed at securing the refusal of the application, not at setting the full facts before the Local Review Body in a fair and balanced manner.

2 Odour

2.1 Mr Neish suggests that because there is a risk that the ventilation filter may not always remove every last trace of odour, the application must be refused.

2.2 There is no evidence and no reason to believe that, with the proposed flue arrangement and a vapour barrier as proposed by Mr Gilchrist, Mr Malik's shop would cause any form of odour

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offensive to neighbours, still less an odour sufficient to constitute a nuisance to them.

- 2.3 Mr Gilchrist, who is the Council's expert on these matters, said on 31 May 2010 (document 8) that the proposed system was "effective in odour control". He said no system can be relied on to be 100% effective, but recommended a vapour barrier in addition to prevent smells percolating to the flat above. He, as an expert, is satisfied that there is unlikely to be a problem and that the application is acceptable. If he was not satisfied, he would have objected to the application. If the Local Review Body has any doubt on this point, we suggest that it holds a hearing and asks Mr Gilchrist directly whether he thinks the application is acceptable as regards odour impact.
- 2.4 To cause a problem any residual odour at the louver would have to travel through the open air, find a way into a neighbouring property, and be strong enough to cause offence if it did so. Mr Neish has nothing to say on these matters. The expert evidence from Mr Gilchrist and Mr Speirs indicates it is unlikely there would be a problem caused by odour, assuming the proposed filtered ventilation system is regularly maintained. Mr Neish's position, if applied generally, would make it impossible for any hot food takeaway to be approved anywhere near housing.
- 2.5 Mr Neish has provided a reporter's decision P/PPA/190/183. This decision shows East Ayrshire Council granting permission to a hot food takeaway in a residential area on the condition that active filtration was placed on the ventilation system (a similar arrangement to the proposed development). He has not explained why the present application should be treated differently.

3 Statutory Nuisance

- 3.1 We have said that if a problem did arise, the Council has power to require abatement of any nuisance.
- 3.2 Mr Gilchrist says that judging whether a statutory nuisance exists is "entirely subjective". This is not completely correct. The legal test for a statutory nuisance is whether the effect is "more than reasonably tolerable to a person of ordinary sensibilities". Government guidance states "there is a scale between mildly irritating and intolerable and in each case the determination of whether a nuisance exists is a matter of judgement (Budd v Colchester BC 1997). In addition, the determination is based upon an objective test of reasonableness."¹ There are a range of factors which must be taken into account in deciding whether a smell meets the nuisance test, including frequency, intensity, effect and context.
- 3.3 Mr Neish suggests that an odour can be a problem without being a nuisance. In most cases it will be obvious whether an odour is a nuisance or not. There are some cases that might be marginal, if the irritation caused is not great. However, the key point is that it is the Council that determines whether a statutory nuisance exists. If it finds that a statutory nuisance exists (or is likely to occur or recur), then it must serve an abatement notice on the person responsible. It is a criminal offence

¹ Paragraph 3.10, Scottish Government Guidance to accompany the Statutory Nuisance Provisions of the Public Health etc (Scotland) Act 2008, Edinburgh (2009)

for the recipient of the notice not to obey it. If the recipient appeals against the notice, he must prove there is not a nuisance.

- 3.4 Mr Neish refers to these enforcement powers as being "retrospective". The fact is that they are a considerable deterrent. The Council has the power to stop any nuisance caused by Mr Malik's premises.

4 Disturbance

- 4.1 Mr Neish claims the proposed hot food takeaway would cause disturbance of the area, which he says is a residential area. This is not something he mentioned in his refusal notice. It appears to be a rationalisation of his decision for the purposes of the review rather than a factor that formed part of the original decision.

- 4.2 The area in which Mr Malik's shop is located may be predominantly residential, but it is not a quiet suburb: it is the main road through Stewarton (as Mr Neish points out). There are a number of small existing shop units opposite, as well as a pub nearby, which is open until 11pm. There is also a Masonic social club on Springwell Street. Mr Malik's shop is presently open until 10pm. There are no planning restrictions on any of the shop units, and they may open at any time of the night or day, without additional planning permission.

- 4.3 It is not proposed that the takeaway will be open later than 10 pm except on a Friday and Saturday night, when it is proposed to open to 11 pm. These times are reasonable, and fall within ordinary evening hours. A statutory definition of evening hours, as distinguished from night hours is found in the Antisocial Behaviour (Noise) (Scotland) Regulations 2005 and the Environmental Noise (Scotland) Regulations 2006. Evening hours last from 7 pm until 11 pm. There is nothing to suggest that the takeaway custom would cause any disturbance that would not be ordinarily be expected in this type of location within its opening times. People returning from pubs or the railway or bus stations late at night will not stop off at the takeaway, because they will find it closed.

- 4.4 Mr Neish asserts that the take-away will "act as a focal point for local youths in the early evening". There is nothing to suggest this would be the case. It is an assertion that could be made of any new facility. No hot food takeaway, café, early evening shop, local fitness centre or other local facilities could be consented if this standard was applied universally.

Yours sincerely

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