



Head of Planning & Economic Development: A Neish DipTP

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**Our Ref:** 10/0689 (CSI/SA)

**Date:** 30 June 2011

**MEMO:**

**TO:** Bill Walkinshaw, Head of Democratic Services

**FROM :** Alan Neish, Head of Planning & Economic Development

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East Ayrshire COUNCIL

**TOWN & COUNTRY PLANNING (SCOTLAND ) ACT 1997, THE TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION & LOCAL REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2008**

**APPLICATION REF : LRB 10/0689/PP**

**PROPOSAL : HOT FOOD TAKEAWAY**

**SITE: 65 HIGH STREET STEWARTON**

I refer to your recent request from the Local Review Body for information regarding the appeal made against the decision to refuse Planning Application 10/0689/PP.

#### Information requested

**“Why it was felt that the proposals were not compatible with the surrounding and existing land uses, given that there were a number of small businesses located which stretched along the length of High Street.”**

Many of the towns within East Ayrshire have either one central spine road or in the case of Stewarton , two central roads forming a crossroads, these streets form the basis for the original town. With all these types of settlement it is common that streets such as High Street have one end within a town centre area while the rest of the street is predominately residential in nature.

It was considered by the Planning Authority that while the appeal site is located on High Street it is in part of the street which is more residential in nature and is clearly not in the town centre area as identified in the Local Plan.

It is also considered that while this part of the street does contain a number of small shop units, these are predominately day time uses. Therefore they are compatible with the adjacent residential uses as they do not provide the potential for activity which may be detrimental to the enjoyment of the residential units in the area. This is typical for spine roads of this nature where there is a gradual decrease in commercial activity as you move away from the town centre.

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**“On the impact on residential properties”, and**

It is considered that there will be an impact on residential properties due to the increased activity at a time of day when householders in this residential area would expect activity to be decreasing.

By its very nature the hot food takeaway will operate in the later part of the day and into the evening therefore creating activity and potentially disturbance at a time of day when it would be reasonable for the residents of a non town centre area to be expecting a decrease in activity.

It is also noted that such hot food premises often act as a focal point for local youths in both the early evening and by adults leaving licensed premises later in the evening. Therefore increasing the noise and activity in the area significantly from the existing activity at that time. It is noted that this type of activity is significantly different from the operation of the existing convenience shop.

It is also worth noting that location of the hot food premises at this end of the High Street would create a “stopping off” point for people coming from the town centre activities or from transport links such as the train station or bus stops and heading home to properties on the east of Stewarton.

Therefore it is considered that the proposal, given its close proximity to the residential units would have a detrimental effect on the amenity of the adjacent properties due to the increased activity and hence noise.

**“ On the view taken that the proposal would have a detrimental effect on the amenity of the adjacent properties by reason of odour given the view taken by Environmental Health Officers who had no objection to the proposed development.”**

It was considered by the Planning Authority that the content of the Environmental Health Officers (EHO)consultation was significant in the determination of this application. The Consultation states that the EHO team have “ no objections in principle to the proposed development” and also state “should the proposed ventilation arrangements prove unsatisfactory and as a result complaints are received regarding nuisance from fumes or odours ..... take appropriate action under the provisions of the Environmental Protection Act 1990”.

This information should be taken in conjunction with the other relevant information available to the Planning Authority in the determination of this application.

During the site visit it was apparent that as the shop unit was on the ground floor of the two storey building that extract flue would have to discharge onto the front elevation of the building. It was also apparent from the site visit that there were a number of residential properties with first floor windows in close proximity to the proposed ventilation system. Therefore it was vital that the extraction system from the hot food takeaway is effective.

Another piece of vital information in the determination of the application was drawing 172 from Portland Chimneys Ltd submitted in support of the application. This drawing indicates that the proposed ventilation system *“acts by oxidising cooking contaminants, breaking them down into carbon dioxide and water thereby **reducing** cooking smells, **helping to dramatically improve air quality**”*.

The importance of this statement shows that the provider of the ventilation system does not believe that the system will completely eliminate the cooking smell from the air extracted from the kitchen.

These factors form the basis of the Planning Authority decision to refuse the application due to odour issues. The information submitted in support of the application indicates that the ventilation system “reduces” and “dramatically improves” air quality thus implying that the extracted air remains tainted by the cooking smells. The physical proximity of the extract fan to the adjacent residential house windows requires the extract system to be highly effective to address the potential odour issues and protect the amenity of these properties.

The Environmental Health consultation does not provide any comfort on this issue as they are unable to provide the confirmation that the extraction system will not create an odour problem in the adjacent residential units, although they do indicate that they have retrospective powers to try and address any issue should they arise.

Thus it was concluded that due to the potential that the extraction system would not be extracting clean air this would immediately result in an odour issue for the adjacent residential units. Therefore it was felt that the issue of odour control was not addressed satisfactorily and thus the Planning Authority could not be satisfied that the scheme would comply with Policy RTC15 of the Local Plan hence should be a reason for refusing the proposal.

For clarity, it is the very nature of role of the Planning Authority to make judgements based on all relevant information not solely based on the opinions of consultees.

This view was highlighted in the Appeal Decision P/PPA/190/183 Maxwood Hotel, Galston, (copy enclosed) which also relates to an extract system, where the Reporter was very clear that "the heavy reliance on the lack of objection from the Environmental Health Service does not recognise the need to make planning judgements informed by the opinions of technical consultees but not necessarily determined by them, and having due regard to the level of amenity to be expected in the particular location as well as to general observation and experience of common situations affecting amenity."

In the same judgement the Reporter also states that such a formulaic approach, based solely on consultees opinions "does not take into account the potentially large gap between effects that may reasonably be judged to be unacceptable impacts on amenity in the Planning context of a suburban residential area and effects extreme enough to warrant action under other legislation against a statutory nuisance."

I hope this statement clarifies the reason why the decision was taken by the Planning Authority in the determination of this application. If you wish to discuss this matter further please feel free to contact Craig Iles.

## Appeal Decision Notice

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Decision by William M H Patterson, a Reporter appointed by the Scottish Ministers

- Planning appeal reference: P/PPA/190/183
- Site address: Maxwood Hotel, 10-12 Maxwood Road, Galston, Ayrshire KY4 8JN
- Appeal by Shafiq Ahmed Choudhry against the decision by East Ayrshire Council to grant planning permission reference 07/0973/FL dated 28 March 2008 subject to conditions
- The development proposed: "installation of extract canopy, ducting and fans to kitchen in retrospect"
- The condition appealed against is:

"(1) Notwithstanding the plans hereby approved, the extract canopy shall be fitted within 28 days of the date of this consent with charcoal filters to minimise the escape of smells and noise generated by the restaurant use and which shall thereafter be maintained or replaced for as long as the flues are operational. The details of the charcoal filters shall be agreed in writing by the Planning Authority prior to their installation. Furthermore the noise levels of the charcoal filters shall be examined and appropriate baffles installed both the satisfaction of the Environmental Health Service and Planning Authority. (Reason: To protect the amenity of the surrounding residential area by preventing undue smells and noise.)"

- Date of site visit by Reporter: 6 October 2008

Date of appeal decision: 4 November 2008

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### Decision

I dismiss the appeal and refuse to vary the terms of the planning permission.

### Reasoning

1. The determining issues in this appeal are whether the location of the extract fans is such that only the most effective filtration and noise attenuation available could make them acceptable; and whether there is convincing evidence that the condition is unnecessary in order sufficiently to protect local amenity. No development plan policies have been brought to attention as having any bearing on the matter.
2. The appeal premises are in a residential neighbourhood east of Galston town centre. The extract fans are at ground floor level on the side wall of a rear projection of the converted house, within some 6 metres of the patio back yard of the 1½ storey semi-detached house at no. 14 and a few more metres of its back windows including those in



the upper floor. Clearly this property in particular, downwind from the prevailing westerly winds, and the surrounding houses more generally, would be highly vulnerable to annoying, persistent cooking odours and noise from the extract fans unless these impacts on amenity were effectively controlled. There are strong indications in submissions from affected parties that the installation as it exists is not adequate to prevent unacceptable loss of residential amenity in the most affected houses.

3. It is notable that the basis of the appeal is that charcoal filters are difficult to obtain and generally used only in industrial premises, but there is nothing in the appeal submissions to suggest that the filters cannot be obtained or that they cannot be used on other types of business premises that generate potentially annoying odours. Nor is there anything to substantiate the assertion, contrary to the evident experience or knowledge of the council's environmental health advisers, that they could not be more effective than other kinds of filter. Consequently the case for simply cancelling the condition and letting the installation remain in its present form is not at all convincing.
4. There are aspects of the committee report on the retrospective application which cause concern as they indicate some misunderstanding about the role of development management, under planning legislation, in protecting residential amenity: in particular the comment "Should smells become an issue in the future, the issue could be addressed through the Environmental Protection Act 1990 by the Environmental Health Service at that time". This does not take into account the potentially large gap between effects that may reasonably be judged to be unacceptable impacts on amenity in the planning context of a suburban residential area, and effects extreme enough to warrant action under other legislation against a statutory nuisance. Nor does it pay regard to the proper function of development management in preventing unacceptable impacts on amenity, rather than leaving those working under other legislation to deal with predictable environmental problems when they occur. Moreover, the heavy reliance on the lack of objection from the Environmental Health Service does not recognise the need to make planning judgements informed by the opinions of technical consultees but not necessarily determined by them, and having due regard to the level of amenity to be expected in the particular location as well as to general observation and experience of common situations affecting amenity.
5. It should have been entirely predictable that without the most effective measures to intercept odours and noise, rigorous maintenance of machinery and regular replacement of consumable items, the appeal installations would inevitably cause unacceptable loss of amenity for adjacent households – simply because of their low position and closeness to residential property. The dependency on effective mitigation measures and a consistent and rigorous maintenance and replacement regime would clearly be so overwhelming that a refusal of retrospective planning permission would have been a sensible and supportable decision. In these circumstances it has been necessary to give serious consideration to whether the whole grant of planning permission should be reviewed under section 48(1). However, since the practical outcome of consulting under section 48(3) would most likely be the withdrawal of the appeal leaving both the planning permission and the condition in place, there would be very little point in that procedure.

6. There is no other matter, in the appeal submissions, which could outweigh the findings that the condition both appears to be implementable and is a necessary mitigation measure in the present unsatisfactory situation.



W M H PATTERSON  
Reporter

