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## Appeal Decision

Site visit made on 1 November 2011

by **Philip Major BA(Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 8 November 2011

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**Appeal Ref: APP/H0738/A/11/2156105**  
**55 The Green, Billingham, Cleveland TS23 1EW.**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Mr Ahmed Wahid against the decision of Stockton-on-Tees Borough Council.
  - The application Ref: 10/3027/FUL, dated 25 November 2010, was refused by notice dated 8 April 2011.
  - The development proposed is the change of use to A5 hot food takeaway at No 55c and the revocation of an existing A5 use at 55b.
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### Decision

1. The appeal is dismissed.

### Application for costs

2. An application for costs was made by Mr Ahmed Wahid against Stockton-on-Tees Borough Council. This application is the subject of a separate decision.

### Preliminary Matter

3. The appeal site falls within the Billingham Green Conservation Area. The Council's reason for refusing planning permission notes the alleged harm to retail character, but makes no mention of the effect on the character or appearance of the Conservation Area. The Planning Officer's report does address this matter briefly, and concludes that the proposed development would not be harmful. That is a conclusion with which I concur, and consequently the character and appearance of the Conservation Area would be preserved. In reaching this view it is important to make it clear that I make no comment on the replacement shopfront which has been installed and which has been determined under a different application; that is not a matter before me.
4. The Appellant runs a hot food takeaway in part of No 55, at 55b. That property is part of the application site. He has indicated that if planning permission is granted for the use of 55c as proposed, he would change 55b into a retail shop (class A1). A condition on any planning permission granted has been suggested as the means by which this would be achieved.
5. However, I am aware of no mechanism by which a lawful use can be revoked by condition in the manner suggested unless separate properties benefit from simultaneous planning permissions and cross-referenced conditions. Although it is within the current application site there is no application before me to convert 55b to an A1 use – indeed such an application would not normally be necessary as it would fall within the ambit of 'permitted development'. Hence

the change of use of 55b could not be ensured by imposition of a condition on 55c since there are no linked applications which could effectively be cross-referenced to the implementation of separate planning permissions. I do not doubt that the Appellant intends to change 55b to A1 retail use, but circumstances could change (such as disposal of the interest in 55b) in the period during which any permission relating to 55c were to be implemented. In such circumstances the Council would have difficulty in enforcing the terms of the condition, which would then be attached to a planning permission relating to land in a separate ownership. I do not consider that such a condition would meet the tests of Circular 11/95 – *The Use of Conditions in Planning Permissions*.

6. Consequently I see no option other than to treat this proposal simply as an application for an A5 use at 55c, and being mindful of the fact that despite the intentions of the Appellant the current use at 55b might also be able to continue.

#### **Main Issue**

7. The main issue in the appeal, therefore, is the effect of the proposed development on the character, vitality and viability of the existing shopping area.

#### **Reasons**

8. The appeal premises are located towards the southern end of the main shopping area associated with Billingham Green. The centre is designated as a 'local centre' by the saved Policies of the Local Plan and in the Core Strategy Development Plan Document of 2010. The centre is a linear arrangement of shops and services primarily found on Station Road. It extends for some distance, and is supplemented by other occasional retail and service uses in surrounding streets. It seems to me that as a 'local centre' this one is quite extensive.
9. There is a reasonable range of shops in the centre, though I noted that some are currently vacant. There is also a significant number of hot food takeaways, though in the main these are located towards the middle part of the Station Road frontages. The notable exception is the existing hot food takeaway at the appeal site. The proposal would have the potential to add to this in the absence of an enforceable mechanism to prevent it.
10. The existing shopping offer in Billingham Green seems to me to be surviving rather than prospering. There is nothing which indicates that the turnover of retail premises is such that there is pent up demand for space here. The opposite is true. The number of vacancies and the state of some of the property indicates that the retail trade in the centre is holding its own, but not performing at a high level.
11. The existing shops are intended to serve the local market, and there are clearly a number of shops which cater for that need, including at least one newsagent, butchers, bakers, and so on. In addition a national multiple food retailer has premises at the petrol filling station just to the north. But I am by no means satisfied that the appeal premises could not satisfy part of the retail demand. It is in a prominent location and well placed to cater for residents of the southern part of the catchment.

12. It would clearly be preferable to have premises in a location such as this occupied rather than remaining empty and unused. That said, it seems to me that the information available is not conclusive in showing that the property would not be taken up by an A1 use. Marketing information is extremely limited. Since the last A1 use ceased it seems that efforts have concentrated on achieving an A5 use.
13. Overall, I believe that the potential consolidation of hot food takeaways at this end of the centre around The Green would lead to it becoming characterised by the predominance of that use, and this would detract from the wider character of the centre. As noted in the previous appeal decision, a significant number of A5 uses can act as a disincentive to investment in A1 use and affect the operation of the centre.
14. On balance, therefore, I am satisfied that the proposed change of use would be unacceptable, would be likely to harm the character, vitality and viability of the existing shopping area, and would therefore be contrary to the objectives of saved Local Plan Policy S10.

**Other Matters**

15. I have noted the representations made in respect of potential nuisance by noise, odour, grease, traffic and the like, to nearby residents. However, it would be possible to ensure, by condition, that facilities are as up to date as possible to address such matters. There is also no objection from the Council's Environmental Health Officer or the Head of Technical Services. I have noted the comments made in relation to competition for other food providers, but this cannot carry weight in land use planning terms

**Conditions**

16. The Council has suggested a number of conditions in the event of planning permission being granted but none of these would overcome the likely harm by the potential loss of an A1 retail unit and by the detrimental impact on the operation of the shopping centre.

**Overall Conclusion**

17. For the reasons given above I conclude that the appeal should be dismissed.

*Philip Major*

INSPECTOR



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## Costs Decision

Site visit made on 1 November 2011

**by Philip Major BA(Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

**Decision date: 8 November 2011**

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**Costs application in relation to Appeal Ref: APP/H0738/A/11/2156105  
55 The Green, Billingham, Cleveland TS23 1EW.**

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by Mr Ahmed Wahid for a full award of costs against Stockton-on-Tees Borough Council.
  - The appeal was against the refusal of planning permission for the change of use to A5 hot food takeaway at No 55c and the revocation of an existing A5 use at 55b.
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### Decision

1. The application for an award of costs is refused.

### Reasons

2. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process.
3. I have made clear in my appeal decision that I do not accept that the 'revocation' of the use of No 55b can be achieved by condition. Hence there is a danger that there would in the future be two A5 uses side by side. The Council is therefore entitled to assess the cumulative impact of those uses. I do not see that the reference to Policy S8 (not S5 as noted in the costs application) is anything other than an illustration of how such assessments could be made. I accept that the proposal was not assessed in detail against this policy. Indeed the Council specifically indicates that little weight can be attributed to the approach espoused in Policy S8. The Council does not seek to rely on imposing any maximum percentage level of A5 uses. It seems to me that the Council has simply exercised its judgement in this case, and as such it has not acted unreasonably.
4. The fact that the Council's report does not deal in detail with the 'revocation' of the existing use at No 55b is not detrimental to their consideration of the case. Though not explicit, the fact that no 'revocation' condition is referred to by the Council is not indicative of unreasonable behaviour. Rather it reflects what I regard as a correct position; that such a condition would be unacceptable and fail to meet the tests of Circular 11/95.

### Conclusion

5. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has not been demonstrated, and no award is made.

*Philip Major*

INSPECTOR