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# Appeal Decision

**by Chris Hoult BA(Hons) BPhil MRTPI**

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

**Decision date: 27 August 2020**

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**Appeal Ref: APP/G5750/X/20/3246849**

**Indiano Pizza, 126 Upton Lane, Forest Gate, London E7 9LW**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development ("LDC").
  - The appeal is made by Mr Mohammed Bashir against the decision of the Council of the London Borough of Newham.
  - The application Ref 18/03252/CLE, dated 13 November 2018, was refused by notice dated 17 December 2018.
  - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended ("the 1990 Act").
  - The use for which a certificate of lawful use or development is sought is described as "a pizza takeaway name Indiano Pizza on the entire ground floor" (Use Class A5).
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## Application for Costs

1. An application for costs was made by the Council against the appellant. This application is the subject of a separate Decision.

## Decision

2. The appeal is dismissed.

## Preliminary Matters

3. The appeal is being determined under the written representations procedure. In an appeal of this kind the planning merits of the use are not for me to consider. My decision will turn on the legislative provisions, relevant planning case law and the submitted evidence. Given therefore that it was not necessary in order to reach a decision to see the appeal site and its surroundings, a site visit was not carried out.
4. The Council refers to some uncertainty on the appeal form as opposed to the application form as to the identity of the appellant. It looks as though the agent representing the appellant, Mr Misbah Uddin, has mistakenly inserted his name as the name of the appellant on the form. I deal with the appeal on the basis that the appellant is as stated on the application form.

## Main Issue

5. Having regard to the provisions of s195 of the 1990 Act, the single main issue is whether the Council's decision to refuse to grant a LDC was well-founded.

## Reasons

6. A LDC is sought for the use of the ground floor of the premises as a pizza takeaway under Use Class A5 of the Use Classes Order<sup>1</sup>. The grounds on which a certificate is sought (taken from the application form) are that the use began more than 10 years before the date of the application, which was 13 November 2018. The burden of proof to demonstrate his case is upon the appellant, the relevant test being the balance of probabilities. In the application form, reference is made to a series of previous uses of the premises.
7. In a statement on the application form relating to previous uses, it is said that the *"current ground floor tenant (Mr Arif Adnan) has been operating as 'Indiano Pizza' Pizza takeaway from 12 July 2013 to the present day"* which I take to be the date of the LDC application. Rate listing and demands are said to be attached. The only other references to previous uses cover a period from 1 May 2002 to 31 March 2011 and are unclear. It is variously said that the premises was rated by the Council as a *"restaurant and premises"* from the first date and was used as a takeaway and grocers up to the second date. Elsewhere on the form, 14 April 2003 is given as the date on which the use began, although reference is made to an interruption in the use from 31 March 2011 to 12 July 2013 owing to a change of tenants.
8. All this information appears on p5 of the form and is the only material I can find on my file from the appellants which sets out the basis of the claimed lawfulness of the use. No evidence has been submitted to support any aspect of the various assertions as to previous uses of the premises and references to dates which have been made. In order for the application to succeed, the appellant needs to demonstrate that the A5 use in this case began on 13 November 2008 (the "relevant date") and has continued uninterrupted since that date, up to the date of the application. It follows on from that that the material I have referred to above, if that is all that has been submitted, comprehensively fails to discharge the burden of proof required for the appellant to make his case.
9. The Council confirms the only documents it has seen supporting the appeal – the LDC application, its decision notice and the appeal form – and they comprise the totality of the appeal documents before me. In order to better understand the background to the appellant's case, I examined the Council's evidence. It is clear that the LDC application subject of this appeal was followed by the issue of an enforcement notice, on 18 January 2019, alleging a material change of use to a hot food takeaway (A5). This was itself appealed on a range of grounds and the Inspector's decision on the appeal was issued on 30 January 2020. Among the grounds appealed under s174(2) of the 1990 Act was ground (d), that it was too late for the Council to take enforcement action. This ground is of greatest relevance to the appeal before me.
10. The Council's officer's report on the LDC application refers to an existing ground-floor plan, to a range of non-domestic rates bills covering a period from 2013/14 to 2018/19 and to a VOA (Valuation Office Agency) rate adjustment letter which dates from 2002. The Council says that the VOA branded the premises as a *"restaurant and premises"* from 2002 and that the rates bills describe the premises as a *"shop and premises"*.

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<sup>1</sup> The Town and Country Planning (Use Classes) Order 1987 as amended

11. The Council goes on to say that its officers visited the premises in 2018 where employees said that the pizza takeaway had been there for 5 years. Larger premises at 126-128 Upton Lane had been granted planning permission for a change of use to a restaurant in 1992 (Use Class A3) but no. 126 some time afterwards formed its own premises and became a different planning unit. Various Google Street View images from prior to 2013 show a grocers and cash and carry in 2008 and 2012, with the pizza takeaway first appearing in 2014.
12. The officer's report recommending issue of an enforcement notice focused on the planning merits of a hot food takeaway use, which is not for consideration in this appeal. In his decision on the enforcement notice appeal, in relation to ground (d), the Inspector had before him primarily the evidence in relation to the refused LDC application subject of this appeal, which I have outlined. He points out that Use Class A5 was made a separate Use Class in 2005 having formerly been subsumed under Class A3, so there could not have been an A5 use of the premises specifically before then. He firmly rejected the appellant's case under this ground. He said in passing that the Council had not produced the Street View images upon which it had relied in its evidence for that appeal but the 2012 image is now appended to its statement for this appeal, in which the premises can be clearly identified as "Shiva Cash & Carry".
13. In his defence against the Council's costs application, the appellant refers to evidence in support of the appeal which it is pertinent to refer to here. He says that, in his appeal decision, the Inspector did not discuss the evidence submitted for the LDC application, in saying that no evidence was submitted in support of the contended 10-years' use. That misrepresents his findings, as he states in paragraph 15 of his decision that the evidence he considered was that dealt with by the Council in its consideration of the s191 application i.e. the LDC application. This is the same evidence that I have referred to. The reference to January 2018 should I think be to 2019 as the enforcement notice was issued in January 2019 and, under ground (d), the appellant was required to demonstrate a period of 10-years' A5 use prior to that date. I have indicated the relevant period for consideration in this appeal.
14. The appellant goes on to say in his costs submission that he wants the evidence submitted for the LDC application to be considered in this appeal. The Council has considered this evidence and firmly rejected it, including on the basis of evidence which it has provided. The appellant has produced no meaningful further evidence in support of this appeal with which to counter the Council's findings in respect of the evidence submitted with the application.
15. Given this, I am bound to concur with the Council on its findings. The evidence submitted to it, such as it is, fails to demonstrate the appellant's case. The likeliest scenario, on the balance of probabilities, is that the use of the premises as a pizza takeaway began no earlier than July 2013, well short of a 10-years' uninterrupted use for such purposes that the appellant needs to demonstrate. Before that date, its use is less clear but there is evidence of use as a grocers and cash and carry. Importantly, there is no evidence to indicate that a hot food takeaway use, either as a pizza takeaway or for any other form of food, was in operation before 2013. The appellant has referred to an interruption in the use from 2011-2013 and that there was no A5 use around that time is confirmed by the Streetview image of a cash and carry at the premises in 2012.

## **Conclusions**

16. For the reasons given above I conclude that the Council's refusal to grant a LDC in respect of the use of the ground floor of the premises as a pizza takeaway (A5) was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act.

*C M Hoult*

INSPECTOR