



Appeal Decisions

Inquiry Held on 13 & 14 April 2021

Site visit made on 25 May 2021

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 July 2021

Appeal A Ref: APP/W4515/C/18/3215378

Land/property at building adjacent to Rudyerd House, Benton Road, West Allotment

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Phil Harrison-Rowe against an enforcement notice issued by North Tyneside Metropolitan Borough Council.
- The enforcement notice was issued on 5 October 2018.
- The breach of planning control as alleged in the notice is unauthorised breach of planning conditions:

Condition 4 – The premises shall be used as a cold sandwich shop/delicatessen falling within Class A1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) only and for no other purpose including any purpose falling within Use Class A3, or Use Class A5 of the Town and Country Planning (Use Classes) Order 1987 (as amended), or in any provision equivalent to that class in any statutory instrument revoking and re-enacting that Order with or without modification.

The premises has been operating outside of Use Class A1 by operating within Use Class A5 as a hot food takeaway and providing an extensive delivery service of hot and cold food.

Condition 5 – There shall be no consumption of food and drink on the premises by customers. There are tables and benches with chairs being used by customers to consume their purchase within the premises.

Condition 6 – Notwithstanding the information provided as part of the application the cooking equipment within the premises shall be limited to 1 domestic oven, 1 microwave, 1 toaster, 1 toastie maker, a single griddle and 1 bain marie. There shall be no deep frying equipment and no preparation or sale of deep fried foods. Deep frying equipment is used within the premises and deep fried food is served at the premises.

- The requirements of the notice are:

Condition 4

1. The Business shall only be used as a cold sandwich shop/delicatessen falling within Class A1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) only and for no other purpose including any purpose falling within Use Class A3, or Use Class A5 of the Town and Country Planning (Use Classes) Order 1987 (as amended), or in any provision equivalent to that class in any statutory instrument revoking and re-enacting that Order with or without modification, and should not carry out deliveries other than for outside catering akin with A1 use. The Business should not operate outside of Use Class A1 and should be in compliance with

Condition 4.

Condition 5

2. No food or drink should be consumed on the premises in compliance with Condition 5.

Condition 6

3. The deep fat frying equipment should be removed in compliance with Condition 6.

- The period for compliance with the requirements is four weeks.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/W4515/X/18/3197818

Big Phill's Deli (Catering and Takeaway), Building adjacent to Rudyerd House, Benton Road/North Terrace, West Allotment, North Tyneside NE27 0DN

- 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 Philip Harrison-Rowe against the decision of North Tyneside Metropolitan Borough Council.
 - The application Ref 17/01781/CLEXIS, dated 27 November 2017, was refused by notice dated 22 January 2018.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is use as a commercial hot and cold catering use with on & off sales, takeaway and delivery.
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Appeal C Ref: APP/W4515/W/18/3197167

Building adjacent to Rudyerd House, Benton Road, West Allotment NE27 0DN

- 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 Philip Harrison-Rowe against the decision of North Tyneside Metropolitan Borough Council.
 - The application Ref 17/01015/FUL, dated 11 July 2017, was refused by notice dated 5 September 2017.
 - The development proposed is change of use from Cold Sandwich Shop/Delicatessen [A1] to Hot Food Takeaway with Home Delivery [A5].
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Appeal D Ref: APP/W4515/W/18/3198298

Big Phill's Deli (Catering and Takeaway), Building adjacent to Rudyerd House, Benton Road/North Terrace, West Allotment, North Tyneside NE27 0DN ("the Land")

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Philip Harrison-Rowe against the decision of North Tyneside Metropolitan Borough Council.
 - The application Ref 17/01650/FUL, dated 3 November 2017, was refused by notice dated 21 December 2017.
 - The application sought planning permission for the change of use from office to a Class
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- A1 cold sandwich shop/delicatessen with outside catering provided without complying with conditions attached to planning permission Ref 15/00352/FUL, dated 1 May 2015.
- The conditions in dispute are Nos 4, 5 and 6 which state that: the premises shall be used as a cold sandwich shop/delicatessen falling within Class A1 of the Town and Country Planning (Use Classes order 1987 (as amended) only and for no other purpose including any purpose falling within Class A3 or A5 of the Town and Country Planning (Use Classes order 1987 (as amended), or in any provision equivalent to that class in any statutory instrument revoking and re-enacting that Order with or without modification (Condition 4); There shall be no consumption of food and drink on the premise by customers (Condition 5); Notwithstanding the information provided by as part of the application the cooking equipment within the premises shall be limited to 1 domestic oven, 1 microwave, 1 toaster, 1 toastie maker, a single griddle and 1 bain marie. There shall be no deep frying equipment and no preparation or sale of deep fried foods (Condition 6)
 - The reasons given for the conditions are: In order to protect the residential amenity of adjoining residents and having regard to policy H13 of the North Tyneside Unitary Development Plan 2002 (Condition 4); In order to protect the residential amenity of adjoining residents and having regard to policy H13 and DCPS 16 of the North Tyneside Unitary Development Plan 2002 (Condition 5); In order to protect the residential amenity of adjoining residents and having regard to policy H13 and DCPS 16 of the North Tyneside Unitary Development Plan 2002 (Condition 6).
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Summary Decisions: Appeal A is dismissed and the enforcement notice is upheld with variations in the terms set out in the Formal Decision below; Appeal B is dismissed; Appeal C is dismissed; Appeal D is dismissed.

Applications for costs

1. At the Inquiry an application for costs was made by Mr Phil Harrison-Rowe against North Tyneside Metropolitan Borough Council. An application for costs was also made by North Tyneside Metropolitan Borough Council against Mr Phil Harrison-Rowe. These applications are the subject of separate Decisions.

Procedural matters

2. Due to the Coronavirus pandemic the Inquiry was held as a Virtual Event. Evidence at the Inquiry was given under oath by way of affirmation.
3. Where, as in this case, appeals under section 78, section 174 and section 195 of the 1990 Act are considered together, the convention is that the appeal under section 174 becomes the lead appeal. Purely in the interest of clarity and convenience, and notwithstanding the chronological order in which the appeals were submitted, I have labelled the four appeals to which this Decision relates as A to D inclusive, with the section 174 appeal being Appeal A. However, for the reasons that I set out below, I will consider the appeals in a different sequence.
4. The address to which these appeals relate is variously described in the application forms, appeal forms, the Council's formal Decision Notices and the Enforcement Notice. I am, however, satisfied that all four appeals relate to the same site.
5. The application now subject to Appeal D (Council Ref: 17/01650/FUL) sought planning permission for a development described as the "Deletion or variation or alteration of various conditions regarding cooking equipment, sales limitations and consumption on/off the premises on the existing permissions:

- Head permission 04/03889/FUL dated 20 January 2005 (and also those on variation permission 15/00352/FUL dated 1 May 2015 which allowed for Sunday opening hours)". In its formal Decision Letter, the Council summarised that description as "Variation or Removal of conditions 4, 5 and 6 of planning approval 15/00352/FUL – to allow the cooking of hot food on the premises".
6. As is the convention, in the banner heading above I have described the application subject to Appeal D as seeking planning permission for the change of use from office to a Class A1 cold sandwich shop/delicatessen with outside catering provided without complying with conditions attached to planning permission Ref 15/00352/FUL, dated 1 May 2015. This wording reflects section 73 of the 1990 Act, which provides for a grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted (in other words, the same development only subject to different conditions).
 7. In adopting that wording, I am of course mindful of the description of development proposed in the original application and that on the Council's formal Decision Notice. However, on my reading, neither of those description properly reflects the provision within section 73 of the 1990 Act. Furthermore, the description on the original application is not technically correct: pursuant to section 73 of the 1990 Act, the effect of the permission granted under reference 15/00352/FUL is to entirely replace planning permission 04/03889/FUL with a fresh planning permission subject to new conditions. The wording in the banner header above overcomes those defects.
 8. Prior to the opening of the Inquiry, in an email dated 22 March 2021 the appellant's agent, Dr Lang, had questioned the authority on which the notice was issued. Although this had previously formed no part of the appellant's case, it was potentially a matter of fundamental significance. As part of my pre-Inquiry Note, I therefore invited the Council to explain at the Inquiry, either through documentation and/or an appropriate witness, the process through which the enforcement notice was issued in the context of its scheme of delegation.
 9. In the event, the Council called two witnesses to deal with the point. Having heard from those witnesses, I made a ruling at the Inquiry that the Council officer did have the authority to issue the notice in accordance with an approved scheme of delegation and that the notice was therefore not a nullity. I return to that point in detail below.
 10. The enforcement appeal (Appeal A) was originally made on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. During cross-examination, Dr Lang accepted the proposition put to him that if the appeal under section 195 of the Act does not succeed (Appeal B), then both of the section 78 appeals (Appeals C and D) must also fail as does, with the exception of the appeal on ground (g), all other grounds originally pleaded on the section 174 appeal (Appeal A). This was subsequently confirmed in an e-mail from Dr Lang dated 14 April 2021.
 11. That was clearly a significant concession, and one which has determined my approach to these appeals and the structure of my Decision. It is, however, necessary to understand the true extent of the concessions made by Dr Lang, and the implications of those concessions for my Decision.

12. In that context, I am fully mindful that those concessions only apply in the event that the appeal under section 195 of the Act does not succeed (Appeal B). In particular, the two section 78 appeals (Appeals C and D) were not withdrawn and are still before me. It follows that I must determine those appeals, albeit that the appellant's case (following the concessions made by Dr Lang) is now that those appeals cannot succeed in that scenario.
13. On the other hand, if Appeal B does succeed for the reasons advanced by the appellant, then it seems to me that Appeal A must also succeed on ground (b): there would have been no breach of conditions, such the matters stated in the notice would not have occurred. In that scenario, the enforcement notice would be quashed and the appeals on grounds (a), (c), (d) and (f) would not fall to be considered. I would also still need to determine the two section 78 appeals (Appeals C and D) on the basis of the evidence before me although, as the Council points out, they would then effectively become irrelevant given that the appellant could rely on Certificate of Lawful Development arising from the section 195 appeal to continue the use.
14. Having regard to the above, and in the light of the concessions made by Dr Lang, it is logical to consider Appeal B in the first instance. However, before doing so, I return to the point raised by the appellant in relation to the authority to issue the notice and then to an issue relating to the enforcement notice itself.

Authority to issue the Enforcement Notice

15. The appellant's case in this respect is that, aside from an undecipherable 'squiggle', there is no name, job title or officer role on any of the three different enforcement notices issued by the Council in relation to this site to date. The appellant therefore argues that there is nothing to clearly inform anyone reading the documents who issued them, let alone if they had the correct authority to do so. It is the appellant's case that the lack of a proper legible signature, or a printed or written name, or a job title or anything on the notice identified who issued it must make Enforcement Notice subject to this appeal a nullity. In support of that argument, the appellant has referred me to an appeal decision in which the Inspector found an enforcement notice to be a nullity because he was not satisfied that the Council's officer had the authority to issue it¹.
16. The Council's response was led by Ms Louise Watson, Senior Manager for Legal Services and Registration Services and Monitoring Officer. She confirmed that it is her signature on the enforcement notice, and that she had the authority to issue the notice through explicit delegation from the Council's (then Acting) Chief Executive conferred in an email dated 31 August 2018. In support of that, Ms Watson provided a signed copy of the Council's Law and Governance Sub-delegation Scheme. Within Section 3.7 of that scheme, Delegation LG52 specifically delegates the function of serving a planning enforcement notice to the post of Senior Manager Legal Services, the post held by Ms Watson at the time the enforcement notice was issued and indeed the post that she still holds.

¹ APP/N1920/C/15/3005612; APP/N1920/C/15/3005613; APP/N1920/W/15/3121525, dated 10 November 2015

17. This evidence was supported by that of Ms Tessa Crowe, a Solicitor employed by the Council. She described in detail the process through which the draft enforcement notice went before being issued by Ms Watson. This included consultation with the Chair and Deputy Chair of the Planning Committee, as well as the Head of Law and Governance, as required by the Council's Law and Governance Sub-delegation Scheme². She also confirmed that the requisite audit trail was in place.
18. Having regard to the above, I am satisfied that Ms Watson had the necessary authority to issue the enforcement notice and that all of the required procedures were correctly followed in accordance with the Council's Law and Governance Sub-delegation Scheme. I therefore conclude that the enforcement notice is not a nullity. In this respect, my conclusion can be distinguished from that of my colleague in the decision referred to by the appellant in which, on my reading, the narrow point in contention was whether the Council officer had the required delegated authority at the specific point in time that the notice was issued.

The Enforcement Notice

19. The requirement at paragraph 5(1) of the notice effectively repeats condition 4 imposed upon planning permission 15/00352/FUL with added wording to the effect that the business should not operate outside of Use Class A1 and should be in compliance with Condition 4. Similarly, the requirement at paragraph 5(2) of the notice is that no food or drink should be consumed on the premises and that at paragraph 5(3) requires that the deep fat frying equipment should be removed.
20. The enforcement notice purports to attach breaches of conditions that, it alleges, have already taken place. The difficulty is that the requirements at paragraph 5(1) and 5(2) of the notice are passively worded whereas they should properly be directed at requiring the breach of planning control to cease. I raised this matter at the opening of the Inquiry, and in response the Council provided revised requirements. I will vary the requirements based in part on the revised requirements submitted by the Council. It is clear that the appellant has understood the purpose behind the requirements as originally drafted in the notice, and the variations I intend to make do not alter that underlying purpose. I am therefore satisfied that no injustice would be caused.

The section 195 appeal (Appeal B)

21. Section 191(4) of the 1990 Act indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development

² The names of the individuals concerned were provided in the evidence given by Ms Crowe, but are not repeated here.

- (LDC) was well founded. The burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful on the date on which the application was made.
22. To succeed, the appellant must show on the balance of probability that the use of the appeal premises has taken place continuously for a period of ten years from the date on which the application was made without complying with conditions 4, 5 and 6 of planning permission 15/00352/FUL. The relevant date is therefore 27 November 2007.
23. The effect of a successful application under section 73 of the 1990 Act is to grant an entirely new planning permission subject, if appropriate, to new and/or re-imposed conditions. In this case, the new planning permission (15/00352/FUL) was granted on 1 May 2015 and was implemented. The application for the LDC was made on 27 November 2017, only some 2½ years after planning permission 15/00352/FUL was granted. It is therefore impossible for the use of the appeal premises to have carried on without complying with conditions 4, 5 and 6 of planning permission 15/00352/FUL for a period of ten years from the date on which the application was made.
24. It is the appellant's case that neither the original planning permission (04/03889/FUL, dated 20 January 2005) nor planning permission 15/00352/FUL were ever implemented. If that is correct, that would circumvent the shortfall in the period of time that the use has been operating otherwise than in compliance with conditions 4, 5 and 6 planning permission 15/00352/FUL.
25. However, that argument did not survive for long under cross-examination. In giving his evidence, Mr Tierney, the applicant for the original application, re-affirmed that he was completely aware of what he did and did not have planning permission for. This had already been established through the documentary evidence, specifically a letter to Mr Tierney explaining the differences between the A1 and A3 Use Classes³. It was in response to that letter that Mr Tierney re-submitted for an A1 use, having initially been refused permission for an A3 use (Council Ref: 04/02698/FUL).
26. But in my view the even more telling admission made by Mr Tierney was his reaffirmation under oath that he intended to operate pursuant to that permission for an A1 use and did open offering an 80/20 split between cold and hot food. In my view, that in itself is compelling evidence that the planning permission for the A1 use (04/03889/FUL) was implemented.
27. My finding in that respect is reinforced by the evidence given by Mr Logan, a Planning Enforcement Officer employed by the Council. In response to a complaint that the premises was operating as an A3 use, Mr Logan visited the premises on 23 February 2005, very shortly after the premises first opened. He explained that on visiting the premises his first impression was that of a typical sandwich shop, characteristic of similar establishments within the A1 Use Class. In particular, Mr Logan noted that the equipment for cooking and heating of the food was not in breach of condition 7 of planning permission for the A1 use (04/03889/FUL). On the basis of his findings on that visit, Mr Logan concluded that no breach of planning control had occurred and closed the case.

³ Letter dated 8 October 2004 to Mr Tierney from the Planning Manager, Environment, Regeneration & Housing Directorate.

28. Here, then, was a situation in which an experienced enforcement officer visited the premises within a few days of it first opening specifically to investigate whether an A3 use was taking place only to find that no such use was occurring. In conducting that site visit, it is reasonable to conclude that Mr Logan was specifically looking for any indicators that might suggest that an A3 use was taking place. Given that Mr Logan found no such indicators, I consider it more likely than not that the premises were operating as an A1 use at the time of his visit. Given also that this visit took place within only a few days after the premises first opened, it is more likely than not that the premises first opened as an A1 use, as indicated by Mr Tierney in his evidence.
29. The appellant's wider point is that permission 04/03889/FUL could not have been implemented because the use as operated would have been in breach of condition 5 imposed upon that permission. In part, condition 5 states that:
- The premises shall be used as a cold sandwich shop/delicatessen falling within Class A1 of the TCPA (Use Classes Order) 1987 only for no other purpose including any purpose falling within Class A3.....*
- The appellant's argument is that, because the menu offered a variety of hot foods, the premises were operating outside the description of a cold sandwich shop/delicatessen specified in this condition.
30. In my view, that argument is fundamentally flawed. It is settled case law that a single unit of occupation can have one primary use to which other activities are incidental or ancillary. In relation to the appeal property, the primary use granted by planning permission 04/03889/FUL was a Class A1 cold sandwich shop/delicatessen. The operative part of that permission is the reference to Class A1. The reference to the cold sandwich shop/delicatessen is a description of the type of use that falls within the A1 Use Class.
31. The sale of some hot foods could, subject to the extent of those sales, be considered ancillary or incidental to the primary A1 use of the premises. In that context, Mr Tierney confirmed that he first opened the premises offering an 80/20 split between cold and hot food. At 80%, I consider that the primary use of the premises when it first opened was for the sale of cold food, and therefore falling within the A1 Use Class. I am satisfied that the 20% of sales for hot food were ancillary or incidental to the primary A1 use for the sale of cold food. This is evidently the same approach adopted by Mr Logan when he visited the property in February 2005.
32. There is no requirement for a planning permission to specify ancillary or incidental uses, but it is entirely permissible for a planning permission to exclude uses that might otherwise be considered ancillary or incidental through the imposition of conditions⁴. It is instructive in this case that planning permission 04/03889/FUL does not preclude ancillary or incidental uses.
33. In relation to the interpretation of planning conditions, the Courts consider what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole⁵. The Courts have indicated that is an objective exercise in which regard should be had to the natural and ordinary meaning of the relevant words, the

⁴ Provided that those conditions meet the relevant tests for conditions.

⁵ *DB Symmetry Ltd v Swindon BC* [2020] EWCA Civ 1331

overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.

34. Applying those principles to condition 5 imposed upon planning permission 04/03889/FUL, it is clear that the overall purpose of that permission is to grant an A1 use. Looked at objectively, and having regard to the other conditions imposed upon that consent, I consider that condition 5 must properly be read as restricting the use of the premises to an A1 use: that being the primary use, to which other activities may be incidental or ancillary. The latter can include an element of hot food sales. Consequently, on my reading of it, nothing in the wording of condition 5 can reasonably be interpreted as restricting the use to the sale of cold food only. Indeed, condition 7 specifically sets out a list of cooking equipment that may be used in the preparation of (by obvious implication) hot food. Read together, my view is that conditions 5 and 7 cannot reasonably be interpreted in any way other than as restricting the use of the premises for A1 use with an ancillary element of hot food sales.
35. Having regard to the above, I consider that planning permission 04/03889/FUL was implemented. The use of the appeal premises was investigated again on two further occasions, firstly in July 2007 and again in September 2010. On neither occasion was further action taken. The latter investigation found no evidence of the deep fat fryer that was alleged to have been in use at the premises, with the investigating officer being satisfied that the menu at that time was typical of a sandwich shop. There were then no further reported breaches of planning control until the commencement of Sunday opening in or around January 2015, the investigation of which ultimately led to the submission of a planning application seeking to vary the condition that prevented Sunday opening (condition 3). This then resulted in the grant of the new permission under reference 15/00352/FUL.
36. The appellant explains that he purchased the business in or around December 2012, re-naming it as "Big Phillers Deli" in January the following year. He maintains that he sold food from the same menu as Mr Tierney and used the same cooking equipment as sold to him when he purchased the business. He also used the same breakfast bar and stools, together with the table and chairs, installed by the previous operator.
37. This consistent with other evidence before me. The Council officer who investigated the allegation of Sunday opening (not Mr Logan) made no mention of any other issues relating to the use of the premises. That same officer had previously investigated the allegation of a change of use from sandwich shop to hot food take away in September 2010. It is therefore reasonable to conclude that the investigating officer was aware of the previous enforcement history and would have raised any concerns about the use if found to be operating otherwise than in accordance with the planning permission for A1 use.
38. It therefore appears to me that, on the balance of probability, the premises were being operated as an A1 use right up until the submission of the application for a variation of condition to allow Sunday opening. The appellant confirms that he ceased trading on Sundays pending the outcome of his application. The corollary, it seems to me, is that when the premises re-opened with the benefit of planning permission 15/00352/FUL in place, it is more likely than not that it did so as an A1 use. It follows that planning permission 15/00352/FUL was also implemented.

39. The appellant has made a number of subsidiary arguments relating to, amongst other things, customers consuming food/drink on the premises, the provision of an extraction system and outside catering. However, those subsidiary arguments do not go to the heart of the matter. In his oral evidence to the Inquiry, Mr Tierney confirmed that the seating was never used for the seating and serving of patrons in order to consume food on the premises but was used to provide seating for customers when waiting to be served. This was thus a key element of the permitted A1 use which, whilst precluding the consumption of food and drink on the premises by customers through condition 6, does not preclude the provision of seating for customers waiting to be served. There is no evidence before me that an extraction system would have been necessary to operate an A1 use from the premises, and the description of development approved under planning permission 04/03889/FUL specifically provides for an element of outside catering as part of the A1 use.
40. For those reasons, none of the subsidiary arguments advanced by the appellant detract from my fundamental finding that planning permission 04/03889/FUL was implemented and that the premises operated under the control of that permission until superseded by planning permission 15/00352/FUL. It follows that the appellant has not demonstrated, on the balance of probability, that the use claimed in the LDC has continuously occurred for the relevant ten-year period.
41. In conclusion, during the relevant ten-year period the balance between the hot and cold food offered changed significantly, to the extent that the sale of hot food could no longer be considered ancillary to the permitted A1 use. The sale of hot food became a new primary use in its own right, amounting to development for which no planning permission had been obtained.
42. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeal A: the appeals on grounds (b), (c) and (d)

43. These three grounds of appeal were among those conceded by Dr Lang in the event that the Appeal B did not succeed. I consider that Dr Lang was correct to concede these grounds of appeal, for the following reasons:

The appeal on ground (b)

44. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters have not occurred. I have found that both planning permission 04/03889/FUL and planning permission 15/00352/FUL were implemented. The evidence before me is that, at some point after the grant of planning permission 15/00352/FUL, the balance between the hot and cold food offered changed significantly, to the extent that the sale of hot food could no longer be considered ancillary to the permitted A1 use. Indeed, the extent of the change in the character of the use that then occurred is such that over time the balance reversed, with the sale of hot foods becoming the primary use.

45. This is evidenced by comparison of the menus offered by the appellant compared to when Mr Tierney was the operator of the premises. The former⁶ provided a far greater variety in the range of hot meals compared to when Mr Tierney⁷. For example, whereas the menu offered by Mr Tierney included a "Special of the day" (in the singular), the menu offered by the appellant offers a choice of 'Daily Specials' comprising a total of 15 different hot meals that change on a daily basis. The latter included hot meals such as Gammon Steak, Chilli Con Carne, Chicken Curry, Kebab Wraps and Lasagne. Similarly, the menu offered by Mr Tierney included a limited choice of three different types of burger; that offered by the appellant includes seven varieties of burger, as well as jacket potatoes (having a wide range of filling options) and a range of hot meals that included omelettes, pies and chips.
46. This increased range of hot food offered was in breach of Condition 4 imposed upon planning permission 15/00352/FUL.
47. It seems likely that the increase in the range of hot meals offered on the menu required the use of deep fat frying equipment, contrary Condition 6 imposed upon planning permission 15/00352/FUL. Also, following advice from a Council Environmental Health officer, at some point during 2015 the appellant installed an extraction system. That is again consistent with an increase in the amount and types of hot food offered for sale. At the same time, the evidence before me is that there was consumption of food on the premises, contrary to Condition 5.
48. I am therefore satisfied that there has been a breach of conditions 4, 5 and 6 imposed upon planning permission 15/00352/FUL. It follows that the matters alleged in the notice have occurred. The appeal on ground (b) fails.

The appeal on ground (c)

49. The ground of appeal is that, in respect of any breach of planning control that may be constituted by the matters stated in the notice, those matters do not constitute a breach of planning control.
50. Section 171A(1)(b) of the 1990 Act provides that failing to comply with any condition or limitation subject to which planning permission has been granted constitutes a breach of planning control. The matters stated in the notice, and which have occurred, are a breach of conditions 4, 5 and 6 imposed upon planning permission 15/00352/FUL. Pursuant to Section 171A(1)(b) of the 1990 Act, it must inexorably follow that those matters constitute a breach of planning control. Accordingly, the appeal on ground (c) fails.

The appeal on ground (d)

51. The appeal on this ground is that, at the date on which the notice was issued, no enforcement action could be taken in respect of any breach of planning control that may be constituted by those matters.
52. Section 171B(3) of the 1990 Act states that in respect of any other breach of planning control no enforcement action may be taken after the end of the

⁶ Exhibit WL11 to Mr Laing's Proof of Evidence

⁷ Exhibit WL5 to Mr Laing's Proof of Evidence

period of ten years beginning with the date of the breach. In this context, “any other breach” includes a breach of condition.

53. Planning permission 15/00352/FUL was granted on 1 May 2015 and was for an A1 use of the premises. That is only some 3½ years before the enforcement notice was issued and considerably less than the ten years specified in Section 171B(3). It follows that enforcement action could be taken against the breach of planning control alleged in the notice. Accordingly, the appeal on ground (d) also fails.

Appeal A: the appeal on ground (a); Appeal C; and Appeal D

54. The appeal on ground (a), and the two section 78 appeals, are also among those conceded by Dr Lang in the event that the Appeal B did not succeed. However, the appeals are still before me and I consider them here⁸.
55. In relation to the appeal on ground (a), the ground of appeal is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The Council has stated three substantive reasons for issuing the enforcement notice, albeit the reason in relation to highway safety has subsequently been withdrawn. Consequently, I consider that the main issues raised from the extant reasons for issuing the notice are the effect of the development on:
- public health, and
 - the living conditions of the occupiers of the surrounding residential properties, specifically in relation to odours and noise disturbance.
56. The application for the proposed change of use from Cold Sandwich Shop/Delicatessen [A1] to Hot Food Takeaway with Home Delivery [A5] now subject to Appeal C was refused for essentially the same reasons as above. The application for the development of land without complying with conditions subject to which a previous planning permission was granted now subject to Appeal D was refused solely on the grounds of the effect on public health. I am therefore satisfied that all three appeals can be considered together against the main issues identified above, insofar as they relate to each appeal.

Public health

57. Section 38(6) of the Planning and Compulsory Purchase Act 2004 (2004 Act) indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. My starting point for consideration of this main issue must therefore be the development plan for area.
58. Policy DM3.7(d) of the North Tyneside Local Plan 2017 (Local Plan) indicates, amongst other things, that in order to promote healthier communities the Council will prevent the development of A5 uses in wards where there is more than 15% of the year 6 pupils or 10% of reception pupils classified as obese. I am advised that the Council has now changed the terminology within this policy

⁸ Including whether the imposition of suitable conditions would make the development acceptable in planning terms.

from “very overweight” to “obese”, but that otherwise the policy remains unaltered since first adopted.

59. The appeal premises are within Valley Ward. According to the latest childhood obesity figures set out in the National Child Measurement Programme for 2018 issued by Public Health England, within Valley Ward 8.6% of Reception pupils and 23.4% of Year 6 pupils were categorised as being obese⁹. Whilst the figure for Reception pupils is below the threshold of 10% set out in Policy DM3.7 of the Local Plan that for Year 6 pupils exceeds that threshold by some margin.
60. The appellant has sought to challenge the soundness of Policy DM3.7 of Local Plan on the grounds, amongst other things, that it is tantamount to a blanket ban on hot food takeaways and that obesity levels amongst school children could be tackled otherwise than through planning policy. However, prior to adoption, the Local Plan was subject to examination during which the soundness of Policy DM3.7 was tested against the background of an evidence base. This would have included criterion (d) in relation to child obesity figures. The policy emerged from that examination in its current wording and now forms part of the development plan for the area. Nothing before me suggests that Policy DM3.7 is out of date: indeed, the figures in the aforementioned National Child Measurement Programme for 2018 indicate that it remains very much relevant. Consequently, in accordance with 38(6) of the 2004 Act, I must have full regard to Policy DM3.7 of the Local Plan.
61. The appellant also comments that the appeal premises is not close to a school. Policy DM3.7 of the Local Plan is a criteria-based policy. The ‘catchment’ in relation to Criterion (d) is the ward within which the site lies: no reference is made to the proximity to schools in that criterion. On the other hand, criteria (c) of Policy DM3.7 does have a catchment of within 400 metres of entry points to middle and secondary schools. On my reading, the various criteria within Policy DM3.7 are self-standing, such that a development needs to accord with every criterion in order to comply with policy when read as a whole. It follows that the proximity or otherwise of any schools to the appeal premises is not relevant to my consideration of criterion (d) of that policy.
62. In any event, I noted during my site visit that the appeal site lies within an extensive residential area that exhibits a variety of house types. A significant proportion of the surrounding houses appeared to be family-sized units. It is therefore reasonable to conclude that a proportion of the Year 6 pupils captured in the data on child obesity for Valley Ward live within close proximity of the appeal site.
63. I conclude that the development unacceptably harms public health. In addition to being contrary to Policy DM3.7 of the Local Plan in that respect, the development also fails to accord with paragraph 91(c) of the National Planning Policy Framework (Framework) which states that planning decisions should support healthy lifestyles, including through access to healthier food.

Living conditions

64. Although an extract system was been installed at the appeal premises in or around 2015, that system was installed without the benefit of planning

⁹ Exhibit WL18 to Mr Laing’s Proof of Evidence

permission. Consequently, it is not subject to any requirements in terms of regular maintenance and/or ongoing performance. The extract system forms no part of the matters before me and it is therefore for Council to decide how to proceed as regards its installation.

65. There is already some evidence to suggest that the extract system has given rise to unacceptable odours as experienced from within surrounding residential properties and the area generally. In the absence of any controls to ensure ongoing maintenance, I cannot be satisfied that the extract system will maintain an acceptable level of effectiveness going forward, such that it would be sufficient to suppress cooking fumes and odours in the future. In that respect, I adopt the same precautionary approach as the Inspector in dismissing the appeal in relation to an extract duct at premises in Forest Hall, Newcastle upon Tyne (APP/W4515/A/10/2139119).
66. Having regard to the range of hot foods on the menu offered by the appellant, it appears to me that there is potential for odours to arise which, if not adequately mitigated, could adversely affect the living conditions of the occupiers of surrounding residential properties. In that context, I noted at my site visit that the adjoining residential property has an extension at first-floor level in the rear elevation, with the windows in that extension being at approximately the same level as the cowl to the extract duct on the roof of the appeal property. There is also some evidence that odours from the appeal premises are already having an adverse effect on the living conditions of the occupiers of neighbouring residential properties in Benton Road, insofar as this is referred to in objections to planning application 17/01015/FUL (Appeal C).
67. Similarly, the appellant has provided no detailed information in relation to noise emissions from the extract system. The absence of complaints tends to suggest that the extract system has not caused problems in that regard to date, but again I cannot discount the possibility that this situation could change in the absence of adequate maintenance in the future.
68. I conclude that the development could potentially unacceptably harm the living conditions of the occupiers of the surrounding residential properties, specifically in relation to odours. I therefore conclude that the development is contrary to Policy DM5.19 of the Local Plan which, amongst other things, indicates that development proposals that may cause pollution through smell or fumes will be required to incorporate measures to prevent their pollution so as not to cause nuisance or unacceptable impacts to people.

Other considerations

69. I have found that the change of use from Cold Sandwich Shop/Delicatessen [A1] to Hot Food Takeaway with Home Delivery [A5] conflicts with the development plan. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that determination should be made otherwise than in accordance with the development plan.
70. It is evident from representations received in relation to planning application 17/01015/FUL that there is some local support for the A5 use. These representations/petition describe the A5 use of the appeal premises as an advantage to the area for which there is a great need. This local support

clearly weighs in favour of the development, but must be balanced against other representations received in relation to that application objecting to the A5 use.

71. Although made in the context of the appeal on ground (g), the appellant points out that the many employees who are dependent upon the A5 use will lose their jobs. However, there is no evidence before me as to the number of employees at risk of losing their jobs, or indeed whether they would actually do so. For that reason, I am therefore only able to attach limited weight to this consideration.
72. The appellant considers that the Council has not given appropriate weight to the fall-back situation of the previous office use, which would now be Use Class E of the Town and Country Planning (Use Classes) Order 1987 (as amended). The uses permitted by the new Use Class E include café/restaurant uses.
73. I have found that planning permission 15/00352/FUL has been implemented. In summary, Condition 4 of that permission restricts the use of the premises to that of a cold sandwich shop/delicatessen falling within Class A1 of the Town and Country Planning (Use Classes) Order 1987 (as amended) only and for no other purpose. Consequently, not only is the lawful planning use of the premises A1 rather than offices, any change to the uses within Use Class E is precluded by Condition 4 of planning permission 15/00352/FUL and would require express planning permission from the Council. Accordingly, I attach minimal weight to the fallback position identified by the appellant.

Conclusion in relation to Appeal A: the appeal on ground (a); Appeal C; and Appeal D

74. For the reasons set out above, the change of use from Cold Sandwich Shop/Delicatessen [A1] to Hot Food Takeaway with Home Delivery [A5] is contrary to the development plan. I have not been advised of any material considerations of sufficient weight, either taken individually or cumulatively, to indicate that determination should be made otherwise than in accordance with the development plan. The harms that I have identified above could not be overcome by the imposition of conditions.
75. I conclude that permission ought not be granted. Appeals C and D will be dismissed, and I will refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal A: the appeal on ground (f)

76. The appeal on ground (f) was conceded by Dr Lang in the event that the Appeal B did not succeed. Nevertheless, I have a duty to consider whether there are any other suitable alternatives to the requirements stated in the notice (as I propose to vary them) which would achieve the purpose of the notice with less cost or disruption to the appellant. Having regard to the requirements of the notice, I consider that the purpose of the notice must be to remedy the breach of planning control that has occurred. In that context, no suitable alternative requirements that would achieve the purpose of the notice are obvious to me.
77. Accordingly, the appeal on ground (f) fails.

Appeal A: the appeal on ground (g)

78. The ground of appeal is that the period for compliance specified in the notice falls short of what should reasonably be allowed. The period for compliance specified in the notice is four weeks.
79. The appellant's case on this ground of appeal, as set out on the Appeal Form, is that a business which causes no significant harm could be forced to shut, with many employees that are dependent upon it losing their jobs. A period of at least six months is sought in order that the activities can wind down steadily and without undue impact.
80. My task in relation to this ground of appeal is to balance the public interest in securing expeditious compliance with the enforcement notice against the private interest bound up in the development subject to the notice. In so doing, given that the appeal on ground (a) did not succeed, I must approach this ground of appeal on the basis that the breach of conditions does cause the harm alleged in the reasons for issuing the notice: namely, that the development unacceptably harms public health and could potentially unacceptably harm the living conditions of the occupiers of the surrounding residential properties¹⁰. For that reason, I cannot accept the appellant's underlying premise that his business is one which causes no significant harm.
81. My difficulty in discharging this task is that the appellant's grounds of appeal were briefly stated on the Appeal Form and were not subsequently expanded upon in evidence to the Inquiry. Consequently, there is no evidence before me as to the number of employees at risk of losing their jobs, or indeed whether they would actually do so. Similarly, there is no evidence before me that a period of six months is required to wind down the business.
82. Moreover, the appellant has not explained why the actual requirements of the notice could be complied with within the four weeks specified in the notice. Ceasing the use of the premises otherwise in compliance with Condition 4 of planning permission 15/00352/FUL is a relatively simple matter of changing the menu so that hot food is not offered beyond that ancillary or incidental to the A1 use. Similarly, ceasing the consumption of food or drink on the premises by customers is an operational matter that is wholly within the control of the appellant and requires no physical works to instigate. I have no evidence to suggest that the removal of the deep fat frying equipment could not be achieved within four weeks.
83. In weighing the balance between public and private interests, for the reasons set out above I consider that the public interest in expeditious compliance with the requirements of the enforcement notice outweighs private interest in extending that period of compliance. I am, therefore, not persuaded that there is any need to extend the period for compliance with the notice and am satisfied the period of compliance of four weeks stated in the notice is a proportionate response to the breach of planning control that has occurred.
84. Accordingly, the appeal on ground (g) fails.

¹⁰ In that respect, I am mindful that the notice alleges harm to highway safety but that the Council subsequently did not pursue that reason for issuing the notice.

Conclusion

85. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decisions

Appeal A Ref: APP/W4515/C/18/3215378

86. It is directed that the enforcement notice is varied by:

- deleting paragraph 5(1) of the notice in its entirety, and substitute there the words: "Cease the use of the premises otherwise than in accordance with condition 4 of planning permission 15/00352/FUL."
- deleting paragraph 5(2) of the notice in its entirety, and substitute there the words: "Cease the consumption of food and drink on the premises by customers."
- deleting paragraph 5(3) of the notice in its entirety, and substitute there the words: "Remove the deep fat frying equipment from the Land."

87. Subject to the variations, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B Ref: APP/W4515/X/18/3197818

88. The appeal is dismissed.

Appeal C Ref: APP/W4515/W/18/3197167

89. The appeal is dismissed.

Appeal D Ref: APP/W4515/W/18/3198298

90. The appeal is dismissed.

Paul Freer

INSPECTOR

APPEARANCES

FOR THE APPELLANT

Mr Phillip Harrison-Rowe	Appellant
Mr Russell Tierney	Previous operator
Dr Anton Lang MRTPI	Anton Lang Planning Services Limited

FOR THE LOCAL PLANNING AUTHORITY

Mr Piers Riley-Smith	Of Counsel, instructed by Ms Tessa Crowe, Solicitor, North Tyneside Metropolitan Borough Council
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He called:

Mr Kevin Logan	Enforcement Officer
Mr Will Laing MRTPI	Senior Planning Officer
Ms Louise Watson	Senior Manager for Legal Services and Registration Services and Monitoring Officer
Ms Tessa Crowe	Solicitor