
Appeal Decision

Site visit made on 22 February 2024

by R Satheesan BSc PGCert MSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 March 2024

Appeal Ref: APP/G5750/C/22/3310747

37 Woodgrange Road, Forest Gate, London E7 8BA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Shedzad Munir against an enforcement notice issued by the Council of the London Borough of Newham.
 - The enforcement notice was issued on 21 October 2022.
 - The breach of planning control as alleged in the notice is without planning permission the material change of use to a hot food takeaway (*Sui Generis*).
 - The requirements of the notice are:
 1. Cease the use of the premises as a hot food takeaway.
 2. Remove from the property all fixtures and fittings which solely facilitate the use of the site as a hot food takeaway.
 3. On completion of steps 1 and 2, remove all materials and debris from the site.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2) (c) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. The appeal is dismissed, and the enforcement notice is upheld

Application for costs

2. An application for costs was made by Mr Shedzad Munir against the London Borough of Newham. This application is the subject of a separate Decision.

The appeal on ground (c)

3. Ground (c) arises where an appellant seeks to argue that the matters alleged by the enforcement notice do not constitute a breach of planning control. The onus of proof lies with the appellant, the relevant test of the evidence being the balance of probability.
4. The concept of a material change of use (MCU) is not defined in statute or statutory instrument. The basic approach is that, for an MCU to have occurred, there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree.
5. The appellant considers that there has been no material change of use to a hot food takeaway and that the use of the premises is a restaurant and operates

similar to other food establishments such as Nando's and Pizza Hut, and is in accordance with the approved planning permission for the change of use from betting shop (sui generis) to a restaurant (Class E)¹. It is further stated that there is no condition which restricts an ancillary takeaway service from operating and that seating is provided for 30-35 persons in accordance with the approved planning permission. However, the Council argue that the current use occurring is not representative of the restaurant use that was granted permission.

6. The primary use of a restaurant is to serve food for consumption by customers on the premises. Occasional take-away sales (unless prohibited by a planning condition) or customers occasionally choosing to take rather than complete the end of their meal, would not necessarily be incompatible with the primary restaurant use. The primary use of a hot food takeaway is for the sale of hot food where consumption of that food is mostly undertaken off the premises.
7. Whilst the appellant states that the takeaway element is ancillary and amounts to less than 20% of their income, no corroborating evidence or sales data has been submitted to support this claim. Furthermore, no details of online orders have been provided. This would form part of the takeaway service, and the evidence provided by the parties indicates that the business does provide online orders (via Ubereats.com and Justeat.com). As such limited evidence has been submitted from either party as to whether hot food take-away sales are at a scale so as to amount to a primary use of the premises.
8. Notwithstanding this, in an email to the Council's Licensing Department for such a License, on 11 July 2022, the appellant stated that the business would be "more a takeaway/delivery service". This emphatic statement regarding the proposed use of the premises does not suggest any ambiguity or confusion.
9. Food is advertised for sale by way of large displays boards/menu above the sales counter. The type of food prepared and sold to customers comprise a variety of 'fast foods' which includes burgers, fries, onion rings, wraps, kebabs, chicken wings, and chicken and lamb shawarma, and are generally served with disposable packaging and cutlery, which is more akin to a takeaway. Whilst the premises provides seating for approximately 30 customers, all food on site is ordered and paid for at the counter, and therefore, all staff service is limited to taking orders/payment and the preparation of food, rather than table service. I also observed during my site inspection between 12:50 and 13:10 on a weekday that despite the premises being open for business, during typical lunch time hours, there were no customers consuming food onsite.
10. From the evidence presented and from what I saw during my site visit, the character of the premises has changed significantly from that of a restaurant, and the takeaway sales are not ancillary to the preparation of food for consumption on the premises. This change is materially different from the restaurant use previously approved.
11. On the balance of probability and based on all the evidence before me it appears that a material change of use has occurred to a hot food takeaway. Planning permission is required for such a change of use. There is none in place and the change of use is not permitted development. There has therefore been

¹ Council ref: 20/02674/FUL approved on 9 March 2021.

a breach of planning control and the appellant has not discharged the onus on him to demonstrate otherwise.

12. Accordingly, the appeal fails on ground (c).

Conclusion

13. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

R Satheesan

INSPECTOR