



Appeal Decision

Site visit made on 5 December 2024

by **David Jones BSc (Hons) MPlan MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 19 March 2025

Appeal Ref: APP/C5690/C/23/3327709

271 New Cross Road, London SE14 6AR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Mr My Quang Ho against an enforcement notice issued by the Council of the London Borough of Lewisham.
 - The notice was issued on 20 July 2023.
 - The breach of planning control as alleged in the notice is the unauthorised construction of extraction units and change of use without planning permission in conservation area.
 - The requirements of the notice are:
 1. Cease the use of the property as a hot food takeaway.
 2. Remove fixtures and fittings (namely, but not limited to, cooking facilities and fridges) from the property in their entirety that facilitate the unauthorised use as a hot food takeaway.
 3. Remove all extraction units (namely, but not limited to, ducts, flues, vents, and any supporting structure) in its entirety.
 4. Make good all damage resulting from compliance with the requirements of this notice.
 5. Remove all materials, debris, waste and equipment resulting from compliance with the above requirements of this notice from the land.
 - The period for compliance with the requirements is: 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (b) of the Town and Country Planning Act 1990 (as amended). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. It is directed that the enforcement notice is corrected by:
 - In section 3 the deletion of the alleged breach of planning control in its entirety and replacement with “The material change of use of the premises to a hot food takeaway and the installation of extraction units”.
2. Subject to the above correction, the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.

Preliminary Matters

3. The appeal was made under ground (a). However, in his submissions the appellant has stated that, in his view, the development is a restaurant and not a hot food takeaway as alleged in the enforcement notice. That argument amounts to a hidden ground (b) appeal. Both parties were afforded the opportunity to comment on the ground (b) appeal, and I have had regard to the comments received in my determination of the appeal.
4. The revised National Planning Policy Framework (“the Framework”) was published in December 2024. I afforded the main parties the opportunity to comment on the

Framework revisions, however no responses were received. I have therefore had regard to the revised Framework in my consideration of this appeal.

The Notice

5. It is important for me to get the notice in order. On an appeal any defect, error, or misdescription in an enforcement notice may be corrected using the powers available in section 176(1)(a) of the Town and Country Planning Act 1990 as amended, or the terms varied, where the correction or variation will not cause injustice to the appellant or the local planning authority.
6. The alleged breach of planning control in section 3 of the notice alleges two types of development, operational development comprising the installation of extraction units, and a “change of use”. The “change of use” of the premises is, in itself, not development requiring planning permission. I shall therefore correct the notice to refer to a “material change of use” of the premises as defined in section 55(1) of the 1990 Act.
7. The allegation in section 3 of the notice also fails to specify what the use of the premises has been changed to. This is a significant omission, nevertheless it is clear from reading both the reasons for issuing the notice and the requirements that the allegation relates to a hot food takeaway operating from the premises. I am therefore content that the notice is clear within its four corners what the breach of planning control is, and what must be done to remedy it. Furthermore, having read the appellant’s case and their appeal under ground (a), it is clearly understood that the allegation relates to the material change of use of the premises to a hot food takeaway. I am therefore satisfied that this correction of the notice would not cause injustice to either party in this case.

Ground (b)

8. To succeed on this ground, the onus is on the appellant to demonstrate on the balance of probabilities that the breach of planning control has not occurred as a matter of fact.
9. There is no dispute that the extraction units have been installed. However, the appellant considers that the premises is in fact a restaurant and not a hot food takeaway. The appellant refers to the premises having a seating capacity of around twelve people. This is made up of four tables, each capable of seating two people, and a further counter table providing additional seating capacity. This accords with the layout of the premises at the time of my site visit.
10. Other than the availability of seating, the appellant has provided no supporting evidence to demonstrate that hot food takeaway sales have not been taking place at the premises. On the contrary, the appellant has confirmed that hot food takeaways are available.
11. It was readily apparent from my site visit that the internal layout and seating arrangements were more suited to people waiting for food to be cooked rather than eating in and enjoying a meal. Much of the ground floor is taken up for cooking/food preparation and there is a counter with food and drink on display where customers will place their order. The prominent location of the counter opposite the shop window and main entrance gives the appearance of hot-food being for sale for consumption mostly off the premises.

12. Whilst some customers may on occasion choose to eat in the premises, I find it highly probable that these would be in the minority and there is no doubt in my mind that the primary use of the premises is as a hot food takeaway. Accordingly, the appeal on ground (b) fails.

Ground (a) – the deemed planning application

13. The main issues in this case are the effect of the development on:

- The health of local people, in particular school-aged children; and
- The living conditions of the occupiers of neighbouring residential properties, having particular regard to noise and odour.

Health

14. The appeal site is located on the north side of New Cross Road within New Cross District Centre. The property is a three-storey building with the hot food takeaway operating from the ground floor, with residential accommodation on the floors above. The surrounding area comprises a mix of different properties and uses, although ground floor units are predominantly commercial properties including shops, public houses, and hot-food takeaways.
15. Policy E9 of the London Plan 2021 (LP) states at sub-paragraph D that proposals including hot-food takeaways should not be permitted within 400 metres walking distance from the entrances and exits of existing or proposed primary or secondary schools. Policy DM18 of the Lewisham Development Management Local Plan (adopted November 2014) (DMLP) also sets out that planning permission will not be granted for new hot food takeaway shops that fall within 400 metres of the boundary of a primary or secondary school.
16. The appellant does not dispute that the appeal site is located within 400 metres from St James Hatcham Church of England School, and therefore the use is contrary to Policy E9 of the LP and Policy DM18 of the DMLP. I acknowledge that there are other hot-food establishments near to the appeal site, however the distance is set out within both the LP and DMLP and is not subjective. Additionally, I do not know the circumstances leading to the establishment of the other take-aways.
17. The appellant contends that the hot food currently available at the premises is low-calorie, healthy food which is made using only fresh, unprocessed ingredients including vegetables, herbs, and protein. As a result, the appellant does not consider there to be any negative health impacts arising. It is further stated that his customers are not school children but are instead local people and students from the nearby University.
18. I have given consideration to whether a personal planning condition could restrict the use, given the appellant's position that the food for sale is healthy. The Planning Practice Guidance makes it clear that planning permission runs with the land and that it is rarely appropriate to provide otherwise, stating that it would be exceptional to do so. The submitted evidence does not indicate that there are any exceptional circumstances in this case. The appellant also suggested a planning condition stipulating that any permission would be granted for a temporary period of two years. Such a condition though would not overcome the policy conflict set out above.

19. Policy E9 of the LP states at sub-paragraph E that where development proposals involving hot food takeaway uses are permitted, boroughs should encourage operators to comply with the Healthier Catering Commitment standards (HCCS). Where justified, boroughs should ensure compliance with the HCCS through use of a condition. I have not been provided with any suggested wording for a HCCS planning condition. Nevertheless, it would seem extremely difficult for the Council to effectively and continually monitor what food is sold from such a business or who it is sold to. Consequently, such a condition would fail at least one of the tests for planning conditions as set out in the Framework as it would not be enforceable.
20. Based on the evidence before me, the site is located within 400 metres of a school and therefore the development does not comply with LP Policy E9 or DMLP Policy DM18. It has not been demonstrated that the continued use of the premises as a hot food takeaway would not have a harmful effect on the health of local people, and in particular school-aged children.
21. Paragraph 97 of the revised Framework also sets out that applications for hot food takeaways and fast food outlets should be refused a) within walking distance of schools and other places where children and young people congregate, unless the location is within a designated town centre; or b) in locations where there is evidence that a concentration of such uses is having an adverse impact on local health, pollution or anti-social behaviour. The approach of both the LP and DMLP in these respects is largely consistent with the most recent government policy as set out within the Framework. Whilst the Framework does afford some discretion where sites are located within town centres, this does not outweigh my conclusion on this main issue.

Living Conditions

22. The appeal site is in a district centre location, with a range of other commercial uses nearby including shops, public houses, and other hot food takeaways. Accordingly, prior to the commencement of the use and installation of the extraction units, the occupiers of neighbouring residential properties probably already experienced a certain amount of noise and disturbance, including from vehicular traffic, deliveries, and pedestrian comings and goings. Nevertheless, there are residential units on the upper floors of the appeal building, and therefore there is the potential for the living conditions of neighbouring occupiers to be affected by the new hot-food takeaway use.
23. Hot food takeaways have the potential to adversely affect the living conditions of nearby residents by virtue of noise and odour caused by cooking inside the premises and any associated extraction units. The Council are of the view that as the extraction units are located at a low level directly below the residential accommodation above, the living conditions of occupiers are adversely impacted by way of noise and odour.
24. In support of this appeal the appellant has provided a description of the air extraction system and process, photographs of the extraction system and units, and a quotation for the ventilation system. However, no site-specific technical assessments such as a noise assessment, noise mitigation measures, or details of odour abatement technologies have been submitted with this appeal to demonstrate that neighbouring residential occupiers are not being affected by this new use.

25. In the absence of a detailed technical assessment, and particularly given the proximity of neighbouring residential properties, there is no reasonable assurance that the extraction units are not exposing neighbours to levels of noise and odour at a level which would have an adverse impact on their living conditions. In my view, it would also not be appropriate to grant planning permission subject to a condition requiring the submission to and approval by the Council of further details regarding the control of noise and odour emissions from the extraction units. This is due to it being unclear whether it would be capable of successfully addressing any issues, or that it may potentially involve the installation of a new extraction unit which would likely require planning permission to be granted for development which is not, and not part of, the development enforced against.
26. For the above reasons, and in the absence of further clear evidence, I conclude that the development harms the living conditions of occupiers of neighbouring residential properties, with regard to noise and odour. The development is therefore in conflict with Policy SI1 of the LP, Policy 9 of the Lewisham Core Strategy Development Plan Document (adopted June 2011), and Policy 23 of the DMLP. These seek, amongst other things, to ensure that developments improve air quality, and do not lead to further deterioration of existing poor air quality,

Other Matters

27. I note that the appellant has put significant financial resources into the business, which provides employment for both him and other staff. This provides an economic benefit to those people employed as well as the local area, which are positive factors that weigh in favour of the development.
28. Finally, the appellant alleges that other hot food takeaways have opened in the vicinity of the appeal site without the necessary planning permission. The investigation of alleged breaches of planning control are matters for the Council, and in any event the existence of other unauthorised uses do not justify the appeal scheme or overcome the harms identified.

Conclusion on ground (a)

29. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires planning decisions to be made in accordance with the development plan unless material considerations indicate otherwise. For all the reasons outlined above, the development conflicts with the development plan taken as a whole. None of the other matters raised outweigh the harms identified. Therefore, there are no material considerations that would lead me to a decision other than in accordance with the development plan in this case.
30. I therefore conclude that for the reasons set out above and with regard to all other matters, the appeal on ground (a) fails.

Conclusion

31. For the reasons given above I conclude that the appeal does not succeed. I have upheld the enforcement notice with a correction and refuse to grant planning permission on the deemed application.

David Jones

INSPECTOR