



dated 21 March 2019

Appellant's Statement of Case and Application for Costs

in relation to appeal against the Enforcement Notice issued by the London Borough of Camden pursuant to section 172 of the Town and Country Planning Act 1990 in respect of land at 101 Brecknock Road, London, N7 0DA (London Borough of Camden Reference Number EN17/0004)

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1 Introduction

1.1 This Statement of Case is submitted on behalf of Bryanston Investments Limited (the **Appellant**) in support of the enforcement notice appeal concerning alleged breaches of planning control at 101 Brecknock Road, London, N7 0DA (the **Property**) (reference APP/X5210/C/18/3207640) (the **Appeal**). The Appellant is the freehold owner of the Property.

1.2 On 18 June 2018, the London Borough of Camden (the **Council**) served an enforcement under reference EN17/0004 (the **Enforcement Notice**). A copy of the Enforcement Notice is enclosed with this Statement of Case at Appendix 1.¹ The Enforcement Notice contains details of alleged breaches of planning control under Section 171A(1)(a) of the Town and Country Planning Act 1990 (as amended) (the **Act**) namely that:

"Without planning permission: Alterations to the shopfront and the change of use of the public house to form a retail convenience store".

1.3 The Enforcement Notice required the Appellant to take the following steps (the **Requirements**):

1.3.1 *permanently cease use of the property as a retail convenience store;*

1.3.2 *re-instate the frontages to the property as depicted in the photographs attached at Appendix A and B and*

1.3.3 *make good any damage and remove from the property all constituent materials resulting from the above works.*

1.4 The Enforcement Notice imposed a three month deadline from the date the Enforcement Notice took effect (27 July 2018) to comply with the Requirements.

1.5 The Appellant considers that the matters alleged in the Enforcement Notice do not constitute a breach of planning control. This Statement will demonstrate that the change of use carried out at the Premises was permitted development pursuant to the *Town and Country Planning (General Permitted Development) Order 2015* (the **Order**) and that the works carried out to the shop front did not constitute development for the purposes of the Act. The Appellant shall also demonstrate that planning permission should be granted retrospectively for the development in question.

¹ The Enforcement Notice is dated 15 June 2018 (a Friday); but the notice was not served until Monday 18 June 2018.

2 Background

- 2.1 The Property is situated on a corner plot at the junction of Brecknock Road and Torriano Avenue in the London Borough of Camden. It comprises four above ground storeys and a basement.
- 2.2 When the Appellant purchased the Property in August 2014, the ground floor and ancillary basement were in use as an establishment, known as The Leighton Arms. The first floor and second floor provided ancillary residential accommodation. The third storey had not yet been constructed.
- 2.3 In December 2015, planning permission was granted for *"the erection of five new residential units to be provided on the upper floors of the existing building as well as a single storey roof extension in accordance with the terms of the application ref 2014/4554/P dated 10 July 2014"* (Ref: APP/X5210/W/15/3095242).
- 2.4 A further planning permission was granted on 16 January 2017 for the erection of two four storey houses (ref: 2016/0372/P). Those houses are to be situated immediately to the rear of the Property and will be accessed via Torriano Avenue. The houses are currently under construction.
- 2.5 The Appeal concerns the ground floor and basement of the Property, which until March 2016 comprised The Leighton Arms (the **Premises**).
- 2.6 A statutory declaration provided by the former landlady of The Leighton Arms, Jeanette Brosnan, is enclosed at Appendix 2 of this Statement and we refer to the declaration in further detail at section 4.14. Ms Brosnan's declaration makes it clear that by the beginning of 2016 the continued operation of The Leighton Arms was no longer viable. Aware of the pressures facing The Leighton Arms and eager for it to remain open, the Appellant offered Ms Brosnan rent reductions and rent free periods with a view to preserving the operation of the establishment. But the offers were declined and, in March 2016, The Leighton Arms closed.
- 2.7 The Appellant's intention was to let the Premises as a public house or restaurant and it instructed a firm of estate agents and property management specialists, David Astburys, to market the Premises. Enclosed at Appendix 37 is a letter sent by Aaron Cox, Managing Director of David Astburys. Mr Cox describes the efforts made by the former landlady to make a success of the business and confirms that his firm was instructed by the Appellant to market the Premises as a public house or restaurant. Mr Cox concludes that it was only "when [finding another pub/restaurant operator] proved futile, [that] we advised that you should consider other types of businesses".

- 2.8 In August 2016, L A Foods (UK) Limited (the **Tenant**) approached the Appellant to negotiate a lease of the Premises for use as a convenience store. We refer in further detail to the negotiation between the parties and to the substantial works undertaken to the Premises to facilitate its conversion to a convenience store in section 4.85 of this Statement.
- 2.9 On 12 October 2016, the Appellant and the Tenant entered into an Agreement for Lease of the Premises. The Agreement for Lease is enclosed at Appendix 3.
- 2.10 At the time lease negotiations were taking place, the extant version of the Order permitted the following development:
- "Development consisting of a change of use of a building from a use falling within Class A3 (restaurants and cafes), A4 (drinking establishments) or A5 (hot food takeaways) of the Schedule to the Use Classes Order, to a use falling within Class A1 (shops) or Class A2 (financial and professional services) of that Schedule."*
- 2.11 The Order also stated that where the change of use was from a use falling within Class A4, development was only permitted subject to compliance with the following conditions:
- "(2) Before beginning the development the developer must send a written request to the local planning authority as to whether the building has been nominated, which must include –*
- (a) the address of the building;*
 - (b) the developer's contact address; and*
 - (c) the developer's email address if the developer is content to receive communications electronically."*
- 2.12 As stated in the Appellant's grounds of appeal and as will be made clear in this Statement, the Appellant's primary position is that the lawful use of the Premises prior to the change of use fell within Class A3 of the *Town and Country Planning (Use Classes) Order 1987* (the **Use Classes Order**). Without prejudice to this position, the Appellant also maintains that it complied with the conditions of the Order set out above. This means that if the lawful use of the Premises is considered to have fallen within Class A4 of the Use Classes Order, the change of use to a retail store constituted permitted development pursuant to Part 3, Schedule 2 of the Order.
- 2.13 On 9 August 2016, Kevin McMeel of Boyes Sutton & Perry (the Appellant's former legal advisers) wrote to the Council to request confirmation as to whether The Leighton Arms

had been nominated as an asset of community value per the requirements of paragraph A.2(2) Part 3, Schedule 2 of the Order. We enclose a copy of this written request (the **Request**) at Appendix 4. The Council issued no response to the Request.

- 2.14 The Council has averred that it never received the Request but we enclose with this Statement evidence to the contrary.² Annexed to the Request at Appendix 4 is a copy of a signed delivery receipt. The receipt is dated 10 August 2016, timed at 8:16am, and lists the Council's office address as the location to which the Request was delivered. We also attach at Appendix 5 a statutory declaration provided by Kevin McMeel (the solicitor instructed by the Appellant to send the Request) confirming that he did prepare the Request and that he did send it to the Council on 9 August 2016. We also enclose at Appendix 6 a copy of an email written by the Council's Planning Enforcement Manager in which it is clearly made out that the Request was received. An extract from the email reads:

"It appears that the developers had submitted to the council the documents required for them to be able to benefit from permitted development rights back in 2016 to lawfully allow the change, however the conditions require that they implement the change within 12 months of the ACV (asset of community value) notice date. We don't believe that the A1 use was implemented within 12 Months from the submitted ACV notice date (10/08/2016), although the developer disagrees with us on this point."

- 2.15 The Agreement for Lease was signed on 12 October 2016, sixty four days after the date of the Request. As Kevin McMeel confirms in his statutory declaration enclosed at Appendix 5, exchange of the Agreement for Lease was intentionally delayed until the expiry of the 56 day period mentioned in paragraph A.2(4) Part 3, Schedule 2 of the Order. After expiry of this period, the parties entered into the agreement in the knowledge that a change of use of the Premises to a convenience store would constitute permitted development if that change were completed within 12 months of the date of the Request. If the "date of the Request" is the date the Request was served upon the Council (i.e. 10 August 2016), the date by which the change of use must have completed to constitute permitted development was 9 August 2017 (the **Relevant Date**).

- 2.16 By the date the Agreement for Lease was entered into, the Appellant had completed a substantial programme of works to convert the Premises into a unit suitable for use as a convenience store. We refer in detail to the works carried out at section 4.66 of this Statement.

² See email sent by the Planning Inspectorate on 16 October 2018, enclosing the Council's comments on the Appellant's grounds of appeal.

- 2.17 When the Appellant's works were substantially completed in October 2016, the Premises were handed over to the Tenant. Enclosed at Appendix 28 is a copy of the main contractor's Site Handover document dated 17 October 2016. At that date, the contractor had not fully isolated the ground floor from parts of the Property where works were still ongoing. This meant that formal handover was delayed until 7 November 2016. A copy of the letter issued by Construction Health & Safety Limited confirming the handover of the Premises to the Tenant is contained at Appendix 29.
- 2.18 With an Agreement for Lease and deemed planning permission for the change of use in place, and with occupation of the Premises secured, the Tenant then initiated the process of obtaining an appropriate premises licence for the convenience store and instructed a team to design the store layout. The variation to the premises licences was granted in March 2017 but subject to conditions that were commercially unacceptable to the Tenant. The Tenant appealed the decision but no settlement was reached until October 2017. Full details of the licensing decision and the implications of the delayed settlement are set out in section 4.69 of this Statement.
- 2.19 Aware that a change of use to a retail store had to be completed by the Relevant Date, the Tenant opened a shop at the Premises on 1 August 2017. We enclose with this Statement a suite of contemporaneous documents that evidence the store opening. We refer to this suite of documents in further detail in section 4.29.
- 2.20 By the Relevant Date, not only had The Leighton Arms closed, not only had the bar and all public house furniture been removed, not only had structural and internal works been carried out so that the unit resembled a shop, not only had fridges, a goods lifts, shelving and tills been installed, not only had a premises licence variation been granted such that consumption of alcohol on the premises would have been a criminal offence, but also a shop within the meaning of class A1 of the Use Classes Order had opened to members of the public. The Council will argue that no change of use had taken place by the Relevant Date; the evidence presented by the Appellant demonstrates emphatically that the opposite is true.
- 2.21 The shop was not generating sufficient income and it closed on 22 August 2017. It will be made clear in this Statement that the principal reason for the shop only opening temporarily was the Council's delay in handling the premises licence appeal. We refer to the conduct of the Council's licensing team in section 4.79 of this Statement. It was not until October 2017 (some ten months after an application for the premises licence variation was initially submitted) that the Council's licensing committee agreed to settle the premises licence dispute on commercially acceptable terms. At this stage, the Tenant decided to continue its comprehensive fit out of the Premises and to enter into the lease.

The lease was completed on 24 January 2018 and fit out works completed on 29 June 2018. The shop re-opened on 30 June 2018 and is now trading successfully, attracting around 3,500 – 4,000 customers per week.

3 **Grounds of Appeal**

3.1 Section 174 of the Act states:

"174. Appeal against enforcement notice.

(1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.

(2) An appeal may be brought on any of the following grounds –

- (a) that, in respect of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;*
- (b) that those matters have not occurred;*
- (c) that those matters (if they occurred) do not constitute a breach of planning control;*
- (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;*
- (e) that copies of the enforcement notice were not served as required by section 72;*
- (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;*
- (g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."*

3.2 The Appeal is made under sections 174(2)(a) (**Ground A**), 174(2)(c) (**Ground C**), and section 174(2)(g) (**Ground G**) of the Act.

3.3 The Appellant's primary position is that the matters alleged in the Enforcement Notice do not constitute a breach of planning control. For this reason, this Statement addresses the Appellant's Ground C submissions before those made under Grounds A and G. The

matters alleged in the Enforcement Notice (the change of use; and the shop front alterations) are also addressed under separate headings.

4 **Ground C – Change of use**

4.1 Section 55(1) of the Act states that “*development means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*”

4.2 It is common ground that the change of use from a restaurant or public house to a shop is a material change of use for the purposes of the Act. It is also agreed that the existing Nisa Local store falls within Class A1 of the Use Classes Order.

4.3 At issue is whether the change of use to A1 retail was permitted development under the Order. Specifically, the issues are whether:

4.3.1 the former use of the Premises fell within Class A3 or Class A4 of the Use Classes Order;

4.3.2 the change of use from Class A3/Class A4 to Class A1 was permitted development under the Order; and

4.3.3 at what point the change of use to an A1 shop completed.

4.4 **Did the use of The Leighton Arms fall within Class A3 or Class A4?**

4.5 The evidence accompanying this Statement makes it clear that the use carried on at The Leighton Arms fell within Class A3 the Use Classes Order.

a) The planning unit

4.6 Although the Council has not disputed this point, it should be emphasised that the Premises is a distinct planning unit from the separate unit(s) comprising the residential flats on the upper storeys of the Property, which are accessed independently via Torriano Avenue. The Premises is a physically separate area occupied for a purpose which is wholly different and unrelated to the residential flats.

b) A3/A4 permitted development

4.7 In April 2005, the Use Classes Order was amended and separate use classes were created for Class A3 (food and drink), Class A4 (drinking establishments) and Class A5 (takeaways).

- 4.8 The new class A4 embraced *"use as a public house, wine-bar or other drinking establishment"*. One interpretation to draw from the language of Class A4 is that all public houses, bars, bistros and other establishments where people commonly go to drink alcohol fall within Class A4. But this interpretation is wrong.
- 4.9 Class A4 is actually very narrow in terms of the uses it embraces and it will only capture establishments that serve drink with no more than a very limited food offering. A public house serving traditional bar snacks *will* fall within Class A4, but where that food offering is more substantial, Class A4 is not the appropriate designation. This is because Class A3 encompasses a similar but far broader category of uses.
- 4.10 Class A3 (post the 2005 amendment) embraces: *"use for the sale of **food and drink** for consumption on the premises."*
- 4.11 This means that where an establishment that nominally is a public house (and even looks like a public house) sells both food and drink, and the sale of food is not functionally dependent on the sale of drink (i.e. the sale of food is not ancillary to the sale of drink) the use of that establishment must fall within Class A3 (not A4) of the Use Classes Order.
- 4.12 It is wrong to conclude that an establishment falls within Class A4 simply because it has an appearance or name that one would typically associate with a public house. One must look beyond that initial impression and investigate the use that is actually carried on. If that investigation reveals that the establishment has a food offering that is not functionally dependent on the sale of drink, and that the primary use of that establishment is the sale of food and drink, the establishment will not be a public house for the purposes of Class A4, it will be a drinking and eating establishment under Class A3.
- 4.13 The food offering at The Leighton Arms is therefore a central issue in this Appeal. If that offering was ancillary to drinks sales, the use class designation of the former Premises must be A4. But if food sales comprised an independent use or if there was a single, mixed use (i.e. the sale of food and drink) the appropriate designation must be class A3.
- 4.14 We have spoken with the former landlady of The Leighton Arms (Jeanette Brosnan) and Ms Brosnan has provided the statutory declaration enclosed at Appendix 2 (**Ms Brosnan's Statement**). We have also carried out a thorough investigation into the past use of the Premises, which has revealed the evidence accompanying this Statement. The picture established by Ms Brosnan's Statement and by the accompanying evidence is clear: the food offering at The Leighton Arms formed a substantial part of the operation's business:

- 4.14.1 When Ms Brosnan acquired the Premises in July 2008, she decided that The Leighton Arms would need to offer food to enable the establishment to survive. Paragraph 2 of Ms Brosnan's Statement states:
- " We recognised that in order to drive profits we would need to offer food which has a much greater sales margin. This is not something which was unique to us, indeed most establishments these days need to diversify in order to survive.... We therefore set about investing in the installation of a new kitchen including an oven on the ground floor in or around October 2008."*
- 4.14.2 The Leighton Arms offered hot food each day of the week. The daily menu would include pie and mash, curry, stews, pizzas, scampi, sausages, ham and egg and chips, soup, and hot and cold sandwiches (see paragraph 7 of Ms Brosnan's statement). Ms Brosnan would also mark the specials of the day on a chalk board on the pavement outside the Premises, as shown on the photograph enclosed at Exhibit 1 of Ms Brosnan's Statement
- 4.14.3 The Leighton Arms offered tea, coffee and cakes throughout the year. The photograph contained at Exhibit 1 of Ms Brosnan's Statement shows the hot beverage A-board that was displayed outside the Premises. As Ms Brosnan explains at paragraph 14 of her statement, her intention was to diversify The Leighton Arms's offering. She wanted to ensure that passers-by knew that The Leighton Arms did not just offer hot food and alcohol but that it was also a place where passers-by "could come to just eat or grab a cup of tea";
- 4.14.4 The Leighton Arms's Facebook and Twitter pages listed the operation as a gastropub, so that "people knew we had a traditional food offering" (paragraph 9, Ms Brosnan's Statement and the image shown at Appendix 38);
- 4.14.5 Ms Brosnan purchased food supplies for use in the commercial kitchen from the wholesale suppliers, Booker. Ms Brosnan has provided a series of VAT returns (enclosed at Exhibit 3 of Ms Brosnan's Statement) which show purchases made from Booker. Ms Brosnan states: *"I made multiple purchases from Booker each month, and these transactions formed a substantial proportion of The Leighton Arms' total expenditure"* (paragraph 10, Ms Brosnan's Statement);
- 4.14.6 The Leighton Arms served full breakfasts and roast dinners on Sundays. There would often be 50-60 roast dinner sittings each Sunday (*paragraph 7, Ms Brosnan's Statement*);

4.14.7 The Leighton Arms held regular "themed events" and would theme the food offering accordingly. Examples would include Christmas dinners at Christmas, haggis on Burns Night, valentines dinners, New Year's Eve buffets, summer barbeques, and Easter Sunday lunches (*paragraph 15, Ms Brosnan's Statement*). Hot and cold buffets would also be provided at birthday parties, christenings, funerals and retirement parties (*paragraph 17, Ms Brosnan's Statement*).

4.14.8 The Leighton Arms had a food hygiene rating published by the Food Standards Agency. The Food Standards Agency only issues ratings to establishments where food is supplied, sold or consumed. A food safety officer will inspect a business to check that it follows food hygiene law so that the food is safe to eat. A copy of the food hygiene certificate relating to The Leighton Arms is enclosed at Appendix 12.

4.14.9 Enclosed at Appendix 42 is a statutory declaration provided Robert Maynard, the former partner of Jeanette Brosnan and landlord of The Leighton Arms. Mr Maynard explains:

"I prepared hot food at The Leighton Arms on a daily basis. Tables would be laid out with food menus, members of staff would take orders at the tables, and we would serve food to the tables. Customers would enjoy their meal and settle their bill after eating. In this way, The Leighton Arms operated much in the same way as a typical restaurant. The food was typically a "Best of British" offering and would include roast dinners, pie and mash, stews, sausages, scampi, soup, and hot and cold sandwiches."

4.15 Ms Brosnan concludes at paragraph 12 of her statement that:

"I would estimate that on an average month food sales accounted for approximately 45% of our total sales. This could be a lot more when we had catered for an event or had a very successful themed event. In those circumstances food could account for up to 60% of total sales."

4.16 The Appellant has presented this evidence to David Forsdick QC of Landmark Chambers and has enquired whether, in view of this evidence, the use of The Leighton Arms fell within Class A3 or A4. David Forsdick's full opinion is enclosed at Appendix 17. His conclusion (and ours) is that there is a good argument that the use at the Premises had shifted over time to an A3 use as the food element grew to replace the loss of A4 custom. Food sales were plainly not functionally dependent upon the sale of drink; the food offering formed a substantial part of the business, and a substantial attraction to customers, in its

own right. The Leighton Arms had a single, mixed use for the sale of food and drink and this use must fall within Class A3 of the Use Classes Order.

4.17 A final point to raise in respect of the A3/A4 designation is that prior reference to the Premises as a Class A4 establishment should not influence the Inspector's decision in this appeal. For example, when submitting its application for planning permission under reference 2014/4554/P, the Appellant referred to the existing use as falling within Class A4. The Council may also point out that by virtue of submitting the Request, the Appellant acknowledged that a Class A4 use existed.

4.18 These references should have no bearing on the assessment of the use at The Leighton Arms. Our client's previous legal adviser may have been of the view that the Premises was an A4 public house when he submitted the written request in August 2016, and the same view may have led the applicant to select Class A4 on the application form to which we refer to above. However, the use of the Premises should not be determined by reference to the actions of the Appellant's former advisers nor by wording on historic planning applications; instead, the use of the Premises must be determined by reference to its actual use assessed against the provisions of the Use Classes Order. This is the assessment we have carried out above, which indicates clearly that the use of the Premises falls within Class A3.

4.19 **Is the change of use from A3 (or A4) to A1 permitted development under the Order?**

a) A3 to A1

4.20 Development comprising a change of use from Class A3 to Class A1 is permitted development under Class A, Part 3, Schedule 2 of the Order. As the use of The Leighton Arms fell within Class A3, the change of use of the Premises to an A1 convenience store was permitted development.

b) A4 to A1

4.21 Without prejudice to the Appellant's position that the use at The Leighton Arms fell within Class A3, this Statement addresses why the change of use would have been lawful even if the use of The Leighton Arms were to have fallen within Class A4.

4.22 The version of the Order in force at the time negotiations for the lease of the Premises took place permitted:

"Development consisting of a change of use of a building from a use falling within Class A3 (restaurants and cafes), A4 (drinking establishments) or A5 (hot food takeaways) of the

Schedule to the Use Classes Order, to a use falling within Class A1 (shops) or Class A2 (financial and professional services) of that Schedule."

4.23 The Order also stated that where the change of use was from a use falling within Class A4, development was only permitted subject to compliance with the following conditions:

"(2) *Before beginning the development the developer must send a written request to the local planning authority as to whether the building has been nominated, which must include –*

(a) the address of the building;

(b) the developer's contact address; and

(c) the developer's email address if the developer is content to receive communications electronically.

(3) If the building is nominated, whether at the date of request under paragraph A.2(2) or no a later date, the local planning authority must notify the developer as soon as is reasonably practicable after it is aware of the nomination, and on notification development is not permitted for the specified period.

(4) The development must not begin before the expiry of a period of 56 days following the date of request under paragraph A.2(2) and must be completed within a period of 1 year of the date of that request."

4.24 The Appellant's former legal adviser submitted a written request to the Council dated 9 August 2016 (defined previously in this Statement as the Request).

4.25 The Order was amended by the *Town and Country Planning (General Permitted Development) (England) (Amendment) (No.2) Order 2017* (the **Amending Order**), with the effect that from 23 May 2017 permitted development rights relating to A4 drinking establishments were removed. However, paragraph 5 of the Amending Order set out transitional provisions. Under these provisions, where the 56 day period referred to in paragraph A.2(4) expired before 23 May 2017, the planning permission granted under class A of the Order would continue to have effect as if the amendments made by the Amending Order had not been made.

4.26 In the present Appeal, it is not in dispute whether the 56 day period had expired prior to 23 May 2017 (clearly it had). The issue is whether the development "completed within a period of 1 year of the date of that request" (i.e. by the Relevant Date, 9 August 2017). If the development had completed by the Relevant Date, planning permission for the change

of use was granted under Class A. If it had not been completed by this date, no permission was granted and an express grant of planning permission will be required.

4.27 The Appellant submits that the change of use did complete by the Relevant Date. There are two elements to the Appellant's case in this regard:

4.27.1 a shop opened at the Premises on 1 August 2017. It cannot reasonably be argued that a change of use has not completed when the "new" use is in operation. The Appellant submits with this Statement evidence that demonstrates a store was opened on 1 August 2017 and we refer to that evidence in section 4.29; and

4.27.2 as a matter of law, development comprising a material change of use will often "complete" at a point in time before the date on which the "new" use is actually implemented. As will be demonstrated, the change of use of the Premises completed well in advance of store opening on 1 August 2017.

4.28 We address each of these elements in further detail below.

4.29 **The store opening on 1 August 2017**

4.30 In response to the Appellant's grounds of appeal, the Council intimated that there was no evidence of the shop having opened in August 2017. This is wrong. Evidence of the shop opening accompanies this Statement and is described below:

(i) **Letter from AS Associates dated 12 June 2018**

4.31 The letter is enclosed at Appendix 13.

4.32 AS Associates is a member of the Association of Chartered Certified Accountants. It is the firm instructed by F.A.B Retail Limited to handle all accountancy matters for the Tenant's Nisa Local stores across London. F.A.B Retail Limited is the operating company of the Tenant.

4.33 In the letter enclosed at Appendix 13, AS Associates confirms that a shop operated from the Premises as of 1 August 2017. The letter goes onto confirm trading figures for the VAT quarter ending 31 October 2017, which are consistent with the figures contained in the VAT and sales report to which we refer below.

(ii) **Letter from Umbrella Insurance Service to F.A.B Retail Limited dated 26 July 2018**

4.34 The letter is enclosed at Appendix 14. Sajjad Ahmed of Umbrella Insurance Services confirms that F.A.B Retail Limited procured employers liability insurance for its employees to work from the Premises. The letter refers to the "Brecknock Road store" and to 1 August 2017 (i.e. the store opening date) as the date from which the policy takes effect.

(iii) **VAT/sales report for the period 1 August 2017 - 31 October 2017**

4.35 The VAT and sales report is enclosed at Appendix 19. When fitting out the shop in July 2017, the Tenant installed a till manufactured by IT Retail Systems. Such tills contain EPOS reporting software, which enables sales data for a given period to be exported.

4.36 The enclosed report dated 27 November 2017 refers to the "Brecknock Road" branch and shows sales data for the period from 1 August 2017 to 31 October 2017. The report demonstrates that goods were sold from the Premises between the period 1 August 2017 to 31 October 2017 onwards. This is consistent with the shop having opened on 1 August 2017.

(iv) **Wage slips**

4.37 In August 2017, F.A.B Retail Limited employed Arfan Hussain, Fizhan Hussain, and Ansar Hussain to work from the Premises.

4.38 The wage slips enclosed at Appendix 15 are dated 25 August 2017, which is consistent with the shop having opened on 1 August 2017. The wage slips also refer to the "Kentish Town" branch; the Tenant operates no other shops in the vicinity to which this description could relate.

(v) **Invoice from K M Foods dated 1 August 2017**

4.39 The invoice is enclosed at Appendix 16.

4.40 K M Foods is a regular supplier of the Tenant. The invoice is dated 1 August 2017 and refers to the "Nisa Local" at "101 Brecknock Road, N7 0DA".

4.41 In August 2017, it was not feasible for the Tenant to accept large deliveries at the Premises and the majority of the stock was transferred from the Tenant's other stores (see paragraph 17 of the statutory declaration provided by Ansar Hussain contained at Appendix 41). However, the invoice demonstrates that chilled goods were delivered to the Premises on a date consistent with the date that the Appellant maintains that the shop opened.

(vi) **Statutory declarations provided by Mustafa Olhaye, Steven Tarrant and Christine Tarrant**

4.42 Mr Olhaye's statutory declaration is enclosed at Appendix 40.

4.43 Mr Olhaye is a former labourer who, in the summer of 2017, was working at the Property on the development authorised by the planning permission granted by the Council on 16 January 2017 under reference 2016/0372/P.

4.44 Mr Olhaye states :

"At the beginning of August 2017, a shop opened on the ground floor of the Property. After it opened, I would go to the shop some lunchtimes and afternoons, as would a number of the builders working on the site. The products the shop sold were very basic, but on each visit I would buy bread, chocolate, pot noodles and some soft drinks.

When the shop opened, there was some scaffolding outside because works to the upper floors of the Property were ongoing. But the door to the shop was always open, and it was clear to passers-by that the shop was open for business and I saw members of the public entering and leaving the shop. Inside, the shop looked like a typical convenience store but with less produce than you might normally expect. There were members of staff as well as a counter, a till, fridges, and shelves."

4.45 Mr Tarrant is a resident of Brecknock Road. His statutory declaration is enclosed at Appendix 46 and his comments are consistent with those made by Mr Olhaye. Mr Tarrant states:

"Right at the beginning of August 2017, I recall walking past the Property and noticing that a shop had opened. I went in for the first time a few days later, and remember being a bit disappointed that there were not more products available for sale. From what I recall, there were a few chilled food goods, fizzy drinks, milk, bread, and chocolate. It certainly was not a shop you could go in to do a large order, but over the next few weeks I did find myself going in there on several occasions to pick up the basics.

I cannot recall exactly when, but the shop closed a few weeks later around the beginning of September."

4.46 Together, the documents referenced at sections 4.31 – 4.45 provide compelling evidence that a shop opened at the Premises on 1 August 2017 and that the change of use to an A1 convenience store had completed by the Relevant Date. David Forsdick QC concludes at paragraph 25 of his opinion contained at Appendix 17 that:

"on the evidence as to the works and the commencement of the use on 1st August 2017 , if the former use was A4, the change of use to A1 was permitted. The totality of the evidence on the commencement of the use appears compelling"

4.47 He also states:

"[the change of use] will plainly have occurred by the time the new use is actually operating (here 1st August 2017). At that point, there can be no doubt that the change of use is "complete"."

4.48 The Council will argue that in August 2017 the shop was not registered with its business rates department and that the absence of registration is evidence that no shop existed. However, a failure to pay business rates is no evidence that a shop does not exist. Even now, fifteen months after the shop first opened in August 2017 and five months after it re-opened permanently in June 2018, the Council has still not registered the shop for business rates. By the Council's logic, this means that there is still no shop at the Premises, even though 3,500-4,000 customers are served each week.

4.49 A further point to address is that the closure of the shop on 22 August should have no bearing on the Inspector's decision. The closure of the shop after a temporary period of opening does not mean that the change of use (whether from A3 or A4) had not completed. As David Forsdick concludes at paragraph 25(e) of his enclosed Opinion:

"The temporary closure of the shop on 22nd August 2017 is of no significance in law. Once the use has commenced and has not been lost through another change of use or abandonment that use continues through periods of closure".

4.50 Christine Tarrant's statutory declaration is enclosed at Appendix 48.

4.51 **Completion of the change of use prior to the shop opening**

4.52 If the Inspector considers that an A4 use was carried on at The Leighton Arms, the Appellant's position is that the opening of the shop on 1 August 2017 is irrefutable proof that the change of use had completed by the Relevant Date. Without prejudice to this position, the Appellant contends that the change of use took place far in advance of 1 August 2017 for the reasons set out in this section.

4.53 The Order states that development must be completed by the date that is twelve months from the date of the written request. The wording of the Order raises an important issue: when does a material change of use complete?

4.54 Planning permission authorises a material change of use (not the ongoing use of land). Once that change is made, the permission is spent (*Cynon Valley BC v Secretary of State for Wales [1986] J.P.L. 760.*) In *James Hay Pension Trustees Ltd v First Secretary of State [2006] J.P.L. 1004*, it was acknowledged that:

"development is completed, or spent, as soon as the change is made".

4.55 The *James Hay* and *Cynon* cases emphasise that as soon as a change of use is made, the permission authorising that change is initiated, spent, and completed. But, in practice, when does that change actually take place?

4.56 Section 56 of the Act describes when development will begin. Section 56(1)(b) states that development comprising a change of use will be initiated "at the time when the new use is instituted". There is no statutory definition as to when a use is "instituted" but the point has been considered by the courts.

4.57 The Scottish case *Doonin Plant v Scottish Minister* provides a helpful summary. Section 27(1)(b) of the *Town and Country Planning (Scotland) Act 1997* reflects the wording of section 56(1)(b) of the Act. In the *Doonin* case, Lady Clark of Calton stated:

*"I consider that counsel for the respondents was correct to insist upon a focus on the words in s.27(1)(b) which specify that a change in use shall be taken to be initiated at the time when the new use is instituted. In my opinion, however, that requires ... **a focus on the factual matters as to whether something more than preparation has been done to change the use of the premises** ..., and whether such change has occurred in accordance within the ambit of the planning permission. I do not accept that such a change of use can only occur if all the conditions are fulfilled. **I consider ... it must be a matter of judgement on the facts to decide if and when the change of use** ...took place."*

4.58 In *Impey v Secretary of State for the Environment (1980) 47 P & CR 157*, a similar principle emerged that a broad and long term view of the surrounding facts was required. In *Impey*, the question was whether development had occurred in the form of a material change of use of a building from the breeding of dogs to residential use. Donaldson LJ stated:

*"**Change of use ... can take place before the premises are used in the ordinary and accepted sense of the word**, and [counsel] gives by way of example cases where operations are undertaken to convert premises for residential use and they are then put on the market as being available for letting. Nobody is using those premises in the ordinary connotation of the term, because they are empty, but there has plainly, on those facts, been a change of use. The question arises as to how much earlier there can be a change of use. Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. **It may well be that during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree.**"*

4.59 And in Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another, it was stated that

"Too much stress has, I think, been placed on the need for "actual use", with its connotations of familiar domestic activities carried on daily... it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is. As I have said, I consider it artificial to say that a building has or is of no use at all, or that its use is as anything other than a dwelling house, when its owner has just built it to live in and is about to move in within a few days' time (having, one might speculate, probably also spent a good deal of that time planning the move)

4.60 The above cases demonstrate that for a change of use to have taken place, "actual use" need not have occurred so long as "something more than preparation has been done".³ It will be a matter of fact and degree when the material change of use occurs and consideration should be had to the surrounding facts.

4.61 In the present Appeal, the surrounding facts to be considered are the events beginning with the closure of The Leighton Arms in March 2016 and ending with the passing of the Relevant Date. If it is concluded that by the Relevant Date, something more than preparation had been done to institute a change of use of at the Premises, that change of use will be complete for the purposes of the Order and will therefore have comprised permitted development.

4.62 In section 2 of this Statement, we have produced an outline of the events that took place following the closure of The Leighton Arms in March 2016 and we do not intend to recite all of those events here. However, we do refer to the material events that demonstrate that the change of use took place in advance of the store opening in August 2017. Those material events are:

4.62.1 the works carried out to the Premises after the closure of The Leighton Arms;

4.62.2 the variation of The Leighton Arms's premises licence; and

4.62.3 the Tenant's lease agreement, and the occupation and fitting out of the Premises

4.63 Each of the material events is addressed below

³ The Council has tacitly acknowledged this to be the case. By serving the Enforcement Notice in advance of the store re-opening in June 2018 (which the Council wrongly claim is the date on which the store first opened), the Council has conceded that a change of use can occur before "actual use" has commenced. The Council evidently concluded that the change of use had taken place before June 2018 (in spite of their view that the shop was still to open).

i) Works carried out to the Premises after the closure of The Leighton Arms

- 4.64 We enclose with this Statement a statutory declaration provided by Stephen Satwick. The statutory declaration is contained at Appendix 45. Stephen Satwick is the managing director of Planet Construction Limited, the main contractor instructed by the Appellant in August 2014 (after the Appellant's acquisition of the Property) to carry out various construction works.
- 4.65 Following the closure of the Property in March 2016, the Appellant endeavoured to re-let the Premises as a public house or restaurant. Details of the Appellant's marketing programme are set out in section 7.18 of this Statement.
- 4.66 After it became clear that there was little appetite in the market for a letting of the Premises as a restaurant or public house, the Appellant committed to a scheme of works to completely strip the interior of the Premises. These works coincided with the Tenant first contacting the Appellant to negotiate a lease of the Premises, and the Tenant's proposals to operate a convenience store shaped the works that were carried out. As set out in Stephen Satwick's statutory declaration, the works carried out before November 2016 (when the Premises was handed over to the Tenant) comprised the following:
- 4.66.1 removal from the Premises of the bar, all internal partitions, the staircase, staircase enclosure, and all furniture;
 - 4.66.2 a substantial programme of structural works as set out in the drawings contained at Appendix 43. All existing timber supports from the front and side elevations were removed. Steel joists were installed throughout the ground floor and basement of the Property. A new concrete ground bearing slab was installed at basement level. New piles to support ground beam foundations were introduced. New load bearing walls were erected and the existing timber posts were then removed. The extent of the structural works was a specific requirement of the Tenant; the structural support required to house the Tenant's refrigeration units is substantial and the scheme of works was amended to reflect this requirement;
 - 4.66.3 installation of fire proof ceilings to meet the internal fire spread requirements of the Building Regulations 2010, again at the request of the Tenant; and
 - 4.66.4 the installation of a lift shaft between the basement and ground floor to accommodate the Tenant's proposals to install a goods lift.
- 4.67 Enclosed at Appendix 18 of this Statement are photographs, showing the Premises at various stages during the scheme of works. The photographs demonstrate the

comprehensive nature of the works and make it clear that that by the conclusion of the works, the Premises no longer resembled a public house. By November 2016 (when the Premises were handed over to the Tenant), the interior of the Premises had been stripped to a complete shell.

4.68 Following the closure of The Leighton Arms (in March 2016) and following the total removal of all structure and furniture associated with The Leighton Arms (completed in October 2016), it is difficult to conclude that the use of the Premises in October 2016 was as an A4 public house. But this is what the Council will argue. A more credible conclusion is that together with the material events identified in section 4.62, the substantial programme of works undertaken to accommodate the proposed retail store is evidence that the use had changed to that of a retail store, albeit one in its infancy.

ii) Variation of The Leighton Arms' premises licence

4.69 A copy of The Leighton Arms's former premises licence is contained at Appendix 20 of this Statement. The licence is consistent with licences of like operations. The licence permitted, inter alia, the on-premises consumption of alcohol, the playing of live and recorded music, and the sale of late night refreshment.

4.70 In November 2016, the Tenant set about securing a variation to the premises licence and instructed Gill Sherratt of Licensing Matters in this regard. Licensing Matters submitted an application on behalf of the Tenant to vary the premises licence on 6 December 2016. A copy of the application form and the accompanying floor plan are contained at Appendix 21 of this Statement.

4.71 On 26 January 2017, the Council's licensing panel resolved to grant a variation to the premises licence. The variation authorised:

4.71.1 the change of name of the premises;

4.71.2 the floor plan (contained at Appendix 21);

4.71.3 the removal of all conditions and embedded restrictions contained within The Leighton Arms' premises licence;

4.71.4 the removal of all seasonal variations;

4.71.5 the removal of the following licensable activities: sale of alcohol for consumption on the premises, live music, recorded music, late night refreshment;

4.71.6 the supply of alcohol for consumption off the premises (Monday - Saturday 10:00 - 23:00; Sunday 10:00 - 22:30).

- 4.71.7 New opening hours (Monday to Sunday 07:00 – 23:00).
- 4.72 The minutes from the Council's licensing committee meeting held on 26 January 2017 are contained at Appendix 22.
- 4.73 As well as evidencing the resolution detailed above, the minutes provide helpful background to the change of use carried out at the Premises. The minutes contain the following extracts:
- 4.73.1 *"The Chair also added that the change of use of the existing premises had been approved by planning and the Licensing Panel had no remit to comment on planning issues and could only consider matters relevant to the licensing objectives"; and*
- 4.73.2 *"the premises had been a derelict/unoccupied building for some time but was now being refurbished and turned into a shop".*
- 4.74 The Council did not formally grant the variation to the premises licence until 17 March 2017. A copy of the varied licence under reference PREM-LIC\2254 is contained at Appendix 23.
- 4.75 The date of grant of the premises licence variation is significant on two fronts.
- 4.76 Firstly, the grant of the variation is a significant milestone in the chain of events that evidences the change of use that took place at the Premises. From this date, all conditions associated with the use of The Leighton Arms were removed from the licence and it would thereafter have been an offence under the Licensing Act 2003 to operate a public house from the Premises. It cannot reasonably be argued that a unit is still in use as a public house where:
- 4.76.1 that unit had been closed to the public for over 12 months;
- 4.76.2 the unit had been stripped to shell and core such that no furniture associated with the old establishment remained;
- 4.76.3 the name of the establishment had been formally deleted from the Council's licensing register; and
- 4.76.4 it would be a criminal offence to sell alcohol for consumption on the premises
- 4.77 The rational conclusion is that the use had changed to use as a convenience store, notwithstanding that "actual" use had not yet commenced.

- 4.78 The second important point to draw from the Council's decision to grant the variation on 17 March 2017 is the substantial delay this represented on the Council's part. The variation was not formally granted until a date seven weeks after the resolution to grant was made and a date fourteen weeks after the application to vary was submitted.
- 4.79 The Council's failure to handle the premises licence variation in a diligent and prompt manner had significant repercussions for the Tenant and for the opening of the store, as is set out below.
- 4.80 The Tenant decided to appeal the Council's variation to the original licence, as the variation was granted subject to commercially unacceptable conditions. Restrictions on the sale of alcohol and the refusal to grant opening hours in line with the Council's core hours were unacceptable to the Tenant. The Tenant's notice of appeal is contained at Appendix 24. Details of the Tenant's licensing appeal are set out in an Opinion provided by Sarah Clover of Kings Chambers dated 6 May 2017 and contained at Appendix 25.
- 4.81 From the date that the Appeal was submitted, Licensing Matters attempted to engage with the Council to "settle the matter and so avoid a costly and unnecessary appeal" (see the email dated June 22 2017 sent by Gill Sherratt of Licensing Matters at Appendix 26). But Ms Sherratt's attempts to engage the Council were repeatedly ignored: emails indicating the Council's lack of engagement are contained at Appendix 26.
- 4.82 It was only in late September 2017 that the Council provided a substantive response to Licensing Matters. Once the Council *did* engage, matters were swiftly resolved and a Consent Order was made on 2 October 2017 certifying that the Tenant and the Council had agreed to vary the licence on terms acceptable to both parties. A copy of the Consent Order is contained at Appendix 27.
- 4.83 There was a period of ten months between the date the licensing application was submitted and the date that the Consent Order was made. This is a disproportionately long period for the determination of what was a very simple premises licence variation. The fault for the delay lies with the Council, initially in failing to grant the variation until 17 March 2017 (having resolved to grant two months earlier in January 2017) and subsequently in failing to engage with Licensing Matters. As soon as the Council did engage, the appeal was settled within days; had that engagement been forthcoming months earlier, the delay would have been avoided.
- 4.84 The delay had repercussions for the store opening at the Premises. By July 2017, the Tenant found itself in a difficult position: on the one hand, the Tenant had been advised that to secure the benefit of permitted development rights for the store conversion, the change of use had to be completed by the Relevant Date; on the other, the Tenant was

understandably reluctant to open a store while the related premises licence contained commercially unacceptable conditions and remained subject to an appeal. As is set out in section 4.29 of this Statement, the Tenant opened the store on 1 August 2017 and subsequently closed it on 22 August 2017. The only reason for the temporary nature of the store opening was the outstanding premises licence appeal. Had that appeal been resolved promptly, the Tenant would have proceeded with its full fit out of the Premises well in advance of the Relevant Date and would have opened the store on a permanent basis.

iii) **Tenant's involvement with the Premises**

4.85 Between June 2016 (when the Tenant first contacted the Appellant to discuss entering into a lease of the Premises) and 1 August 2017 (when the store first opened to the public), there is a comprehensive chronology of events evidencing the Tenant's efforts to open a store at the Premises. Enclosed at Appendix 41 is a statutory declaration provided by Ansar Hussain, director of the Tenant company, which describes this chronology in detail. The chronology includes:

- 4.85.1 instructing solicitors, Maher & Co, to negotiate an agreement for lease and lease of the Premises. The agreement for lease was completed on 12 October 2016;
- 4.85.2 engaging Derek Saunders (the retail development manager for Nisa Stores across London and the south of England) in October 2016 to design a new shop layout. This is the layout shown on the licensing application contained at Appendix 21;
- 4.85.3 taking occupation of the Premises on 7 November 2016 (as certified by the handover letter contained at Appendix 29);
- 4.85.4 instructing Licensing Matters and Sarah Clover of Kings Chambers to apply for the premises licence variation and subsequently to appeal the Council's decision;
- 4.85.5 instructing Maher & Co to write to the Council to explain that the Tenant had entered into a lease agreement and that it would be using the Premises as an A1 shop. A copy of this letter is contained at Appendix 44.
- 4.85.6 instructing Jinan Morn Technology Co Ltd to install a cargo lift platform for a goods lift (see invoice dated 20 March contained at Appendix 30);

- 4.85.7 obtaining quotations from suppliers for shelving, joinery works, flooring works and refrigeration units (see the quotation from The Jordon Group dated 26 April 2017 contained at Appendix 31);
 - 4.85.8 ordering new refrigeration units to be delivered to the Premises (see the quotation dated 3 June 2017 and the invoice dated 8 June 2017 from Universal Refrigeration Ltd contained at Appendix 32);
 - 4.85.9 commencing its fit out of the Premises, including the installation of a new till system, refrigeration units, and shelving;
 - 4.85.10 procuring employer's liability insurance to take effect as of 1 August 2017 (i.e. the date that the store opened) (see the letter sent by Umbrella Insurance Services contained at Appendix 14);
 - 4.85.11 instructing Electric Circuit Solutions to install mains lighting and electricity sockets and to carry out testing (see the invoices and electrical testing certificates dated 27 July 2017 contained at Appendix 33); and
 - 4.85.12 employing staff to work from the Premises following the store opening on 1 August 2017 (see the wage slips dated 25 August 2017 contained at Appendix 15).
- 4.86 When considering this chronology in the wider context of the closure of The Leighton Arms in March 2016, the comprehensive strip out and structural works that completed in October 2016, and the premises licence variation in March 2017, it is inconceivable to argue that by July 2017 the use of the Premises was still a public house. Applying the legal principles set out in section 4.49 of this Statement, it is clear that the works and expenditure described in this Statement amount to "something more than preparation", which means that the change of use must have completed notwithstanding that "actual use" had still to commence.

5 **Ground C: conclusions on the change of use**

- 5.1 A summary of the Appellant's contentions that the change of use carried out at the Premises does not constitute a breach of planning control is as follows:
- 5.1.1 the use of The Leighton Arms fell within Class A3 of the Use Classes Order. A change of use from Class A3 to Class A1 is permitted development under Class A of the Order;

5.1.2 if the use carried on at The Leighton Arms fell within Class A4, a request was submitted in accordance with paragraph A.2(2) Part 3, Schedule 2 of the Order, which meant that a change of use to use as an A1 store would be permitted development if that change of use completed within a date 12 months from the date of the request:

(a) the shop opened on 1 August 2017 (a week in advance of the Relevant Date), which is clear evidence that the change of use did complete within 12 months of the date of the Request;

(b) without prejudice to the argument in limb (a), the Appellant contends that the change of use actually completed well in advance of the date the shop opened, in view of the surrounding facts set out in sections 4.49 - 4.86 of this Statement.

6 **Ground C: alterations to the shop front**

6.1 Section 55(2)(a) of the Act states that works that "*do not materially affect the external appearance of the building*" will not involve development of land for the purposes of the Act.

6.2 The Appellant has engaged David Norris of ADN Planning Ltd to investigate the works carried out at the Property. Mr Norris has concluded that the appearance of the ground floor of the building has not materially changed between its previous use as The Leighton Arms and its current use as a convenience store. The modern boarding has been partly removed to expose the original opening and the front door replaced, but its overall proportions have not changed, including the fascia detailing as illustrated in the "before" and "after" photographs enclosed at Appendix 34.

6.3 It is considered that there has been no material change in the external appearance of the building as to create a breach of planning control.

7 **Ground A: retrospective grant of planning permission**

7.1 David Norris of ADN Planning Ltd has assessed the change of use and the operations carried out at the Property against the provisions of the Council's statutory development plan and its supplementary planning documents. For the reasons set out below, his conclusion is that planning permission should be granted retrospectively for the development in question.

Appeal under Ground A

Reason 1 – Operational Development (Windows and Door)

- 7.2 Policy D1 (Design) of the Camden Local Plan seeks to secure high quality design in development, whilst Policy D3 (Shopfronts) also follows a similar design standard in the design of altered shopfronts. The policy states that the design should respect the characteristics of the building. Further, in the preceding paragraph (7.75) the Council states "*Contemporary shopfront designs will be supported in appropriate locations*".
- 7.3 It is argued that the operational works that have been undertaken to facilitate the change of use of the building have been undertaken in a sympathetic manner. The proportions of the fascia, columns and fenestration are in keeping with the original building. In addition, the signage, in the form of individual lettering lit from above with cowl lighting, provides a sensitive response further enhanced by the retention of the corbels on the corners of the building.
- 7.4 A photograph of the building taken in the late 1950s, and found at Appendix 34 to this Statement, shows that the windows of the building were not original. The windows of the building were not enlarged during the course of the conversion; the modern boarding was simply removed to expose the original opening. It is more than likely that the windows would have been altered several times during the history of the building. As such, the appellant would dispute that the windows are "historical", as stated. Notwithstanding this point, the enlargement of the windows has been done in a sympathetic manner. The windows will still retain stall risers at their base and retain the alignment and proportions of the windows, preserving the vertical emphasis of the building. The new door is in keeping with the more contemporary approach incorporated into the alterations and will enhance the appearance of the shopfront. As for the removal of the previous door, it was a modern standard off-the-shelf type and, as such, its subsequent replacement will not be harmful to the appearance of the building or the area, neither of which have been considered by the Council for specific protection in the form of a conservation area or as a locally listed building.
- 7.5 It is therefore considered that the altered shopfront positively enhances the building and area and, as such, will be in compliance with policies D1, D2, D3 and C4 of the Camden Local Plan 2017 and supporting SPD, CPG 1.

Reason 2 – Change of Use

- 7.6 If the Inspector considers that the previous use of the Premises was as an A4 (drinking establishment) and that the change of use was not completed by the Relevant Date, the following paragraphs are relevant insofar as the planning merits of the change are concerned.

7.7 Paragraph 92 of the revised National Planning Policy Framework (**NPPF**) states *"To provide the social, recreational and cultural facilities and services the community needs, planning policies and decisions should:*

Plan positively for the provision and use of shared spaces, community facilities (such as local shops, meeting places, sports venues, open space, cultural buildings, public houses and places of worship) and other local services to enhance the sustainability of communities and residential environments."

7.8 Policy C4 of the Camden Local Plan states *"The Council will seek to protect public houses which are of community, heritage or townscape value"*. A two stage test is set out in Policy C4, which must be met if the Council are to grant planning permission for the change of use of a public house and these are:

"a. The proposal would not result in the loss of pubs which are valued by the community (including protected groups) unless there are equivalent premises available capable of meeting the community's needs served by the public house; or

b. There is no interest in the continued use of the property or site as a public house and no reasonable prospect of a public house being able to trade from the premises over the medium term."

7.9 It is important to note that, in the first instance, the NPPF requires Local Authorities to plan positively for shared spaces and community facilities, and that both local shops and public houses are specifically listed together with other local services to *"enhance the sustainability of communities and residential environments"*. Consequently, within the definition of the NPPF, a local shop is a community facility and, in this instance, the ever increasing popularity of the local shop clearly provides a local service to the local community.

7.10 Policy C4 of the Local Plan sets out two specific tests that will be applied in assessing whether to grant permission for change of use of a public house to another use. The first test is whether the pub is valued by the community and, if so, there are equivalent premises available capable of meeting the Community's needs. The Council has not designated the premises as an Asset of Community Value. It is also clear from Ms Brosnan's Statement(enclosed at Appendix 2) that there was minimal support for The Leighton Arms in the local community. At paragraph 20 of her statutory declaration, Ms Brosnan explains:

"Local residents very rarely visited the premises. They regularly raised complaints with the local council and made it extremely hard for us to trade. The main complaint was about noise and anti-social behaviour; the local residents would complain if we used the garden or if people gathered on the pavement outside. It made it difficult to trade and we were constantly anxious about patrons using the garden for fear of action from the licensing authority. In particular I can recall complaints about a private BBQ function which we held for the teachers of a local school and when we held our St George's Day event. The persistent complaints lead to the council installing sound monitoring equipment. This meant that we could no longer put on events with music and it made it extremely difficult to use the garden."

7.11 The Leighton Arms generated a number of complaints from local residents, mostly relating to noise and disturbance, and the establishment had the potential to cause further problems (live music and other events) to future occupants of the flats above. This issue was acknowledged by the Inspector when determining a previous appeal for the site (paragraphs 18-26). A copy of the Inspector's decision is contained at Appendix 39. Paragraph 180 the NPPF states that decisions should ensure development is appropriate for its location and should take account of the likely effects upon living conditions of, amongst other things, noise. Whilst the Inspector considered appropriately worded conditions would protect the amenity of the occupiers of the flats and the adjoining residential properties, nevertheless the shop is, by its nature and operation, considered to be more compatible use in this predominantly residential location.

7.12 The absence of community support for The Leighton Arms is further evidenced by the deteriorating financial health of the establishment to which we make reference below.

7.13 As Ms Brosnan makes clear, the ongoing protest from the small group of local residents is not a reflection of the community's support for The Leighton Arms when it was open to the public. Ms Brosnan concludes:

"What does surprise me is the strong reaction from some local residents about the new shop that has opened. When The Leighton Arms was open for business, the same residents had no interest in visiting the premises and regularly raised complaints about its operations. Their current protests seem totally disingenuous."

7.14 It is also clear from Ms Brosnan's Statement that it had become increasingly difficult for the establishment to generate sufficient trade. The available alternative community uses are set out in Appendix 35 and evidently there are a significant number of alternative premises offering an equivalent function. Given the abundance of like premises in the vicinity, the lack of community support, and the spiralling overheads, it is not surprising that The Leighton Arms encountered financial difficulties.

7.15 Turning to the second part of the policy, and as evidenced by Ms Brosnan's Statement and its enclosures, The Leighton Arms struggled to remain profitable. Despite organising special themed events, the footfall remained low and the establishment was barely patronised by local people. At paragraph 18 of her statement, Ms Brosnan states:

"Despite our best efforts to turn The Leighton Arms around we found it extremely difficult to make a profit."

7.16 Enclosed with Ms Brosnan's Statement are VAT reports and bank statements, which demonstrate that the net takings of the business and cash reserves were in decline.

7.17 Ms Brosnan's statement makes it clear that she made substantial attempts to generate as much footfall as possible through the doors of The Leighton Arms. Her initiatives included themed evenings, offers on food and drinks, and providing tea, coffee and hot and cold food throughout the day. This was all an effort to "diversify" the offering at The Leighton Arms and to improve its financial situation. These efforts, and the enclosed financial information, make it clear that the closure of The Leighton Arms in March 2016 was not a result of poor management; the closure owed to the absence of local support and the rising costs of managing such establishments. There was no realistic prospect of The Leighton Arms surviving, no matter who operated it.

7.18 Following the closure of The Leighton Arms, the Appellant's intention was to let the Premises as a public house or restaurant and it instructed a firm of estate agents and property management specialists, David Astburys, to market the Premises. Enclosed at Appendix 37 is a letter sent by Aaron Cox, Managing Director of David Astburys.⁴ Mr Cox describes the efforts made by the former landlady to make a success of the business and confirms that his firm was instructed by the Appellant to market the Premises as a public house or restaurant. The directors of the Appellant company have substantial experience of marketing and negotiating the letting of commercial premises and have often engaged in the "quiet" marketing strategy that Mr Cox alludes to. This off-market marketing strategy involves engaging with the agent's extensive network of commercial agents and surveyors with a view to sourcing potential leads. This was the process that was followed after the closure of The Leighton Arms. As Mr Cox concludes, it was only "when [finding another pub/restaurant operator] proved futile, [that] we advised that you should consider other types of businesses".

7.19 The Leighton Arms' financial struggles are a stark contrast to the success of the new local shop. Policy TC 5 (Small and independent shops) of the Local Plan states that the Council will promote the provision of small shop premises suitable for small and

⁴ When Mr Cox was instructed to market the Premises, he was in fact working for London Residential (not David Astburys). Enclosed at Appendix 47 is a letter dated 28 November 2018 from Mr Cox clarifying the position.

independent businesses. The store, since it opened to the public on 1 August 2017, has seen a significant number of customers of around 3,500 – 4,000 per week, with these being predominantly local to the area. The current use is therefore considered to be a greater asset to the local community than a failing pub, which realistically is never going to provide a profitable return with any future management.

Reason 3 - Waste Management

7.20 Policy A1 (Managing the impact of development) seeks to ensure that the quality of life of occupiers and neighbours is protected. This includes odour, fumes and dust. Policy CC5 (Waste) states that the Council will seek to make Camden a low waste borough, with one of its aims being to make sure that developments include facilities for the storage and collection of waste and recycling.

7.21 The appellant has entered into an agreement with a private waste contractor to collect both waste and recycling from the site. All waste generated by the shop is stored in the basement of the Premises and is collected on a weekly basis. The contract with the contractor is appended to this Statement (Appendix 36) and the Tenant would be happy to accept a condition to ensure that no waste is left on the street, thereby ensuring that there would be no loss of amenity to neighbouring properties through odour.

8 Ground G: unreasonable period for compliance

8.1 As has been described in this Statement, the Tenant expended considerable time and financial resources to secure a lease of the Premises, to obtain an appropriate premises licence, to refit the Premises in a fashion consistent with A1 use, to employ staff and to acquire stock necessary for the operation of the store.

8.2 The Tenant will not be able to carry out the works required by the Enforcement Notice and to find alternative premises from which to operate its business within the three month period required by the Council for the cessation of the use. Securing appropriate premises and ensuring that they are fitted out and properly licensed is an expensive and time consuming process. The Tenant should not be deprived of the opportunity to run a convenience store by the imposition of an unrealistic timeframe in which to comply with the Enforcement Notice. It is submitted that the period for compliance with the Enforcement Notice should be extended to 24 months.

9 Conclusion

9.1 The Appellant submits that the matters alleged in the Enforcement Notice do not constitute a breach of planning control.

9.2 The Appellant has provided robust evidence demonstrating that the food offering at The Leighton Arms formed a substantial part of the operation's business, which means that the use carried on at the Premises prior to its conversion to an A1 convenience store fell within Class A3 of the Use Classes Order. A change of use from A3 to A1 is permitted development under the Order.

9.3 In the alternative and should the Inspector consider that the use carried on at The Leighton Arms fell within Class A4 of the Use Classes Order, this Statement demonstrates that the Appellant complied with the provisions of the Order relevant to a change of use from A4 to A1 and that it completed that change of use by the Relevant Date. The evidence submitted with this Statement is compelling in this respect.

9.4 The works carried out to the frontages of the Property do not materially affect the external appearance of the Property. If the Inspector considers otherwise, the Appellant submits that planning permission should be granted retrospectively for the reasons set out in section 7.

10 **Statement of Common Ground**

The Appellant will seek to agree a Statement of Common Ground (**SoCG**) with the Council in respect of matters of fact. A draft SoCG will be submitted to the Council after the Appellant has had the opportunity to review the Council's statement of case.

11 **Documents/ Relevant Decision on other cases**

11.1 The Appellant intends make reference to the documents appended to this Statement of Case, to decisions made by the Council or Planning Inspector where relevant to this appeal, and to policies in the Camden Local Plan and the Council's development framework.

11.2 The Appellant shall call witness evidence to deal with the following subject areas:

11.2.1 Planning Policy and Need; and

11.2.2 Matters of fact

11.3 Depending on the position adopted by the Council or interested third parties (whether Rule 6 parties or otherwise), the Appellant reserves its position to call further evidence to deal with such issues as may arise.

TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED) APPLICATION FOR COSTS

1 Introduction

- 1.1 This application for costs relates to the Council's decision to issue the Enforcement Notice (the **Application**).
- 1.2 Unless explicitly defined, this Application utilises definitions used in the Statement of Case. The Appellant does not repeat the arguments made out in detail in the Statement of Case for the purposes of the Application but requests that these are considered in detail where referenced.
- 1.3 Pursuant to Planning Practice Guidance (**PPG**), the Appellant asks the Planning Inspectorate to make an award of costs against the Council arising from the Council's unreasonable behaviour. This behaviour has resulted in an appeal, which could have otherwise been avoided and which is not only a waste of public time and costs but has caused the Appellant to incur unnecessary expense in the appeal process.
- 1.4 "Unreasonable behaviour" in the context of an application for an award of costs may relate either to procedural or to substantive matters. In this Application, the Appellant submits that the Council has behaved unreasonably on both accounts.
- 1.5 Paragraph 048 of the PPG states that Local Planning Authorities must carry out "adequate prior investigation" before initiating enforcement action. The PPG states further:

"They are at risk of an award of costs if it is concluded that an appeal could have been avoided by more diligent investigation that would have either avoided the need to serve the notice in the first place, or ensured that it was accurate."
- 1.6 The Council has plainly contravened this requirement. Had the Council carried out an adequate investigation prior to initiating enforcement action, it would have been clear that the Enforcement Notice was unmerited, and the entire appeal process would have been avoided. As set out below, the Council failed to carry out such an investigation, ignored the Appellant's requests for a period of time in which to provide the Council with evidence that no breach of planning control had occurred, and was influenced into taking premature enforcement action by a local residents group.
- 1.7 Despite the lack of community support for The Leighton Arms before its closure, the change of use of the Premises provoked a strong retaliation from a group of local residents. The retaliation is not at representative of the prevailing attitude of the local community (which has been hugely positive, as is now evidenced by the number of customers who use the shop). But the retaliation has been intense, and it appears to have

influenced the Council's decision to initiate enforcement action. Enclosed at Appendix 7 of the Statement of Case are extracts from online media sources reporting on the local campaign, and enclosed at Appendix 8 is an extract of a letter sent by Councillor Merik Apak. In that letter, Mr Apak appears to confirm the Council's animosity towards the development of the Property and emphasises the Council's support for the campaign. The letter states:

"The council has not granted permission for a supermarket in this location. The council will not grant such a permission... I would like you and your neighbours to know that I and the council will defend our decision not to grant this permission all the way. Thank you for inviting me to your demonstration on Saturday 9th. Unfortunately I am out of London that weekend. I hope it goes well"

- 1.8 A letter to a campaign group is clearly not an appropriate forum for a Councillor to assert on behalf of a local planning authority that planning permission for a specific development will not be granted. But this is what Councillor Apak has done.
- 1.9 It is also not appropriate for a local authority to be provoked into taking enforcement action by members of the public at the expense of carrying out an adequate investigation. But, again, this is what appears to have happened. The Council initially raised concerns regarding the change of use with the Appellant in May 2018. In light of these discussions, the Appellant instructed Trowers & Hamlins LLP (**Trowers**) to write to the Council to request a period of fourteen days in which to investigate the factual background to the matter and to invite the Council to withhold taking enforcement action before that fourteen day period had expired. A copy of the letter dated 8 June 2018 as sent to the Council is enclosed at Appendix 9. In the event, Trowers provided a substantive response to the Council on 15 June 2018. This letter is enclosed at Appendix 10. Trowers invited the Council to consider the points raised in the letter and to withdraw the threat of enforcement action.
- 1.10 The Council ignored the contents of both letters. It did not allow the fourteen day period the Appellant had requested to provide evidence that no breach of planning control had occurred; and it plainly did not consider the contents of the letter of 15 June. In fact, the Council issued the Enforcement Notice on the very same day (15 June 2018), although the notice was not served until the next working day, 18 June 2018.
- 1.11 It is concerning that the Council also appears to have informed the local campaign group of its decision to issue the Enforcement Notice in advance of the notice actually being served. Enclosed at Appendix 11 of the Statement of Case is an article from the campaign's website dated 14 June 2018 (four days before the notice was served) stating:

"Today Council Planning officer confirm us that they are going to serve a notice to developer today or tomorrow (sic)"

1.12 As set out in the PPG, and as referenced above, local authorities must carry out "adequate prior investigation" before initiating enforcement action. By way of the letter dated 8 June 2018, the Council was presented with an opportunity to have evidence relating to the alleged breach presented to it. But this opportunity was ignored and enforcement action was initiated in any event. The current appeal, and the costs associated with it, have flowed from that unreasonable decision. The Appellant has incurred substantial legal and planning agent costs in responding to the Enforcement Notice and in preparing for this appeal. It is these costs that the Appellant seeks to recover.

1.13 Paragraph 049 of the PPG also states that local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the of the matter under appeal. The PPG provides the following examples, which are relevant to this Application:

1.13.1 Preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.

1.13.2 Acting contrary to, or not following, well-established case law.

1.14 In its letter dated 15 June 2018, the Appellant set out that the change of use at the Premises accorded with the relevant provisions of the Order. It would have been entirely reasonable for the Council to have requested further evidence to substantiate the points raised in that letter, and it could have done so without initiating premature enforcement action. But the letter was ignored, the Council did not engage with the Appellant, and as a result the Appellant's development proposals have been unreasonably frustrated.

2 **Conclusion**

2.1 The Appellant submits that the Council has not exercised its duty to carry out an adequate prior investigation and that it has acted unreasonably for the reasons stated above. It was plainly not expedient to issue the Enforcement Notice.

2.2 The Council's unreasonable behaviour has led to the Appellant incurring significant and unnecessary costs, through having to obtain legal representation and planning agent's advice to protect its position and to deal with this appeal. The Council's position has also fuelled the protests of the local resident group and damaged the reputation of the Appellant and the Tenant in the process.

APPENDICES

Appendix	Document	Date
	Documents	
1	Enforcement Notice – EN17/0004	15 June 2018
2	Statutory Declaration Jeanette Brosnan	19 December 2018
3	Agreement for lease	12 October 2016
4	Letter from Kevin McMeel at Boyes Sutton & Perry to London Borough of Camden Council and delivery receipt – Confirmation regarding nomination as an asset of community value	9 August 2016
5	Statutory Declaration Kevin McMeel	17 December 2018
6	Email from Gary Bakall, Planning Enforcement Manager	
7	Extracts from online media sources reporting on local campaign	
8	Letter extract from Councillor Merik Apak	
9	Letter from Trowers & Hamlins to London Borough of Camden	8 June 2018
10	Letter from Trowers & Hamlins to London Borough of Camden	15 June 2018
11	Article from campaign website	14 June 2018
12	Food Hygiene Certificate – The Food Standards Agency	27 February 2013
13	Letter from AS Associates	12 June 2018
14	Letter from Umbrella Insurance Service to F.A.B Retail Limited	26 July 2018
15	Wage slips for Arfan Hussain, Fizhan Hussain and Ansar Hussain	25 August 2017
16	Invoice from KM Foods	1 August 2017
17	Opinion of David Forsdick QC Landmark Chambers	24 November 2018
18	Photographs of works	

19	VAT and sales report for period 1 August 2017 – 31 October 2017	27 November 2017
20	The Leighton Arms premises license	
21	Premises license application	
22	Minutes from the Council's licensing committee meeting	26 January 2017
23	Premises licence PREM-LIC\2254	
24	Notice of appeal	16 March 2017
25	Opinion of Sarah clover of Kings Chambers	6 May 2017
26	Correspondence regarding licensing matters	Various dates
27	Consent Order	2 October 2017
28	LA Foods Site Handover	17 October 2016
29	Letter from Construction Health & Safety – Site handover	7 November 2016
30	Invoice Jinan Morn Technology Co Ltd	20 March 2017
31	Quotation from The Jordon Group	26 April 2017
32	Quotation and invoice from Universal Refrigeration Ltd	3 June / 8 June 2017
33	Invoice ElectriCircuitSolutions and Electrics certificate -	
34	Historical photographs of the appeal building	
35	Alternative community uses	
36	Biffa Waste documentation	
37	Letter – From Aaron Cox at David Astbury's to Mr Cramer	16 November 2018
38	Image of Facebook description of The Leighton Arms	
39	Appeal decision – APP/X5210/W/15/3095242	11 December 2015
40	Statutory Declaration Mustafa Olhaye	17 December 2018
41	Statutory Declaration Ansar Hussain	17 December 2018
42	Statutory Declaration Robert Maynard	20 December 2018
43	Drawings – Structural works	

44	Appendix 44 – Letter from Maher & Co	27 January 2017
45	Appendix 45 – Statutory Declaration – Stephen Satwick	19 December 2018
46	Appendix 46 – Statutory Declaration – Steven Tarrant	19 December 2018
47	Appendix 47 – Letter from Mr Cox	28 November 2018
48	Appendix 48 – Statutory Declaration - Christine Tarrant	19 December 2018