

## PLANNING APPEAL DECISIONS

**Lead Officer:** Tony Pomfret – Development Services Manager

**To inform Members of the outcome of a recent Public Enquiry in respect of 3 appeals for the extension of opening times for hot food take away businesses in Duke Street, Whitehaven**

**Recommendation:** That the decisions be noted in the context of future similar applications and also in relation to performance monitoring.

**Resource Implications:** Nil

### 1.0 SUPPORTING INFORMATION

- 1.1 Planning permission was refused in November 2005 for the extension of opening times at three town centre take-away premises. The premises are Southern Fried Chicken, 14 Duke Street, Milano Pizza House, Globe House, Duke Street and Chattanooga, 5 Duke Street, Whitehaven.
- 1.2 Appeals were lodged and the appellant's solicitor sought a Public Inquiry to determine them and there was some delay in organising a date for the joint inquiry. The Inquiry took place on 6 November 2007 and the Inspector appointed to hear the case has dismissed all three appeals. The decision letter is appended and Members are commended to read this in detail.
- 1.3 The Inspector considered that the main issues in all three appeals were:
  - (a) the effect of the extension of opening hours on the living conditions of local residents, with particular regard to noise and disturbance;
  - (b) the effect on the character of the area, and
  - (c) whether it is necessary or reasonable for hours of opening to be the subject of a planning condition in view of concurrent controls under the Licensing Act 2003
- 1.4 The Inspector noted that whilst the licence conditions address many of the objectives of planning they do not wholly equate. The prevention of public nuisance or crime and disorder, or the objective of public safety are not the same as seeking to protect residential amenity or living conditions. What might harm living conditions may well fall far short of constituting a public nuisance or a crime. Noise and disturbance from late night traffic might well be extremely annoying to a local resident, and yet it would



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T Pomfret  
Copeland Borough Council  
Development & Environment  
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CA28 7NY

Your Ref: 4/05/2835/0  
Our Ref: APP/Z0923/A/06/2020899/NWF  
Further appeal references at foot of letter  
Date: 16 November 2007

Dear T Pomfret

## Town and Country Planning Act 1990

Appeals by Mr A. R. Lotfmanesh, Mr M Panahi and Mr V Alkan -

Site at Southern Fried Chicken, 14 Duke Street, Whitehaven, CA28 7ER, -4/05/2835  
Milano Pizza House, Globe House, Duke Street, Whitehaven, CA28 7EN and -4/05/2834  
~~Chattanooga, 5 Duke Street, Whitehaven, CA28 7EW -4/05/2833/0.~~

I enclose a copy of our Inspector's decision on the above appeals.

The attached leaflet explains the right of appeal to the High Court against the decision and how the documents can be inspected.

**If you have any queries relating to the decision please send them to:**

### Quality Assurance Unit

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Yours sincerely

*D Cardy*

Daniel Cardy

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Further appeal references:- APP/Z0923/A/06/2020902 and APP/Z0923/A/06/2020907



INVESTOR IN PEOPLE





# Appeal Decisions

Inquiry held on 6<sup>th</sup> November 2007

Site visits made on 5<sup>th</sup> November 2007

by Jonathan G King BA(Hons) DipTP MRTPI

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

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## Appeal A: Ref: APP/Z0923/A/06/2020899

14 Duke Street, Whitehaven

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land without complying with a condition subject to which a previous planning permission was granted.
- The appeal is made by Mr A R Lotfmanesh against the decision of Copeland Borough Council.
- The application Ref 4/05/2835/0, dated 15<sup>th</sup> November 2005, was refused by notice dated 11<sup>th</sup> January 2006.
- The application is described as being for the *amendment of planning condition to permit opening to 1:00am on Sundays and to 3:00am Thursday Friday and Saturdays.*

**Decision: I dismiss the appeal.**

## Appeal B: Ref: APP/Z0923/A/06/2020902

Milano Pizza House, Globe House, Duke Street, Whitehaven

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land without complying with a condition subject to which a previous planning permission was granted.
- The appeal is made by Mr M Panahi against the decision of Copeland Borough Council.
- The application Ref 4/05/2834/0, dated 15<sup>th</sup> November 2005, was refused by notice dated 11<sup>th</sup> January 2006.
- The application is described as being for the *amendment of planning condition to permit opening to 1:00am on Sundays and to 3:00am on Thursday, Friday and Saturday.*

**Decision: I dismiss the appeal.**

## Appeal C: Ref: APP/Z0923/A/06/2020907

5 Duke Street, Whitehaven

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land without complying with a condition subject to which a previous planning permission was granted.
- The appeal is made by Mr V Alkan against the decision of Copeland Borough Council.
- The application Ref 4/05/28333/0, dated 15<sup>th</sup> November 2005, was refused by notice dated 11<sup>th</sup> January 2006.
- The application is described as *change of opening hours to 12 midnight on Sunday, Monday, Tuesday and Wednesday, and to 3am Thursday, Friday and Saturday.*

**Decision: I dismiss the appeal.**

## Procedural matters

1. This Inquiry dealt with 3 appeals by 3 individuals relating to 3 separate premises. The points in common are that they all relate to applications for the extension of hours of opening of hot-food takeaways in Duke Street, Whitehaven. In my preamble, I have repeated the form of words used in the individual applications. However, it was agreed between the parties at the Inquiry that more correctly they are for the carrying out development without complying with conditions previously attached to earlier planning permissions. In each case the conditions have been breached. Breach of Condition Notices have been served in relation to all 3 premises, but the Council has held off taking enforcement action pending the outcome of these appeals.
2. In the interests of clarity, I set out below the details of the permissions that form the background to the appeals, together with the basis of my determinations.

### Appeal A

3. Planning permission for the change of use to a hot food takeaway was granted in June 1999 (Ref 4/99/0327/0), subject (among other things) to condition 2:

*The use hereby permitted shall not be open to customers outside the following times:*

*11:00am – 12:00 midnight Sundays – Thursdays inclusive.*

*11:00am – 1:30am Fridays and Saturdays.*

*The reasons given were to minimise the risk of nuisance to neighbouring premises; and in the interests of amenity.*

4. I consider the appeal as being in relation to this condition, as submitted.

### Appeal B

5. Planning permission was granted in January 1994 (ref 4/93/0864/0) for the change of use of shop to pizza and kebab take-away, subject (among other things) to condition 3:

*The premises shall close by 1:00am on Thursday, Friday and Saturday nights and by 12:00 midnight on all other nights.*

*The reason given was to safeguard the amenities of the locality.*

6. In February 1995, permission (ref 4/94/0865/0) was granted, described as extend closing time to 1:30am, Friday and Saturday, subject to condition 2:

*The premises shall close by 1:30am on Friday and Saturday nights by 1:00am on Thursday nights and by 12:00 midnight on all other nights as confirmed by the applicant in his letter to the Local Planning Authority dated 23 January 1995.*

*The reason given was for the avoidance of doubt.*

7. It is in relation to this second permission that the application was made, though the number of the condition was not indicated.
8. However, that second permission is not complete in itself, as it does not state the nature of the development. It has meaning only by reference to the

20 NOV 2007

original permission; and it is therefore to that earlier permission more precisely to condition 3, that the application should have related. There is no dispute about what the appellant is intending - to extend the hours when the takeaway may remain open - and there is no harm to any party's interests if the appeal is considered as being in relation to the earlier permission. I therefore propose to consider it on that basis. This was agreed between the parties at the Inquiry.

*Appeal C*

9. Planning permission was granted in November 1983 (ref 4/83/1027/068) for the change of use of 5 Duke Street from retail to "Take-away food", subject (among other things) to condition 2:

*The premises shall close by 10:30pm as agreed by the applicant in his letter to the Local Planning Authority on 21 November 1983.*

The reason given was *to safeguard the amenities of the locality.*

10. The hours of opening were subsequently varied on a number of occasions, the last being in September 1995, when permission (ref 4/95/0493/0) was granted, described as *extension of opening hours to 1:30 am Thursday, Friday and Saturday*, subject to condition 2:

*The premises shall continue to close by 12:00 midnight on Sunday, Monday, Tuesday and Wednesday nights.*

The reason given was *for the avoidance of doubt.*

11. It is in relation to this last permission, and particularly this condition that the application was made. The situation is the same as with Appeal B: the application should more properly have been made in relation to the original permission for the change of use, and more precisely to condition 2. Once again, there is no dispute about what the appellant is intending, and similarly there is no harm to any party's interests if the appeal is considered as being in relation to the earlier permission. I therefore propose to consider it on that basis. This too was agreed between the parties at the Inquiry.
12. The revised hours of closing sought in the applications are set out in my preamble. However, at the Inquiry, a different approach was taken by the appellants. It was argued, first, that it was unnecessary and unreasonable for the hours to be prescribed at all; but second, and without prejudice to the first, that, if hours were to be prescribed, then they should be consistent with the terms of the Premises Licences granted under the Licensing Act 2003. As the imposition of any condition on a planning permission places an obligation on the decision taker to consider the necessity and reasonableness of that condition in any event, I shall not restrict myself to consideration of the hours initially proposed, but I shall also take account of the alternatives put forward. This is reflected in my third main issue.
13. I undertook unaccompanied site visits on the afternoon and evening before the Inquiry. The parties did not request a further daytime visit. The Council suggested that a late-night weekend visit would be useful. However, I consider that I have sufficient material to enable me to make a decision on these appeals without so doing.

## **Main issues**

14. The main issues in all three appeals are:

- (a) the effect of the extension of opening hours on the living conditions of local residents, with particular regard to noise and disturbance;
- (b) the effect on the character of the area; and
- (c) whether it necessary or reasonable for hours of opening to be the subject of a planning condition in view of concurrent controls under the Licensing Act 2003.

## **Reasons**

### *The effect on the area and its residents*

- 15. This Inquiry was unusual in that no witnesses were called on behalf of the appellants. Rather, they relied on the common written statement of case and submissions relating principally to the interaction between the objectives and application of planning legislation and that of the Licensing Act 2003.
- 16. In the absence of witnesses from the appellants, it is hard to establish areas of factual agreement between the parties. However, it is clear that the town centre of Whitehaven has a vibrant evening and night-time economy, comprising pubs, bars, night clubs, and eating establishments, the greatest concentration of which is in Duke Street and Tangier Street. All of the 3 premises that are the subject of these appeals are in that vicinity.
- 17. On the nights of the week when the drinking establishment are at their most busy, large numbers of people move into the streets around, or shortly after closing time. For the local pubs/clubs that I understand are the most popular, this is at 2:00 – 2:30am when account is taken of “drinking-up time”. Many people seek takeaway food from the numerous premises in the locality, including the three which are the subject of these appeals. The serving areas of the takeaways are fairly small, so that at these times of heavy demand, queues will form outside. The premises provide a focus for large numbers of people to congregate in the street, waiting to be served or simply enjoying the company of others doing so.
- 18. Much of the Council’s evidence is not specific to the particular premises that are the subject of these appeals, in that it relates in large part to takeaways in the locality generally. There is a suggestion from the appellants that the police video footage I have seen, which focuses on the area between No 5 Duke Street (Chattanooga)(Appeal C) and the Milano Pizza House (Appeal B) may not provide a typical example of current conditions, as it was taken before a nearby night club ceased business. Nonetheless, I have no reason to disbelieve the Council’s evidence that crowds form at this end of Duke Street; and that such crowds are attracted to hot food takeaways, including the 3 appeal premises.
- 19. The police video and incidents log shows that the concentration of so many people into a fairly small area, and commonly affected by the consumption of alcohol, can, at the least, give rise to noisy, boisterous behaviour; and, at worst, to violent crime. I agree with the appellants that the root cause of the

20 NOV 2007

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bad behaviour is almost certainly the alcohol, not the takeaways. There is no objective survey evidence to show at what times the greatest numbers of people congregate outside, or whether they seek to remain in the area even if the takeaways are not open. But it seems to me that the takeaways must provide an additional reason for individuals and groups to stay outside for longer, rather than making their way home.

20. While this part of the town centre is mostly commercial in nature, there are a number of residential properties. Amongst these are properties above and adjoining the Milano Pizza House and above Chattanooga, and opposite No 14, Duke Street. Representations from local residents say that the quality of their lives has been diminished by the late-night activities in the streets at times when the takeaways have been open past the hours allowed by their planning permissions. From my own experience, and taking these representations into account, I fully accept the Council's view that late-night noise and disturbance in the streets harms the living conditions of local residents; and that this is in part linked to the fact that takeaways remain open late, after the drinking establishments have stopped serving.
21. I share the view of my colleagues who determined planning appeals in Whitehaven in 1998 [ref T/APP/Z0923/A/98/292247/P4] and in 2001 [ref APP/Z0923/A/01/1065397], the latter in relation to the Appeal C premises, that, while town centre residents could reasonably expect to suffer some noise and disturbance compared with a wholly residential location, they could equally expect some peace and quiet in the early hours of the morning. I would go further, however, in saying that both residents and visitors might reasonably expect the town centre to be pleasant and non-threatening. It is apparent from the representations received that certain late night activities in the town, including fighting, littering, vomiting and worse, can be, or are perceived to be intimidatory as well as unpleasant. In my view, that has the potential to harm the character of the area as well as the living conditions of its residents. While such activities may be brought on principally by drink, I am in no doubt that the lateness of opening of the takeaways is a contributory factor in that it encourages people to stay and eat in the street after they have finished drinking.
22. Planning Policy Statement 6 *Planning for Town Centres* (PPS6) acknowledges that a diversity of uses during the day and the evening can make town centres more attractive to residents, shoppers & visitors; and that local authorities should prepare planning policies to manage the evening economy. The relevant policy in Whitehaven is Policy TCN 7 (formerly TCN14) of the Copeland Local Plan 2001 – 2016 (LP), which says that proposals for food and drink uses in shopping areas will be permitted subject, among other things, to paying attention to: 1. *the likely impact on the character and amenity of the general area and on nearby residential properties as a result of noise, disturbance, litter, smell, sewage discharge or visual intrusion;* and 2. *restrictions on late-night opening where late-night activity associated with the proposed use would be harmful to the general character and amenity of the area.* This policy reflects some of the particular environmental issues raised by hot-food takeaways that were recognised in the creation of Class A5 of the Town and Country Planning (Use Classes) Order 1987, as amended. The guidance in Circular 03/2005 *Changes of Use of Buildings and Land* gives as examples

litter, longer opening hours, and extra traffic. In my view, the Council has properly taken account of its policy in determining the 3 applications.

23. Following submissions made at the Inquiry, the appellants no longer seek to amend their closing times as put forward in the planning applications. Nonetheless, that is what was before the Council when it made its determinations. As thus proposed, the 3 premises would be open until 3:00am on 3 days a week. In my view, that time is incompatible with an area which includes residential properties because of the effect on living conditions and the character of the area, and is unacceptable. Moreover, allowing these premises to open until that time would, I believe, make it difficult for the Council to resist similar applications from other premises in the area, which would have the potential to make the problems of disturbance greater. I consider the alternative times, or the removal of limitation on hours, after reviewing the implications of the controls under the Licensing Act 2003.

#### *The Licensing Act 2003*

24. The Licensing Act 2003 for the first time brought hot-food takeaways under licensing control. The 3 premises that are the subject of these appeals have been licensed under the Act. The times authorised for the carrying on of licensable activities varies with the activity, but for the take-away elements they are:

##### *Appeal premises A & B*

4:00pm – midnight on Mondays to Thursdays inclusive.

4:00pm - 2:30am on Fridays, Saturdays, Christmas Eve and New Year's Eve.

4:00pm – 1:00am on Sundays.

##### *Appeal premises C*

Noon – midnight on Mondays to Wednesdays inclusive.

Noon - 2:30am on Thursdays to Saturdays inclusive and on Bank Holidays and the day preceding a Bank Holiday.

Noon – 1:00am on Sundays.

#### *Necessity*

25. Circular 11/95 *The Use of Conditions in Planning Permissions* says that matters which are subject to control under separate legislation may also be of concern to the planning system. But a condition which duplicates the effect of other controls will normally be unnecessary. However, it sets out limited circumstances in which it would be appropriate to have both controls.
26. In these cases, there is no doubt that hours of opening are relevant considerations to both legislative codes. The improvement of people's quality of life is a recognised objective of the planning system, and it is therefore appropriate for a local authority to seek to protect the living conditions of the local population from development that has the potential to cause harm. PPS6, Circular 3/2005 and the local plan all place the control of the evening and night-time economy within the ambit of planning. Significantly, all post-date



20 NOV 2007

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the passing of the Licensing Act. None suggests that the planning system should cease to consider certain aspects of development because of the existence of that Act. The environmental consequences of hot-food takeaways in town centres are planning matters and something which it is proper for the local authority to seek to address by way of planning conditions. The hours of opening are, in principle, an area where control may reasonably be exercised.

27. The objectives of the Licensing Act are: (a) the prevention of crime and disorder; (b) public safety; (c) the prevention of public nuisance; and (d) the protection of children from harm.
28. The last of these is not of particular relevance to planning, but it is common ground that the others overlap to a considerable degree. The scope of the objectives of the premises licences in these cases may be judged having regard to the other conditions imposed, including: provision of litter bins at or near the exits and the clearing of litter at the end of trading; provision of CCTV systems; participation in the *Pubwatch* scheme (including exclusions and radio links with other premises); reporting incidents of crime and disorder; the display of notices requiring customers to leave the premises and the area quietly; and the prohibition of nuisance through noise and smell. An additional advantage of a licence is that it may be reviewed on application by an interested party or a responsible authority, and may be revoked or its terms modified by reference to the licensing objectives.
29. In my view, the licence conditions address many of the objectives of planning, including elements of LP Policy TCN 7 and the reasons for imposing the original conditions. However, in my view, they do not wholly equate. The prevention of public nuisance or crime and disorder, or the objective of public safety are not the same as seeking to protect residential amenity or living conditions. What might harm living conditions may well fall far short of constituting a public nuisance or a crime. Noise and disturbance from late night traffic might well be extremely annoying to a local resident, and yet it would not be a public nuisance. A moderate level of disturbance that would not be so great as to be a public nuisance might be acceptable occasionally, but would not necessarily be so if experienced on a frequent basis. Yet such frequent occurrences would not necessarily breach the objectives of the Premises Licence. In the same way, I believe that the character of an area, as perceived by a resident or a visitor could be affected very substantially by the activities of late night revellers without any crime or disorder, or public nuisance taking place.
30. I conclude that a planning condition which limited the hours of opening, even though it might duplicate the effect of a similar condition on a premises licence, may still be necessary because the considerations material to the exercise of the two systems are substantially different, and it would be unwise to rely on the licences being exercised in the manner or to the degree needed to secure planning objectives. This is in accordance with the guidance in Circular 11/95.

#### *Reasonableness*

31. Circular 11/95 also says that a planning condition whose requirements conflict with those of other controls will be *ultra vires* because it is unreasonable. "Conflict", in this context I understand not simply as meaning "inconsistent" or "different", but meaning that it would not be possible to comply with both. But

that is not the case here. Certainly, when the hours of opening allowed under a planning permission and a licence are different, there is inconsistency between them. But, as the conditions are permissive rather than prescriptive, it is entirely possible for an operator to comply with both. The licence does not require the premises to be open at certain times, only that they shall not be open outside them. Closing earlier than allowed by the licence in order to comply with the planning condition would not breach the licence therefore. There would be no conflict, and therefore no unreasonableness.

32. Nor, in my view, was it unreasonable for two parts of the same Council to come to different conclusions with respect to the hours of opening. The Licensing sub-Committee and the Planning Panel have different terms of reference and consequently they are entitled to come to different conclusions. The Licensing sub-Committee minutes show clearly that its members were not only aware of the objectives of the Licensing Act, but also that these were different from planning considerations. Indeed, it states "*...the statutory principles upon which a decision is made are different and respective committees hear different representations and evidence*". It is true that much of the evidence brought before the sub-Committee and the Panel was the same, but the former was aware that its decision would cut across planning conditions; and the Panel was made aware of the recent decision on the licences.
33. PPS6 advises local authorities to ensure there is an integrated approach to the evening and night-time economy, so that their planning policies and proposals take account of and complement their Statement of Licensing Policy and the promotion of the licensing objectives under the Licensing Act. They should consider developing a local strategy which, when co-ordinated with other local strategies, tackles a range of issues. It may be that the Council have some way to go before their approach under the 2 sets of legislation is co-ordinated to that degree. But, in the meantime, while differences in conditions might be potentially confusing, I conclude that it is reasonable that the Council, when taking decisions within different legislative frameworks, may take different decisions.

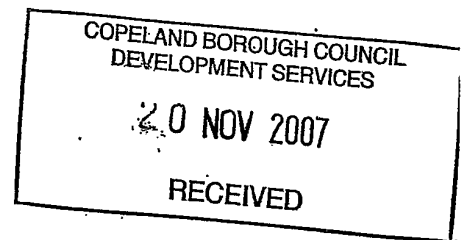
#### *Overall Conclusions*

34. I conclude that although there is substantial overlap between the planning and premises licensing regimes, there is sufficient difference in their objectives to justify restricting the hours of opening on these hot food takeaways by way of planning conditions. I have already concluded that the extension of hours as proposed in the planning applications would have the potential to cause harm to the living conditions of those residing locally and to the character of the area, contrary to intentions of LP Policy TCN 7. Notwithstanding the superficial attractiveness of harmonising the hours of opening with those set in the premises licences in the interests of having a co-ordinated approach, I also take the view that allowing the premises to remain open as late as 2:30 am on 2 nights a week in the case of Appeals A & B, and on 3 nights in the case of Appeal C, would be unacceptable for the same reasons. No other alternative hours of opening were proposed. In reaching these conclusions, I acknowledge that some of the drinking establishments are not controlled by planning conditions and some may, under their liquor licences, stay open as late as 2:00am, plus drinking up time. There will inevitably be some unavoidable noise and disturbance at these times as their patrons disperse. I also

acknowledge that the 3 premises that are the subject of these appeals are not the only takeaways in the centre of Whitehaven, and that they cannot be held responsible for all of the harm to the planning objectives I have identified. But these are not good reasons, to my mind, to encourage drunk and excitable people to stay in the town centre at late hours, when that has the potential to cause further noise and disturbance. I conclude that the appeals should therefore fail.

*Jonathan King*

**Inspector**



## **APPEARANCES**

### **FOR THE LOCAL PLANNING AUTHORITY:**

<b>Mr Martin Jepson</b>	Solicitor, Head of Legal & Democratic Services, Copeland Borough Council.
He called	
<b>Mr Leonard Cockcroft</b> DipTP MRTPI	Consultant Planning Officer Copeland Borough Council.
<b>Sgt Richard Farnworth</b>	Cumbria Constabulary.

### **FOR THE APPELLANTS:**

<b>Mr John Dugan</b>	Solicitor Brockbank, Curwen, Hall & Cain, Duke Street, Whitehaven.
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Mr Dugan called no witnesses.

## **DOCUMENTS SUBMITTED AT THE INQUIRY**

- 1 Letters of notification of the Inquiry and list of those to whom it was sent.
- 2 Statement of Common Ground.
- 3 Letter from Ann Ellams, Two Castles Housing Association, and response to survey of residents.
- 4 Premises Licence: Milano Pizza, Globe House, Duke Street, Whitehaven.
- 5 Premises Licence: Chattanooga, 5 Duke Street, Whitehaven.
- 6 Schedule of Whitehaven Licensed Premises: Cumbria Constabulary.
- 7 Planning permission 4/99/0327/0 – 14 Duke Street, Whitehaven.
- 8 Planning permission 4/93/0684/0 – Globe House, Duke Street, Whitehaven.
- 9 Planning permission 4/83/1027/068, Duke Street, Whitehaven.
- 10 Bundle of papers relating to saved policies of the Copeland Local Plan 2001-2016.
- 11 Cover sheet and "standard conditions": Copeland BC Planning Panel 11.01.06.
- 12 Appeal Decision: APP/W0910/A/06/2025135: 72 Duke Street, Barrow-in-Furness.
- 13 Bundle of supporting material submitted by Mr Dugan.