

## Planning and health: Defining the limitations of regulation and the discretionary context at the micro / site scale

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### Abstract

*Planning, at its most basic, is about making better places. In recent years, there has been a positive renewed focus on strengthening the links between planning and the promotion of wellbeing and good health outcomes. This is a welcome emphasis with origins relatable to the health narrative in the 1909 Housing and Town Planning Etc Act. Within the post 1947 Town and Country Planning Act context, planning in some respects regressed to a land use and infrastructure focus, with health considerations limited to physical health infrastructure provisions and environmental/amenity considerations. This relatively recent 'reuniting' of planning and health is one way in which planning has been expressly identified as central to the ability of the state to improve the quality of life of the people. This is based on two implicit assumptions. Firstly, that the characteristics of the built environment have an impact on the health of the population. Secondly, that planning, via its current policy, regulatory, and legislative provisions, has the right tools to achieve positive on the ground changes in relation to this. The first aspect of this is well established through a public health evidence base, the second, however, remains substantively under-researched as part of a broader lack of attention paid to the regulatory or development management aspect of planning. This paper begins to address this deficit by examining the manner in which issues of health are or are not encompassed into decision-making on the site scale by looking at appeal decisions into the location of fast food outlets. By so doing, it challenges some of the assumptions inherent in policy aspirations and calls for a renewed and detailed investigation of the tools needed to achieve such good intentions on the ground.*

## Introduction

From its earliest origins, the purpose of town planning has included improving and managing the quality of life of those in towns, cities, and the countryside through the control of development in the built and natural environment (Freestone and Wheeler, 2015). These claims, however, have a long history of contestation both in terms of the focuses/execution of planning in practice and ways of thinking about the goals of planning: often conveyed in debates about the idea of the public interest which remain topical and timely in planning theory (Alexander, 2002; Campbell and Marshall, 2000a; Tait, 2016; Moroni, 2019; Lennon, 2017). This paper aims to explore a particular avenue within these wider claims by focusing on the possibilities and limitations of decisions at the site scale to promote the public interest. Specifically, we focus on planning for health and wellbeing as a prime example of how contemporary policy and practice can [attempt to] promote the equitable distribution of goods and personal capabilities within a given theme (Lennon et al, 2019). What is original about this contribution, however, is its focus on actual decisions, the way they were justified; significantly, this paper also considers the construct within which these decisions are made, and their potential limitations.

The discourse concerning the role of the public interest in planning often focuses upon the ethical frameworks of planners, or the contested notion of the public as a unitary or diverse and splintered entity (Campbell and Marshall, 2000b; Sandercock, 1998). Despite much support for Campbell's (2006) statement that planning should be 'the art of situated ethical judgement' (author, 2018; Lennon and Fox-Rogers, 2017) the majority of work focuses on the *ethical judgement* at the expense of the *situated*. Recent research and writing mainly focuses on either the philosophical framings on the idea (Moroni, 2018, for example) or has investigated how planners frame their judgements (Murphy and Fox-Rogers, 2015; Lauria and Long, 2019), demonstrating both the importance of precise and sophisticated understandings of the terms and also how these are interpreted by practitioners. What this does not do is directly look at how these moral frameworks bring about better or worse outcomes in the built environment. Focus on practitioners' thinking and reason is important in itself (Forester, 1999) but there remains another step or sphere which remains largely under-researched: the relationship of this to the constructs and tools we have for policy implementation. It is this gap that this paper seeks to address.

The recent debate between Mick Lennon and Willem Salet in the pages of *Planning Theory* bring out some of these tensions between high level moral theorising and ways and means of influencing practice with Lennon claiming that such debates are 'a dialogue between the abstract and the actual'

(Lennon, 2019, 267). Moreover, Moroni's statement that 'planners neither create nor uncover the public interest but contribute to specifying and operationalising (it)' (Moroni, 2018, 78) is useful in thinking about the relationship between the intellectual framing of the concept of the public interest: the conflicts between utilitarianism, liberalism and more substantive or collective notions of the public interest, and practice. It is to the latter, at the level of small-scale site-based decisions that this paper turns its attention. The notion of the public interest in planning is a practical, or evaluative one (Alexander, 2020) and something which is employed to debate about purpose, action and processes. In this, it asks questions of not only how to do conceive ideas of 'better', but how do we bring them about, on the ground, in specific places and settings. Without understanding more fully the possibilities of, and limits to regulatory decision making, it is not possible to understand how planning can actually exert an influence on built and natural environment outcomes. This understanding is critical; an inability to effectively implement aspiration and intention in practice challenges the proposition of planning as a positive tool of influence and hope with regards the public interest. The recent debate around the Planning White Paper (2020) in England alludes to this relationship, but still in the majority indirectly. Ellis claims, in contradiction to the government reform agenda of the last three decades, that 'red tape was in fact the only thing holding society together' (2020, 1) and there is rightly much concern raised over the proposed shift from a discretionary system to one based on zoning. The value of strong regulatory oversight in creating places which at least meet a basic standard of human habitation has also been noted in the research and debate about permitted development for office to residential conversions. Despite all this, there is little work which directly links these concerns of reform to ideas of what the best tools are in enabling planning to *deliver* the public interest in its developments.

On this basis, our argument in this paper aims to begin to draw these strands together and redress the imbalance in research and theorising about the regulatory aspects of planning practice. It uses Appeal decisions in the UK concerning the development of hot food takeaways as a specific lens into the micro scale of planning as specific to health and wellbeing. By focusing on the detail of such decisions and the regulatory framework within which they are taken, the paper is able to assess the powers and limits of planning tools in bring about changes to promote healthy lifestyles in line with stated policy aspiration and intent, rather than focusing on the motivations and understandings of practitioners themselves. This is not to belittle the importance of such work, but instead to raise different questions concerning the powers and limits of the system itself in acting on these expressed motivations and visions of better places. The paper next outlines the history of planning for health, exploring its origins and contemporary interpretations. It then discusses the importance of the regulatory tools and practice of managing change in the built environment, highlighting how these

mechanisms remain largely overlooked when considering questions about how planning can achieve positive change in people's lives, despite having arguably more influence on day to day existence than high-level strategies. It then reviews some recent amendments to the scope of control in development management and their implications for the possibilities of managing change with regards to promoting health and wellbeing, before turning to look in detail at use classes, health and hot food takeaways.

### **Planning for health as promotion of better places**

Planning has a historically long relationship with questions of health and public wellbeing as a prime factor in defining better place quality. In ancient Greece and Rome, questions of healthy lives in the city were important to a range of thinkers and both offered what could be categorised as policy and regulatory management interventions in this area. In the UK, Roman developments displayed examples of this intervention through the provision of public baths, sports facilities, and layouts delivered against planned intentions (Aldridge, 1915; Barton, 2016). The development of controls concerning land management from the middle ages to the start of the Victorian era via key steps including the Assize of Nuisance (1275) and Royal Proclamations under Elizabeth I James I (VI), Charles I, Charles II were the beginnings of an ordered system of control of the built environment in the UK (author, 2017). Such measures sought to influence development in ways which limited the actions of individuals in the name of a greater, public good: establishing a principle which is central to the operation of planning today. The Victorian era saw the introduction of both a wider set of controls, and a more overt emphasis on the role of the built environment in promoting health/minimising disease culminating, via a series public health focused legislations, in the 1909 Housing and Town Planning Act of 1909

The significance of health as a driver in the 1909 Act is clear via the holistic and grand stated intentions of the Act. In presenting the Bill the following was stated:

*'The object of the Bill is to provide a domestic condition for the people in which their physical health, their moral, their character, and their whole social condition can be improved by what we hope secure in this Bill'* (Parliamentary Debates on the Housing, Town Planning Etc Bill, 1908).

By definition, this legislation also set out the aims and role of town planning: underpinned by the assumption that the act of intervention in the built environment *could* and should aim to improve the moral, health and social conditions of 'the people'. The evolution of planning continued via a series

of key pieces of legislation, for example the 1919, 1932, and 1935 Acts, which developed the UK planning system around a Bylaw (essentially regulatory) and plan approach. The limitations of this approach as applied within the UK led to criticism for being overly restricted and too limited in application rendering it incapable of enabling the realisation of the aims and aspirations of planning. The search for a new system with flexibility ultimately led to the birth of the modern planning system via the 1947 Town and Country Planning Act. With this came a discretionary and ultimately plan-led approach which continues to define the system to this day (Booth, 2003); an approach which should enable planning to be able to secure the desired improved domestic condition called for in the 1909 Act.

The 1947 Act can arguably be presented as the marginalisation of health and wellbeing within planning, but only in sense that it was a victim of its own success in the wider context of political, social, and economic reform which also saw the emergence of the Welfare State, including universal social and health care. This was a zeitgeist period of the large and interventionist state, desired by a majority in society and motivated by the creation of a new and better post-war world (Ward, 2004). For the following sixty years, the links between planning and health were focused in some respects around environmental amenity health considerations and the provision of physical health infrastructure as planning was tasked with promoting a range of other public goods – environmental aims, amenity protections, social inclusion and equity, economic growth - and in this time, wider considerations of wellbeing and health became less prominent.

However, into the 21<sup>st</sup> Century, planning and health can be seen as reintegrating as part of a wider integration approach (Freestone and Wheeler, 2015; Kidd, 2007) and is now a topic on which there is a burgeoning literature of academic research (Barton, 2016; Sarkar et al, 2014; Beatley, T., Jones and Rainey, 2018; Corburn, 2009). For planning and health specifically, we can look to the Health and Social Care Act 2012 with Joint Strategic Needs Assessments (JSNAs) and Joint Health and Wellbeing Strategies (JHWSs), the National Planning Policy Framework 2012 (NPPF) and Planning Practice Guidance (PPG), Environmental Impact Assessment (EIA) 2014 Amendment, and Health Impact Assessments (HIA). In 2012, the Town and Country Planning Association published 'Reuniting Planning and Health' (Ross and Chang, 2012), evidencing this narrative and bringing it to the fore of professional practice.

Today, health and wellbeing, often presented within the wider context of sustainable development, is, again, at the very heart of national planning policy and intention. Within the National Planning Policy Framework (NPPF) the first makes a very clear statement that:

‘The purpose of the planning system is to contribute to the achievement of sustainable development. At a very high level, the objective of sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs’ (MHCLG, 2019, 5).

Further definition is then provided to explain the manner in which this will be achieved, specifically through three key objectives:

‘a) an economic objective – to help build a strong, responsive and competitive economy, by ensuring that sufficient land of the right types is available in the right places and at the right time to support growth, innovation and improved productivity; and by identifying and coordinating the provision of infrastructure;

b) a social objective – to support strong, vibrant and *healthy communities*, by ensuring that a sufficient number and range of homes can be provided to meet the needs of present and future generations; and by fostering a well-designed and safe built environment, with accessible services and open spaces that reflect current and future needs and *support communities’ health*, social and cultural well-being; and

c) an environmental objective – to contribute to protecting and enhancing our natural, built and historic environment; including making effective use of land, helping to improve biodiversity, using natural resources prudently, minimising waste and pollution, and mitigating’. (MHCLG, 2019, 5, emphasis added)

This clearly sets out that the objective of planning for health is important at a very high level, but also suggests that this can be achieved via the ‘correct’ planning for housing, services and open spaces- more specific and tangible actions which planning can deliver in its day to day work. Planning Practice Guidance (Paragraph: 001 Reference ID: 53-001-20140306) provides further detail specific to planning:

‘What is the role of health and wellbeing in planning?’

‘Local planning authorities should ensure that health and wellbeing, and health infrastructure are considered in local and neighbourhood plans *and in planning decision making*. Public health organisations, health service organisations, commissioners and providers, and local communities should use this guidance to help them work effectively with local planning authorities in order to promote healthy communities and support appropriate health infrastructure.’ (emphasis added) (MHLG, 2019b)

The phraseology is notable here; 'healthy communities' are a requirement beyond the health of the individuals contained therein, and the use of the word 'wellbeing' represents a further demonstration of the holistic intentions of the policy. Moreover, the emphasis here is that this should not merely be a policy aspiration, to be written in to documentation, but something that should be at least *considered* in the taking of planning decisions. The planning policy hierarchy, from national to neighbourhood, can therefore be said to now offer a decision making context in which enabling good health and wellbeing outcomes is emphasised; this is a context informed by international and national legislation, and there the plans themselves are subject to scrutiny and evidencing mindful of these outcomes. Planning applications can also require EIA and HIA to ensure evidence based decisions at the site scale and implementation phase too. However, is planning, within a discretionary plan-led planning system subject to challenging legislative reform, capable of delivering the scale of influence expected of it? To consider this further, the paper next explores the regulatory tools that the UK system has to manage change. It considers how recent changes to regulatory mechanisms have led to a diminishment of planning's ability to promote good quality housing- or more specifically to prevent poor quality development- and considers more widely the relationship between policy aspirations and the means of implementing them in the micro-level.

### **Regulation, development management and site-specific decisions: The nature of the system**

Despite its importance in the running of the planning system in a UK context, development management receives substantially less attention in both academic research and professional commentaries than other aspects (but see Harris, 2017, 2015, 2012, 2010 and authors, 2020, and author, 2017). However, because of the discretionary nature of the English system (author, 2019), decision making mechanisms and the judgements of said decision-makers are vital in the link between policy aspirations and on the ground, site specific outcomes. There is not the scope to explain all the complexities and nuances of this here beyond basic principles, but it is necessary to outline a few basic presumptions of the system to make sense of the argument which follows. Any intervention which is defined as development needs planning permission in some form (author, 2017). These permissions, when Express or within certain limitations via Prior Approval, are discretionary decisions largely taken by local government planners on behalf of their elected representatives. These decisions are taken in accordance with - but not being bound to - a statutory Development Plan unless 'Material Considerations' indicate otherwise. Each express planning permission is therefore an informed judgement considered against a range of matters, rather than a test of conformity with the Local Plan. However, within this framework, there is a hierarchy of development forms within which some are

deemed as needing less state oversight for reasons of efficiency. The UK therefore operates a hierarchy of scaled control, progression through which sees a parallel increase in opportunity for state intervention into the decision (author, 2019). There are three key steps in this proportionality hierarchy: permitted development, prior approval and the need for express planning permission.

Within the above hierarchy can be found a sliding scale of opportunity for state intervention. For the smallest scale development, Permitted Development constitutes a regulatory approach; a national Development Order grants planning permission for development which meets set criteria. Using a mixture of volumes, dimensions, and explained allowances, the smallest scale of development which are considered to have an acceptable impact in most instances are therefore given planning permission via this provision and no further permission is required. The step up from a full Permitted Development allowance is the provision of Prior Approval in association with Permitted Development. This essentially places defined and limited criteria over which the local authority has influence, creating a 'catch' within the Permitted Development allowance where development can be refused. At the upper end of the hierarchy is Express Permission. This is the route to permission where the full discretionary approach is employed; development types falling outside the provisions of Permitted Development (including with Prior Approval) will require Express Permission.

The other dimension of the system that needs to be understood is the manner in which the planning system manages uses. This is done through the Use Classes Order 1987 (as Amended) which organises uses into categories, or 'classes'. The classes can be summarised as follows:

*INSERT TABLE 1: Planning use classes overview*

*Table updated from Sheppard et al (2017)*

Legally, development can occur where a *material change of use* takes place. This is typified through the Use Classes Order via movement *within* Classes not constituting development, whereas movement *between* Classes is development. As above, this movement can be facilitated via Permitted Development, Prior Notification in association with Permitted Development Rights, or through Express Planning Permission.

The aim of this discussion has been two-fold. First, it aims to outline some of the structure of the decision-making process in the England (with degrees of transferability elsewhere around the UK), and secondly, by so doing, illustrate some of the limits to control which will be discussed more fully below. Within these structures, there are implicit value judgements about the impact of one sort of



development or change as opposed to other ones. Within the UCO, it is possible to change a concert hall into a gym without the need to attain any further permissions for the change of use itself, and permitted development exists so that householders can substantially increase the size of their own properties. These reflect, in turn, assumptions about leisure and culture, and about private property. At a more profound level, Use Classes reflect assumptions about the categorisation of uses and life choices within a mainstream and capitalist understandings of acceptability as demonstrated when people try to live beyond these categories (authors, 2019). Two questions arise from this. The first is what do the tools of the planning system reveal about the sorts of 'good lives/better places' that planning wants to promote. Deeming that the regulation of development is in the public interest might be broadly agreed, but asking the question what sort of regulation of what sort of development unpacks assumptions within this broad statement in more insightful ways. This wider debate is the agenda of this special issue (see intro). The second- and this is the focus of this paper- is do these tools actually work in achieving these ends.

Specifically, this paper aims to consider is the implications of the regulatory construct at the micro (typically unit) scale, in particular the implications the Use Classes Order arrangements with regards hot food takeaways. The discretionary nature of the UK planning system should allow for decisions to be taken which promote health and wellbeing in line with the above discussion of policy and literature, and indeed this task is expected of planners and the planning system. However, it can be argued that the regulatory construct of UK planning is limited in the extent to which it can bring about positive changes.

With specific reference to the UCO as a tool; its power is to intervene in scenarios of over-concentration of specific uses or their existence in particularly sensitive locations can be limited. This is a complex, under-researched and under-theorised challenge; a rigid regulatory construct is required to ensure clarity and definition, yet this exists within a real world setting world and as such is exposed to the dynamic nature of reality. Uses do not always fit neatly into a 'box', and furthermore the activities may be difficult to define due to their characteristics; the result is a construct unable to facilitate the place management expected/required of it.

### **Not that, not here? Use classes as a means of achieving healthy places?**

To explore what these issues mean for the ability of planning to promote healthy communities, the paper now turns its focus on changes to the Use Classes Order in the area of Hot Food Takeaways (HFTs). Instead of looking at the impact of reducing regulation, this example explores whether an increase in regulation can alternately work better at promoting healthy outcomes. In the ten year period 2008 to 2018 the numbers of HFT increased by 35% (Horner, 2018), and research identifies a

particular challenge with regards the number of HFTs clustered in areas of social deprivation; these areas themselves being identified as having higher than average obesity levels (PHE,2018). Areas characterised by a high density of HFTs effectively enable increased consumption of unhealthy food via the presence of the opportunity to consume (Burgoine et al, 2009). Furthermore, evidence indicates clear links between obesity levels and high concentrations of fast food outlets; as well as linking these with deprivation (LGA, 2016, 5), and concerns are here raised about the influence of proximity of hot food takeaways to schools and the diet of schoolchildren.

In England in 2005, the previously expansive Use Class A3 was divided into three distinct categories to enable the effective control of uses with distinctive implications. This was due to a wider recognition of the distinctly different challenges and implications of the activities associated with each use type, with amenity and nuisance the principle drivers rather than health in the wider sense:

- A3 Food and drink: restaurants and cafes
- A4 Drinking establishments
- A5 Hot food takeaways

This change offered the ability to control each use type separately, including hot food takeaways with the introduction of a new 'Hot Food takeaway' classification to try to limit and steer the locations of a use seen as potentially harmful in some circumstances.

More recently [2020] 'hot food takeaways' were reclassified as 'sui generis' use, distinguishing further this use type as a category of use. This was part of a wider restructuring which was focused around the creation of a new 'Class E'. This new 'Commercial, Business, and Service' use class combines the former Class A1, A2, A3, B1 and certain D1 and D2 uses in England, with the associated reclassification of other uses from A4, A4, D1, D2 uses into either Sui Generis designation or new F1 'learning and non-residential institutions' / F2 'Local Community' Use Classes.

As a sui generis use now (and indeed as previously A5), the theoretical potential exists to apply robust controls over takeaway uses. A key challenge here however is the impact and identification of 'hot food takeaway' use is not simple and clear-cut. Firstly hot food take-away vary widely in the healthiness of their products, and some takeaway food is less unhealthy than others. Small variations in activity can have an impact too, for example just by changing the fats used for frying, an outlet can become substantially more (un)healthy; this is not something than can be controlled via the UCO (NHS, 2013). The important implication of this, remembering planning is blind to users and sees only uses, is that planning cannot differentiate readily between occupier implications. A planning application may require the consideration of a 'hot food takeaway' use occupier but the nature of that product, or how the range on offer evolves over time, may not be definable or controllable.

In addition to the challenge of definition, there is further difficulty when categorising Use Class. There is a particular challenge differentiating between a 'food and drink' type use (within Class E), and a 'hot food takeaway' use type (sui generis). This will be an individual interpretation of circumstances considering matters such as provision of seating, extent of seating, percentage of sales that are consumed on site, provision of a toilet, and facilities for heating of food and maintaining temperature. This means that users such as Greggs, Subway and others may fall into either E or 'hot food takeaway' use type. The identification of a unit may not, therefore, prevent a user that some may wish to see controlled. Furthermore, the provider of takeaways could occupy a B2 [industrial] use unit; the more recent phenomenon of 'Dark Kitchens', industrial units being used to cook food in association with a takeaway located elsewhere or particular brand which is then distributed via online/telephone ordering, entirely disrupts traditional land use planning in association with this use type and further complicates and challenges matters (Makwana, 2019).

Finally, the nature of the food purchased merits consideration. Hot food is targeted due to the link between the food types and obesity, as well as a range of environmental concerns. But food purchased within a Class E 'retail' type use, which may be located in a geographical area of health indicator concern but seen as an acceptable use types from a policy perspective, may be little better than the 'restricted' food types:

*INSERT TABLE 2 HERE: Typical fats*

(Sheppard, 2016)

*INSERT FIGURE 1 HERE: Typical sugars*

Action on Sugar, cited in BBC (2016), '*Shocking' sugar levels in High Street hot drinks, warns charity*, [www.bbc.co.uk/news/health-35593007](http://www.bbc.co.uk/news/health-35593007). (accessed 18 January 2021)

We must also be mindful, as noted already, that impact is circumstance and context dependant; the characteristics of the area, and the concentration level of the use, influences impact (Burgoine et al, 2009). Planning decision making also need to try to take this into account when considering the acceptability of an application, whilst also considering the variables and challenges discussed.

If hot food takeaways are the 'low hanging fruit' of control opportunities they serve to illustrate the challenge of managing any one category of use type via the use classes order. There is significant pertinence now to this discourse mindful of the creation of Class E in the Use Classes Order in 2020. The implications of Class 'groupings', and the associated challenges of spatial/use management within this context, make an understanding of existing challenges important. With regards hot food takeaways, this is now explored in greater detail in reference to seven examples from case law which remain of significance and validity post 2020 UCO changes, and provide insight into the complexity of managing use types mindful of the operational practices and approaches of planning.

### **Policy application**

As has been discussed, a plan-led discretionary planning system operates in the UK. The importance of material considerations is of note here; the presence of policy seeking to resist something is only one consideration of the decision maker. Unlike a regulatory construct where definitions in policy can be absolute, in the UK there is flexibility in the decision outcome. Furthermore, the role of planning conditions must be considered; a use being problematic in certain circumstances does not equate to a need to resist a use outright, rather managed/controlled operations through the use of conditions can be considered to overcome the specific concern in question. In consideration of the hot food takeaway example, relatively early decisions post the introduction of the new A5 use class (2005) helped define the importance of health within decision making as a material consideration, the value of strong policy, but also the limitations and constraints on decisions being taken.

This section now draws on a series of examples under five headings that have been identified following analysis of the Development Control Practice (DCP) appeals resource, demonstrating how planning authorities have attempted to use the tools they have to control development to promote health. DCP is a database used extensively by the public and private sector within planning, and represents one of the key sources for legal information for planning professionals. It contains key appeal, ombudsman, court and Secretary of State decisions pertaining to development management, enabling an understanding of the pertinent regulatory and legal constructs. It should be noted here for completeness that in England planning decisions form informative precedents, meaning decisions over an extended period of time create an evidence base which informs (but does not bind) subsequent decisions. When making planning decisions, previous decisions represent Other Material Considerations (Section 38 of the Planning and Compulsory Purchase Act 2004) which are taken into account by decision makers. Case law essentially retains its importance until it is supplanted meaning decisions made today can be influenced by both recent and historic cases, combining to inform a body of planning decisions that provides some clarity and definition for decision makers with regards the

interpretation of cases. Even with continuing change to the UCO, previous case law remains valid and pertinent. Informing understanding, interpretation, and practice behaviour. The DCP database was searched for all references to health and hot food takeaways, with the key cases then analysed to create the framework below:

### **1: *The need to consider health***

In *Copeland v London Borough of Tower Hamlets* (11/6/2010) it was found that the council had acted unlawfully in granting planning permission for a takeaway by failing to take into account the proximity of a secondary school with a healthy eating policy as a material consideration even though the council had no planning policy relating to this issue. The council subsequently decided that the scheme would add to the proliferation of takeaways which would erode its ability to combat the effects of poor diet in the local community. It highlighted the proximity of various schools and that the premises would attract children. On appeal the inspector agreed that the council's core strategy did seek to reduce an over-concentration of uses that would detract from the ability of residents to adopt healthy lifestyles but found no over-concentration within 300 metres of the site and there was no clear-cut evidence that the proposal would increase child obesity or undermine the healthy eating policies in local schools. The appeal was allowed.

This case illustrates the ability of the system to control for the location of hot food takeaways, but also that the system does not see this as a simple route to promote healthy lifestyles. Use class location takes into consideration policies and statements about health as material considerations, but they are given no excess weight in decision making. This case is at best ambivalent about the ability of the planning tools to achieve higher level aspirations of 'better'.

### **2: *Strong policy and evidence for decisions***

The following five cases demonstrate the way which policy can steer decisions on changes of use.

- *Hammersmith and Fulham* (14/11/2012, DCS No 100-079-610) - a proposed takeaway and restaurant was found to reduce the shopping frontage in a neighbourhood parade from 60% to 57% in conflict with a policy which stipulated a 65% minimum. The inspector expressed some sympathy for the appellant's submission that the parade lay within a larger centre which was vibrant and viable and that anybody walking along the road would have difficulty identifying the boundary of the parade. Nonetheless the inspector considered it important to apply the boundaries adopted by the council since otherwise the aims of its policies would be undermined. The proposal would also conflict with an Supplementary Planning Document which had to be given significant weight.

- Barking and Dagenham (11/02/2011, DCS No 100-071-105) - An inspector accepted that there was no effective retail demand for a retail premises in a district centre primary frontage that had been vacant for over a year but concluded that a proposed pizza takeaway would be contrary to a 30% non-retail use policy and the appellant company had failed to provide evidence of a need for the proposed use in accordance with that policy.
- Swale (16/08/1989, DCS No 030-552-861) - A takeaway was proposed in a secondary street adjacent to a town centre. The local authority stated that in the street in question there were 13 establishments selling food and drink, some 21% of the total number of units. This had reached a level which was seriously detrimental to the character and vitality of the street. An inspector noted the council's intention to encourage the development of this street as a local centre. Whilst takeaway food premises would be expected to be an appropriate element in such a centre, there was already a high proportion of such uses. A further establishment would result in an over-concentration of such uses and an imbalance in the retail mix which would be significantly detrimental to the character of this pleasant local shopping street.
- Walsall (04/12/1984, DCS No 100-004-597) - A fish and chip shop was proposed in a town centre. A local authority argued that the change would be contrary to their shopping policy which stated that non-retail frontages should not exceed 6 metres and should have retail uses on either side. An inspector found that the premises occupied a very prominent and imposing building, and that the loss of the whole frontage for non-retail purposes would significantly detract from the shopping character of the street.
- Aberdeen (09/10/1984, DCS No 100-004-175) - A proposal for a "Spud-u-like" takeaway from a baker's shop in the centre of Aberdeen was refused. A local policy existed to prevent such facilities in order to maintain "civic quality and character". A Reporter felt that the council's efforts to maintain the City's fine and prime shopping concourse were to be commended. It would be unfortunate if the continuity of shopping frontage were to be eroded by the intrusion of too many non-retail uses. Non-retail uses would be increased to over half in this particular section of the street if the appeal were allowed, see.

In the above cases it merits emphasis that health is not driver for these decisions specifically, rather matters such as vitality, viability, and character are. This does not therefore demonstrate the power of the health narrative, but rather that strongly worded and defined policy can enable management of areas where it is desirable to control the level of non-retail use types, within which there may be a health narrative. This further demonstrates that regulatory tools exist in direct relation to policy guidance, and that these can be effectively applied. This may be something which is assumed by all

first year students of planning, but in contrast to the cases in (1) above, these cases demonstrate the means of making tools which ultimately bring about 'better' - decisions which enhance health, liveability and aesthetic environment.

An important point to emphasis at this juncture with regards health and wellbeing based decision making is the ability to evidence actual impact, not the potential for it to occur. Carmichael et al. (2013) note that detailed evidence with regards public health contexts and implications specific to proposals can create a more robust basis for a decision, but this can be challenging to provide and apply on a site scale basis. The traditional use of policy with prescribed requirements concerning frontages etc are quantifiable and this offers opportunity as a model with regards HFT policy approaches. But behind any such policy must exist a fine grain evidence base that can justify that application of the policy criteria; this can be difficult but is important – planning decision making requires the consideration of planning policy and other materials considerations; it is not a regulatory construct but a discretionary one. Decision makers therefore consider the weight of evidence and make a balanced judgement, rather than accepting and applying policy without interrogation.

### **3: Consideration.....not refusal**

In Waltham Forest (07/12/2010, DCS No 100-070-229) a location for a hot food takeaway within 40m of a park was found to be in conflict with the council's SPG which stated explicitly:

*“With regard to proposals which fall outside designated town centre and local parade locations, hot food takeaway shops will be resisted where the proposal will: 1. Fall within 400m of the boundary of an existing school or youth centered facility (e.g. YMCA, after school clubs). 2. Fall within 400m of a park boundary.”*

This was considered on balance to be insufficient grounds for withholding permission. This is an example of a case which demonstrates recognition of health as a material consideration but where it is not the determining factor. Again, the importance of fine grain evidence is highlighted here from the perspective of informing the question of weight and judgement. As a general point, to make a sound judgement decision the evidence base must be complete; this can enable informed decision making. In the absence of a robust and complete evidence base, weight may be impacted upon.

Decisions such as the Waltham Forest case are not unusual and highlight the balancing of 'weight' within a discretionary decision; health is a consideration but the existence of a health concern, and indeed evidence to substantiate this, does not equate to a refusal. Rather it is a matter that is weighed up as part of the decision considerations. In some ways this could be seen as a limit of the power of planning tools to promote better outcomes, but reflecting more broadly it could be argued it actually

does the opposite. The point of balance within a discretionary system is key to many professionals' understandings of the idea of planning promoting the public interest (Campbell and Marshall, 2000b; Murphy and Fox-Rogers, 2015). Promoting health and wellbeing might be part of planning for the public interest, and therefore need regulatory tools to enable this, but setting this within a discretionary system at best allows for specific, informed decisions; or 'situated ethical judgement' (Campbell, 2006)

#### **4: Informed life choices**

In East Riding of Yorkshire (25/08/2011, DCS No 100-073-812) the inspector concluded on a proposal for a takeaway that the college promoted healthy lifestyles and accordingly the students had the ability to make an informed choice on whether to use the facility on a regular basis. This effectively mitigated against the health 'risk' associated with the provision of a takeaway in proximity to the college. Here we see the discourse concerning the parameters of intervention associated with planning decision making. Informed choice, the freedom to make our own informed decisions about our own lives, is at the fore here. Also evident here is a differentiation between younger and older children; the ability to make an *informed* choice is emphasised here and suggests a planning focus upon those children at an age where their ability to make an informed choice is questionable.

A distinction between primary and secondary schools has been made in two cases. In Islington (20/06/2012 DCS No 100-077-825) the Inspector concluded that children of primary school age would be accompanied by an adult who would be able to guide food choices. Similarly, in Rotherham (09/01/2012 DCS No 100-075-699) the inspector similarly considered it that unlikely that children would travel to and from school unaccompanied by an adult and pointed out that the children would not normally be permitted to leave the premises at midday.' Here it can be seen again, as above, that the ability to take an informed life choice is seen as mitigation against the need for state intervention/oversight.

In these scenarios the fact that adults (who can make an informed choice it is assumed) are accompanying younger children (who it is assumed cannot make an informed choice) means the health argument is again not enough to substantiate refused. This creates a scenario where younger children are controlled by informed adults, and older children are themselves old enough. This creates little space for planning control to be applied and highlights the tensions between [acceptance/execution of] state intervention in the public interest, and freedoms of choice and lifestyle.

#### **5: Access and conditions**



As stated earlier, planning also has the ability to use conditions as part of its toolkit. Certain uses may be more acceptable at certain times, and this tool is one of fine tuning.

In Barking and Dagenham (11/02/2011 DCS No 100-071-105) a takeaway was proposed within 400 metres of a primary school and thus in conflict with an SPD, but the inspector had regard to the appellant's willingness to accept a condition requiring its counter service to close between 15:00 hours and 16:30 hours on school days; as such it was considered that risk was sufficiently mitigated given the emphasis upon exposure of school age children to potentially unhealthy food choices. In Brighton and Hove (03/03/2011 DCS No 100-071-282) a similar response can be identified. Here, despite the absence of specific Development Plan policy on the matter, the issue of the proximity of a takeaway to a secondary school was given substantial weight in consideration of health concerns. Again though, it was considered that health risks were satisfactorily addressed by a planning condition to restrict sales to after 16:00, after which time presumably it was assumed the children would have dispersed from the area.

These cases demonstrate that sharp, precise application of planning tools have the ability to allow for greater specificity and nuance within a decision. *More* regulatory tools (conditions controlling opening hours as well as controlling changes of uses) here allows for outcomes which are argued to offer near-satisfactory outcomes to more people than either just controlling uses or having no such controls on potentially harmful developments.

### **Policy application: discussion**

It should first be stressed that it is recognised that in circumstances where strong policy and accompanying fine grain evidence bases exist effective control concerning hot foot takeaways can be operationalised. Good practice in this regard can be exemplified via Newham Council Local Plan policy, (Donaldson, 2018), Barking and Dagenham's Supplementary Planning Document 'Saturation Point' (LBBD, 2010), and Gateshead's hot food takeaway Supplementary Planning Document (Gateshead Council, 2015) to name just three. However, from the above appeal examples it can also be argued that, while not beyond control, the challenges of regulation are manifest and limit the ability of planning to influence the evolution of the built environment to the extent that could be assumed from documents such as the Government published 'Healthy Weight, Healthy Lives: a Cross Government Strategy for England' (2008). This stated that local authorities should use existing planning powers to control more carefully the number and location of fast food outlets in their local areas. The examples given as evidence here show some indication that health can be promoted through the UCO and its use in decision making but it is not able to do so quite in the way envisaged by other parts of government.

To work well, change of use decisions on hot food takeaways need clear, timely and relevant policy backup, as well as consideration given to how conditions can support better outcomes. Critically too, a robust, detailed, current, and fine grain of evidence is required; there is a need to evidence that harm will occur, not just that it could occur. However, as discussed above, this is a slippery and subjective categorisation, and not necessarily something that even if working perfectly would be able to achieve the outcomes aspired to. This is not a call to abandon or reduce regulation; the earlier discussion of the negative outcomes of extending prior approval permission for converting offices to residential accommodation too clearly demonstrate the problem of leaving the market to take forward the public interest. The regulatory tools of the current system in the UK are by no means perfect - and nor are the underfunded authorities who run it – but there is a need to look in greater depth, with both more reflection and empirical research about the benefits and limits of the system of uses classes we have largely inherited from the end of the second world war. Moreover, the discussed cases above raise issues about the manner in which informed/personal choice is considered. These suggest that the scope of planning, and the degree to which planning intervention is accepted, remains a matter of debate. These issues are discussed further in the concluding sections of this paper.

### **Decision making limitations?**

The issues raised in the discussion of these cases raise further questions about the intended scope of the planning system. Returning to the 1909 Act, it is notable that it references ‘morals’ and their ‘character’. Already in this paper we have considered the role of personal choice and the scope of planning as interpreted by decision makers. In general, the modern planning system does not consider morality to be a material planning consideration; despite many academic pages being devoted to just this notion (Bruzzone, 2019; author, 2014; 2018 as well as others cited earlier in this paper)

In practice, this has been further borne out in decisions relating to other uses which can be seen as problematic when considering planning and health influences at the micro scale. Bookmakers and payday loan companies are a clear example with much evidence to demonstrate their negative impact on health inequalities (Ben Cave Associates, 2014).

As with hot food takeaways, measures do exist to enable the control of betting shops, payday loan shops and casinos; all now *Sui Generis* in England meaning Express Planning Permission is always required for such a use to come forward. This provides the need for permission and *potential* for control. We absolutely can manage these uses in some instances, particularly via retail impact (vitality and viability) and amenity considerations, but the scope of controls can again be seen to be limited when case law is considered. Analysis of DCP identifies three cases of note in this regard; in Guildford (21/05/2007, DCS No 100-048-996) a leisure development including a casino was proposed. The

inspector took into account written objections to the casino on moral grounds concerning the social impacts of providing more gambling opportunities but remarked that the licensing regime remained the primary focus for considering such points. Similarly, an amusement centre was proposed in a shopping street in Portsmouth (12/08/1999, DCS No 032-034-414). In this case objectors suggested that the use would have a “negative influence”. However, the inspector took the view that moral issues did not in themselves form a proper planning consideration. Finally, a bingo use was proposed at the Maryhill Shopping Centre, Glasgow (11/04/1995, DCS No 046-564-240). The reporter noted that he recognised the instinctive feeling of some residents and councillors that bingo will not assist people struggling to survive on a low income, but it is not part of the planner’s role to act as licensing authority.

Questions could be raised as to why licencing departments are seen as having a moral duty when planning ones do not, but this is slightly beside the point. Planning policy and government pronouncements (leading to changes in the UCO) have declared that dietary choices *are* a matter for due planning consideration, although there not clear-cut and indisputable evidence that ‘Spud-U-Like’ will do more damage to community wellbeing than a Casino will. There are grey areas, room for interpretation and site-specific judgements here, but there is also a larger picture. By regulation(s), planning seeks to achieve ‘better’ places- it is vital to debate what better means here *and* how it can be achieved.

## **Conclusions**

The purpose of this paper is not to suggest planning is powerless or ineffective, but rather is to highlight the need to recognise the limitations and characteristics of planning so it can be applied as effectively as possible, its potential recognised, and revision considered. This is pertinent today, both in the context of Class E, but also mindful of the 2020 Planning White Paper ‘Planning for the Future’. Planning is not only again tasked with delivering healthier, and therefore ‘better’ places, it also aspires to do this as driven by the public interest narrative at its heart. To implement ‘better’, to deliver and achieve healthier places, the state must be mindful of system and tool limitations, and see all regulatory regimes that can influence the built and natural environment in combination. Within this, what can planning achieve? What should planning be able to achieve? And how can we create a system that can deliver what is aspired to be achieved?

Planning has a role to play at the micro-scale, but this must sit alongside the role of other regulatory constructs; licensing has a key role to play (LGA. 2014), for example, it is often through licensing that the most effect opportunities for control exist. A critical conversation is required to determine the role of planning within the current attempts to create greater influence of the state upon society with

regards health and wellbeing. Part of this must be a consideration of the scope of planning and where the line is drawn between state intervention and freedom of choice. Further to this, consideration must be given to the nature, characteristics, and provisions of the current planning system; it is suggested revision is required to enable planning to be all that it can be.

Progress is possible; the system has evolved and continues to do so; the Use Classes Order has been changed to enable wider control in England specific to some uses, and the policy environment has evolved to support decision making. Where effective policy exists, controls are possible. But against this we must consider the limitations of the system and planning must ensure it is not placed in a position of stated purpose and influence which goes beyond that actually possible. It is suggested that greater attention is needed with regards the micro scale and the implications of the regulatory construct itself; this arguably impacts upon the ability to control as well as the characteristics of control as much at any other aspect of planning.

It is suggested planning faces three key questions:

1. If planning is to become more influential in health, wellbeing and lifestyle/freedom of choices (and morality?), the micro scale needs considering – is this *viable* within the current context of planning construct change(s)?
2. If planning is to become more influential in health, wellbeing and, importantly, lifestyle/freedom of choice at the micro scale, stronger policy and evidence bases, decision making, and guidance is required – is this *wanted* by all stakeholders?
3. If planning is to become more influential in health, wellbeing and lifestyle/freedom of choices at the micro scale, regulatory change is required – is this *possible and wanted*?

Finally, if the system is to be effective it cannot be compromised in the manner in which is seen in the continued and expanded use of Permitted Development allowances. The circumventing of the planning system for the delivery of narrow outcomes (housing numbers, economic growth) risks compromising planning ability to effectively manage place and space and create healthier, better, places. Without the right ‘tools’ planning will not be able to deliver better places, in any formulation of the public interest or common good.

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