



Appeal Decision

Inquiry Held on 8 & 9 October 2019

Site visit made on 9 October 2019

by Mrs H M Higenbottam BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 February 2020

Appeal Ref: APP/L2250/X/18/3198420

Bank Bar, Basement Business Premises, 2 Castle Hill Avenue, Folkestone CT20 2QT

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr George Lim against the decision of Shepway District Council¹.
 - The application Ref: Y17/0921/SH, dated 20 July 2017, was refused by notice dated 20 September 2017.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is for the continued use of the Bank Bar as a basement business premises operating within Use Class A4 separate from the A3² restaurant above and as a separate planning unit³.
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Decision

1. The appeal is dismissed.

Main issue

2. The main issue is whether or not the Council's refusal to grant a certificate of lawful use or development for the continued use of the Bank Bar as a basement business premises operating within use class A4 separate from the A3 restaurant above and as a separate planning unit was well-founded.

Preliminary matters

3. All oral evidence to the Inquiry was given under oath or affirmation.
4. The appeal application was dated 20 July 2017 although it appears that it was not considered a valid submission until 26 July 2017. The Council and the appellant have agreed in the Statement of Common Ground that the relevant time frame for confirming whether or not the claimed use is lawful is a 10-year

¹ At the time of the decision the site was within the administrative boundaries of Shepway District Council. Since the decision was made the Council has been renamed and the site is within the Folkestone and Hythe District Council administrative boundary.

² References to Classes A3 and A4 is under the Town and Country Planning (Use Classes) Order 1987 as amended (UCO). Class A3 is 'Use for the sale of food or drink for consumption on the premises or of hot food for consumption off the premises. Class A4 is 'Use as a public house, wine-bar or other drinking establishment'.

³ The description of use stated at question 8 of the application form is 'Bank Bar is a basement business premises operating within Class A4 and is functionally separate from the A3 Restaurant upstairs. The separate planning unit was formed on or before 16 June 2007 and has been operating continuously since then and is therefore a lawful use.'

period prior to the valid submission of the LDC application, which for the appeal is 26 July 2017. I have therefore accepted the material date as 26 July 2017.

5. The burden of proof is on the appellant and the standard of proof is the balance of probabilities. It is for the appellant to demonstrate that the material change of use of part of the basement to a use within UCO Class A4 has taken place and continued for a period of 10 years on or before the material date.

Reasons

6. The appeal property is a building over two floors; the ground floor is mainly laid out as a restaurant which is known as Kalala (a Chinese buffet style dining experience) and part of the basement is laid out as a bar known as Bank Bar. The kitchen serving Kalala is in the basement. Internally there is access from the ground floor to the basement via a staircase. This is used by customers to access the lower ground level toilets and occasionally customers go down or up to gain access to either the ground floor restaurant or the basement bar. However, this is occasional and not the main purpose of the staircase. There is a small external area to the rear with steps used by employees and a seating area to the front which I understand is used by customers of Bank Bar. Access to the basement Bank Bar is via steps from Castle Hill Avenue. The ground floor restaurant Kalala is accessed from Bouverie Road West.
7. The Council consider that the use of the basement for Bank Bar is not separate from the ground floor restaurant Kalala; the basement is not a separate planning unit; and that it has not been demonstrated that an UCO Class A4 Use was begun in June/July 2007 in the basement and that the use in more recent years (2015-2017) is not a Class A4 use but that Bank Bar has been operating as a night club.
8. The appellant confirmed that they were seeking confirmation of the use of the basement of No 2 to be used as a bar, which they consider is a primary use which was not ancillary to the restaurant on the ground floor.

Background

9. Planning permission was granted in 1998 (reference Y98/0273/SH) (the 1998 planning permission) for the change of use of the ground floor and basement from A2 to a restaurant/bar. In August 2002 a planning application for the conversion of the former bank into three separate units comprising uses falling within Use Classes A1 (shops) or A2 (financial and professional services or A3 (food and drink) including external alterations was granted on 15 October 2002 (reference Y02/0689/SH) (the 2002 permission). The approved plans of the 2002 permission showed three separate units at ground floor level, independently accessed from Castle Hill Avenue and Bouverie Road West and each having independent access to storage areas and their own dedicated WC's in the basement of the building.
10. The 2002 permission was subject to various conditions. Condition 5 required the UCO Class A3 use permitted to not be open to customers outside the hours of 9am-11pm on any day. The reason for the condition was in the interests of the residential amenity of nearby residents.
11. The Council consider that the 2002 permission was never implemented. It showed three units at ground floor and the basement divided into two units comprising storage and male/female toilets. The premises were never laid out

in this configuration. In addition, the plans do not indicate the basement as a separate bar and the conditions and description do not refer to any UCO Class A4 use. I concur with the Council's view that the 2002 permission was not implemented.

12. Works are stated to have started on the conversion works to turn the bank building into a restaurant in April 2003. It was laid out with a single restaurant on the ground floor of the building. The restaurant was called Kalala and this has occupied the ground floor unit since 24 January 2004. There are toilets for disabled people on the ground floor and male and female toilets on the lower ground floor level, between the ground floor and basement areas.
13. When the ground floor restaurant first operated the basement was used as an overspill area where customers sat and waited for a table or had a drink while waiting for a table in the restaurant area. At that time, the basement bar use was ancillary to the ground floor restaurant use. This ancillary bar use ceased when works both internally and externally were carried out to the basement in 2006/7.
14. Planning permission was granted in 2006 for the alterations to provide a stepped approach to the basement level together with the enlargement of the associated doorway (reference Y06/1306/SH) (2006 permission).

How the building and external land are used

15. The male and female toilets at lower ground floor level are accessible to both Kalala restaurant customers and Bank Bar customers. The main kitchen for Kalala is in part of the basement. There are doors separating the restaurant kitchen from Bank Bar. The appellant states these are locked and there is no use of the basement kitchen by the Bank Bar operator. There is no evidence that food has been sold or available to customers of Bank Bar.
16. The customer toilets are shared by Bank Bar and Kalala. A shared rota for cleaning between the bar and restaurant staff has been undertaken.
17. The primary method of fire detection in the Bank Bar and Kalala is a combination of smoke and heat detectors within the ground and lower ground floors. The automatic detection system is linked to the restaurant and the bar. An escape route in the case of fire from Bank Bar is through the main entrance of Bank Bar with an alternative escape route either out of the Kalala main entrance or out the other side of the restaurant.
18. The office at ground floor level, to the rear of the restaurant is used by both Kalala and Bank Bar staff.
19. The H M Land Registry records a registered lease for the Basement and Ground floor dated 25 November 2009 with the listed parties as Kalala Limited and Gee Eng Lim. The Council state that it would be a breach of the lease to assign or sublet part of the overall premises.
20. The appellant states Bank Bar and Kalala are two separate businesses and independent. Bank Bar and Kalala are recorded at Companies House to be run by the same company KLL Express Limited. Only one Corporation Tax return is submitted for KLL Express Ltd.

21. Prior to 2007 the basement area was used as a waiting/holding area for the ground floor Kalala restaurant. In 2007 Bank Bar opened. While the ground floor restaurant, Kalala, and Bank Bar were operated by the same company KLL Express Ltd, I am satisfied that they operated as separate uses. The customers from Kalala did not generally visit Bank Bar and vice versa. The two primary uses operated within their areas of the building. However, ancillary activities were less confined.

The planning unit

22. The leading case on the subject of planning units is *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207. The tests laid down in that case were:
1. Whenever it is possible to recognise a single main purpose of the occupiers use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered;
 2. It may be equally apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another.
 3. Within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each are used for a different main purpose (together with its incidental and ancillary activities) and ought to be considered as a separate planning unit.
23. I am satisfied that while some customers visiting the restaurant from 2007 onwards may have visited Bank Bar before or after eating in the restaurant this was not the main purpose of Bank Bar. It was operated as a separate establishment with the purpose of selling alcoholic and non-alcoholic drinks for consumption in the basement bar premises. I therefore consider it was not a bar ancillary to the restaurant use. This is further reinforced by the presence of bar facilities at ground floor level and the oral evidence supported that most customers of Kalala ordered their drinks from waiting staff which were served at their table. As such, I am satisfied, on the balance of probabilities, that the Bank Bar use was a primary use in its own right and not ancillary or incidental to the Kalala restaurant use.
24. The restaurant use occupies the ground floor with a kitchen in the basement area. There is also an office at ground floor level. The kitchen and office are ancillary to the restaurant use. The office is also utilised by, and ancillary to, the Bank Bar use. The circulation space from the basement through the ground floor is used for purposes ancillary to Bank Bar use for fire escape routes. Bank Bar is stated by the Council to not be able to operate without the fire route through the restaurant area with an exit at ground floor level. The toilets are ancillary to both the Kalala restaurant and the Bank Bar use.
25. While the Bank Bar operates within a defined part of the basement, its ancillary functional areas comprising toilet facilities, office space and fire escape routes are outside of that defined area. Thus, it cannot be said to be within a single unit of occupation as the incidental and ancillary activities required to support the primary use are not within that physically separate and distinct area. I thus find that the Bank Bar is not within its own planning unit but is part of a larger planning unit that includes the Kalala restaurant use, incidental and ancillary activities comprising the basement and ground floor of the building and the external seating/servicing areas.

26. The appellant has put forward a proposition that the toilets could be within two planning units. I have found that the toilet use is ancillary to both the restaurant and the bar uses. A planning unit must include both the primary uses and those ancillary uses linked to that primary use. An ancillary use cannot fall outwith the planning unit. In my view, whether a use is ancillary or a primary use it can only exist in one planning unit. To find otherwise would undermine the concept of a planning unit. I therefore find that the ancillary toilet use must be within the planning unit which includes both primary uses that they serve i.e. the restaurant and the bar. In relation to the office use, while the activities could be undertaken elsewhere for the bar use it is what has actually taken place that is relevant to the appeal. The evidence demonstrated that the office at ground floor level was used for purposes ancillary to both the restaurant and the bar use and thus serves both primary uses.
27. Both functional and physical separation are required before a smaller planning unit can be identified. However, in this case while the bar use takes place in the basement area, the necessary ancillary uses to that primary use take place outside that basement area i.e. the toilets and the office use. In addition, the fire escape route through the ground floor restaurant necessitates access through it and thus a requirement for the route to be available. Without functional separation the ancillary link remains and without physical separation there is no smaller physical area which can be identified as a separate planning unit. I therefore consider that the planning unit is the ground and basement of No 2 along with the external space to service those uses and the sitting out area to the front of the Bank Bar.
28. The concept of a mixed use is one or two or more primary uses existing within the same planning unit or unit of occupation. One is not ancillary to the other, although there may be ancillary uses associated with each primary use.
29. In *Westminster CC v SSCLG & Oriol Badia and Property Investment (Development) Ltd* [2015] EWCA Civ 482, the EN alleged "... the material change of use of the Property from a hotel (Class C1) to a mixed-use hotel and hostel (*sui generis*)". A change of use from a hotel to a mixed hotel and hostel use will require planning permission only if it is a material change of use. The Court of Appeal held that the question the Inspector asked herself was whether part of the premises was in exclusive use as a hostel and part was in exclusive use as a hotel. On the face of it, it was an error of law to address the matter in that way. The Secretary of State accepted that a mixed use can subsist where the different elements are not associated with particular parts of the premises. In my view, in the current case, while the primary uses of bar and restaurant are associated with particular parts of the building, the ancillary elements of the primary uses are not in exclusive use to serve one or other of the primary uses but serve both uses in an ancillary or incidental way.
30. On the evidence available, I consider that the use is a composite or mixed use comprising a restaurant (including sale of food and drink for consumption on the premises and hot food for consumption off the premises) and a bar/drinking establishment for the consumption of alcoholic and non-alcoholic drinks on the premises. It is the specific uses being carried out which are the composite use and therefore reference to a class, which itself is not a use but a collection of uses, in the UCO is not appropriate. A mixed use does not fall within any use class and is itself *sui generis*.

31. On the evidence before me I find that the planning unit includes the ground and basement floors of No 2 along with the external seating area and service area. The use of the planning unit is a mixed use comprising a restaurant and drinking establishment.

Works to create Bank Bar

32. The 2006 permission for the external steps is stated to have taken place in 2007. It is clear that both internal and external works were carried out in 2007 on the basement part of the building. The following documentary evidence is of direct relevance to this period:
- 7 February 2007 approval letter from Technical Services (Building Control) for the Council relating to the proposal for 'form new stepped approach and dry store'.
 - 21 May 2007 approval letter from Technical Services (Building Control) for the Council relating to the proposal for 'conversion of basement into Bar'
 - A letter from Environmental Services (Planning and Environment) dated 29 August 2007 refers to loud music from the basement area of Kalala 2 Castle Hill.
 - A photograph montage of a Halloween Party in 2007, has been provided. This indicates the bar was up and running by October 2007.
 - Completion date for 'Conversion of basement into a Bar' stated to be 23 November 2009. Certificate dated 25 November 2009 from Technical Services Manager for the Council.
 - Completion for 'Underpinning at basement level' stated to be 23 November 2009. Certificate dated 25 November 2009 from Technical Services Manager for the Council.
33. The evidence from the previous owner was that the works to the basement were not a 're-paint job' indicating they were more than cosmetic. It is clear there were structural alterations which took place with the building regulations documents indicating that underpinning, conversion works and the creation of the steps etc (granted under the 2006 permission) took place. However, exactly when works began and how long they took is unclear. There are no documents from the building company or companies to support start and end dates. There is no clear timeline that has been demonstrated in a precise and unambiguous way for these works.
34. The previous owner stated he did not project manager the building works and the dates are not clear. His statutory declaration refers to a date in mid-June 2007 for completion of the basement works. He stated orally that he thought the works to the basement began before the approval of plans by Building Control. However, no documentary evidence has been provided which demonstrates when works were undertaken, what those works were and when they were completed.
35. Mr Gee Eng Lim confirmed in his statutory declaration that the Bank Bar opened on 16 June 2007. In oral evidence he stated that he had been told this date but had no personal knowledge or experience of when Bank Bar opened.
36. The assistant bar manager stated in her statutory declaration that she began working at Bank Bar in June 2007. However, the evidence from the Council in relation to the licensing at the Bank Bar confirms that a variation to the original licence to change the hours and licensable activities together with an extension

to the courtyard area and part of the basement premise was not determined by this time. The Council confirmed that the variation to the licence was granted on 31 August 2007. In oral evidence the assistant bar manager stated that she could have started after the license was granted on the basement area in August 2007.

37. The photo montage indicates that by the end of October 2007 a Halloween Party had taken place at Bank Bar. There is also a letter from Environmental Health, in August 2007, indicating the basement was in operation but not what that use was.
38. The appellant took out a lease for the basement and ground floor premises of No 2 Castle Hill Avenue in 2009. He did not have an intimate knowledge of the businesses and the premises on a day to day basis prior to taking out the lease. The appellant is therefore not able, from his own experience and observation, to demonstrate when the use began of the bar at basement level.
39. On the evidence available, I am not satisfied that it has been clearly demonstrated that works had been undertaken and that the Bank Bar premises were in use by 26 July 2007 as a primary use in the basement area. In my view, the evidence relating to the building works is imprecise and ambiguous and I am not satisfied on the balance of probabilities that the use of Bank Bar began 10 years on or before the material date. I therefore do not accept that the material change of use occurred on or before the 26 July 2007.

Use of Bank Bar

40. In my view, it is clear that the steps and works to the door at basement level which were granted by the 2006 permission were to enable the use of the basement area as a bar/drinking establishment where drinks could be purchased and drunk in the basement area.
41. The fact that the bar is jointly rated with the ground floor restaurant and that the licence, until recently, for both the bar and restaurant was joint, are not determinative as to whether or not the uses were separate primary uses for planning purposes.
42. Between October 2015 to around March 2017 several Temporary Events Notices (TEN's) were granted that extended the opening hours until 3am on one nominated weekend a month. On 22 September 2016 a separate license was sought to formalise these hours.
43. A premises licence was issued on 25 April 2017 for Bank Bar allowing opening between 10am and midnight Monday, Tuesday and Sunday; 10am Wednesday to 2.30am Thursday; 10am Thursday, Friday and Saturday to 3.30am Friday, Saturday and Sunday. However, it has not been operated to these times since the license was granted.
44. TEN's were issued in the period of 2015 to 2017 and the inclusion of music entertainment was introduced within the Bank Bar basement premises. The evidence indicated that the appellant's son was exploring how to increase the offer at the bar to increase customers. However, I am of the view that the primary use of the basement was that of a bar/drinking establishment for the sale of alcohol and that the entertainment or music was to increase the profitability of the bar and was ancillary or incidental to the use of the basement bar. While complaints to the Council about the use increased over

this time, I am not satisfied that the evidence demonstrates a materially different use to a bar/drinking establishment. However, it did open later and there was some music/dancing. In my view, this was not materially different in either the use of the premises or externally to the premises such that a material change of use took place during that period in the basement bar area. I find therefore that the use which was started by the previous owner of the property in the basement and called Bank Bar.

45. I am not satisfied that this resulted in a use materially different from the bar use started in 2007 or that it had become a nightclub use, however that is defined. The business sold alcoholic and non alcoholic drinks which were drunk on the premises. The hours of operation were increased under the TEN's however, that of itself did not, to my mind, result in the establishment of a materially different use to that which had been taking place previously.

Conclusion

46. In my view, Bank Bar is not a separate planning unit and I have concluded that it is part of a larger planning unit forming a mixed or composite use of the ground and basement of the building and ancillary external spaces. I have found that the appellant has failed to demonstrate in a precise and unambiguous way that the use of part of the basement as a bar/drinking establishment was begun on or before the material date of 26 July 2007.
47. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of continued use of the Bank Bar as a basement business premises operating within use class A4 separate from the A3 restaurant above and as a separate planning unit was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Hilda Higenbottam

Inspector

APPEARANCES

FOR THE APPELLANT:

Ms K Olley	Instructed by Mr G Lim
She called	
Mr G Lim FCCA	Appellant
Mr W Lim BSc (Hons)	Appellant's son
Ms D Aldridge	Consultant for the appellant
BA (Hons), MRTPI, Probationer	
member of RICS	
Ms A Page	Previous assistant manager at Bank Bar on behalf of the appellant.

FOR THE LOCAL PLANNING AUTHORITY:

Ms E Lambert	Instructed by the Head of Legal, Folkestone and Hythe District Council
She called	
Miss C Dethier BSc MSc	Strategic Development Manager, Folkestone and Hythe District Council
MRTPI	
Miss Williamson	Senior Licensing Officer, Folkestone and Hythe District Council
BA (Hons)	
Mr G Barnard	Area Office Supervisor, Folkestone and Hythe District Council
Mr Wai Tsa	Environmental Protection Officer, Folkestone and Hythe District Council

DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Statement of Common Ground submitted by the parties.
- 2 Errata note submitted by the Council
- 3 Photos/internet print outs submitted by Council
- 4 Licensing application dated 14 September 2016 submitted by the Council
- 5 Case law transcripts.