The Planning Inspectorate

Appeal Decision

Site visit made on 24 February 2020

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 March 2020

Appeal Ref: APP/E5330/X/19/3235822
Midpoint Restaurant, Anchor Iron Wharf, Lassell Street, Greenwich, London SE10 6PJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the Act) 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 Erdogan Garip against the decision of the Royal Borough of Greenwich Council.
- The application Ref 18/3368/CP, dated 29 September 2018, was refused by notice dated 9 July 2019.
- The application was made under section 192(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 described as "The placing of tables and chairs in the area identified on the submitted plan (below) extending to no more than 10% of the POS1 (or 100 sq.m) and with a capacity of up to 50 covers would be lawful."

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed use which is considered to be lawful.

Application for costs

2. An application for costs was made by Mr Erdogan Garip against the Royal Borough of Greenwich Council. This application is the subject of a separate Decision.

Preliminary Matter

3. The application forms indicate that the development has not been commenced. Photographs included with the statements show and reference is made in the submissions, to previous use of the application site for the purposes being applied for. The application was made and then considered by the Council as a proposal. I will proceed on the basis that the development being applied for was not being undertaken at the date of the application.

4. I have taken the description of the proposed development from the appellant's original statement as it was not specified on the application form. The Council on their decision abbreviated this to "the establishment of outside seating area in conjunction with restaurant".

5. The Council in their final comments have questioned the timing of representations submitted by the appellant who submitted 2 statements as well

as the final comments document. The first statement was within the initial appeal documents and the second was submitted on 6 January 2020, 3 days before the Council submitted their statement of case. All representations were submitted prior to the appeal deadlines and the Council has had an opportunity to comment on each of the submissions by the appellant even if new matters were raised within the second statement.

Reasons

6. The appeal relates to the use of part of the large paved area of land between the front of Midpoint Restaurant and the River Thames. The proposal would involve the placement of tables and chairs and the use by customers of the restaurant, on the area immediately next to the building. The restaurant is on the ground floor of a building which includes residential properties above.

7. Section 191(2) of the Act defines uses and operations as being lawful at any time if:

   (a) No enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

   (b) They do not constitute a contravention of any of the requirements of any enforcement notice then in force.

8. With respect to s191(2)(b), there is no suggestion that any enforcement notice is currently in force that would preclude the proposed use. The matter in dispute is whether the use of the area outside at the front of the restaurant would involve a material change in the use of the land.

9. The concept of a material change of use is not defined in statute or statutory instrument and is a matter of fact and degree given the circumstances of each case. In order to assess whether a material change of use would occur, it is first necessary to ascertain what the correct planning unit is for the restaurant. I have been referred by both parties to the leading case on this subject, Burdle[1]. As set out in that case, the planning unit is usually the unit of occupation, unless a smaller area can be identified which is physically separate and distinct and/or occupied for different and unrelated purposes.

10. The Council in setting out their case references the planning permission, which included the restaurant, that was implemented in 2005. The description of the approved development is the "*Redevelopment of the site involving the construction of two residential buildings, one being 3/4 storeys and the other being part 3 – 7 storeys incorporating ground floor restaurant, riverfront open space including pedestrian walkway and cycle route, on-site car parking and ancillary works. (Revised Scheme)*".

11. The Council refers to that decision as being the starting point for considering this proposal. There is no suggestion that the planning permission has not been complied with in terms of how the physical environment has been laid out. I am not informed of any planning conditions that prevent the use applied for. The physical features of the appeal site and how it appears to be used are key to understanding the extent of the current planning unit of the restaurant

[1] Burdle and Williams v SSE and New Forest DC [1972] 1 WLR 1207

when applying the principles set out in Burdle. The planning unit is a concept which has evolved as a means of determining the most appropriate physical area against which to assess the materiality of changes of use.

12. The planning permission included various uses but that in my view does not mean that the whole site is a single planning unit operating with a mix of several primary uses. The entire space between the front of the restaurant and the banks of the Thames is referred to by the Council as Community Open Space and has been defined as such, within the Local Plan[2].

13. The physical layout of that area includes the clearly defined Thames Path which in this location runs between the river and the railings that define the edge of the appeal site. The railings therefore enclose a large paved and landscaped area at the front of the restaurant and separate it from the Thames Path. The railings also define the area covered by the lease for the restaurant. The lease is material to considering what area of land can potentially be occupied by the business and what area is therefore controlled by that occupier. That is the first matter to consider when following the principles set out in Burdle.

14. The railings include sets of gates to enable access into the appeal site which from outside has the general appearance of a welcoming public open space. Large concrete features running almost parallel with the railings alongside a line of trees provide a potential option for informal seating by anybody walking through the area, although not at the time of my visit on an extremely wet day. People living in the residential units approved within the same planning permission as the restaurant and open space do not need to walk through this area to gain access as there are separate accesses to the sides of the buildings. The area contained within the railings is however a pleasant space for them to use for informal recreation. Much of the application site is used therefore as a recreational space for the general public as well as local residents.

15. Towards the front doors of the restaurant however, there is a low curved concrete wall which partially encloses a separate space. This wall provides that smaller area with a different feel from the wider open space. The wall has metal loops along the top to prevent it being used as informal seating. The wall also appears to corral people towards the restaurant. Anybody wishing to enter the building is directed into it by the wall which gives that space an obvious intimacy with those ground floor premises and also provides a disincentive to walk through if not aiming for the restaurant. The wall provides a clear demarcation of space which appears obviously related to the restaurant in my opinion. It does not entirely rule out use by members of the public. It will not prevent entirely the use of the area as a route through by occupants of nearby flats. However, the physical layout of the space means that there is a strong relationship of that smaller part of the open space with the restaurant.

16. Given the general degree of possible use by non-customers of the majority of the area covered by the lease, not all of it can reasonably be considered as being within the same planning unit as the restaurant. However, the smaller area substantially contained by the curved wall in front of the restaurant, as a matter of fact and degree, provides distinct physical separation and a functional limitation to indicate that it is an obvious forecourt space for use by those wishing to use the restaurant premises.

[2] Royal Greenwich Local Plan: Core Strategy 2014

17. I therefore consider that the area partially enclosed within the curved wall is part of the same planning unit as the restaurant. The placing of tables and chairs at the front of the restaurant as shown on the submitted drawing would not involve a material change of use in my view. Whether or not the use as applied for would involve a breach of the terms of the s106 planning obligation does not affect whether a material change of use would occur. A breach of the s106 is not a breach of planning control as defined by s171A(a) or (b) of the Act and does not affect whether the use would be lawful under the terms of s191(2).

Conclusion

18. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of "The placing of tables and chairs in the area identified on the submitted plan (below) extending to no more than 10% of the POS1 (or 100 sq.m) and with a capacity of up to 50 covers" was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

A Harwood

INSPECTOR

The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 29 September 2018 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in black on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The area of land contained by the low curved wall as shown hatched in black on the plan below, falls within the same planning unit as the adjoining restaurant. Therefore, the placing of tables and chairs for use by customers of the restaurant would not involve a material change of use of that area or the planning unit as a whole.

Signed

A Harwood
INSPECTOR

Date 25 March 2020
Reference: APP/E5330/X/19/3235822

First Schedule

The placing of tables and chairs in the area identified on the submitted plan (below) extending to no more than 10% of the POS1 (or 100 sq.m) and with a capacity of up to 50 covers.

Second Schedule

Land at Midpoint Restaurant, Anchor Iron Wharf, Lassell Street, Greenwich, London SE10 6PJ

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Plan

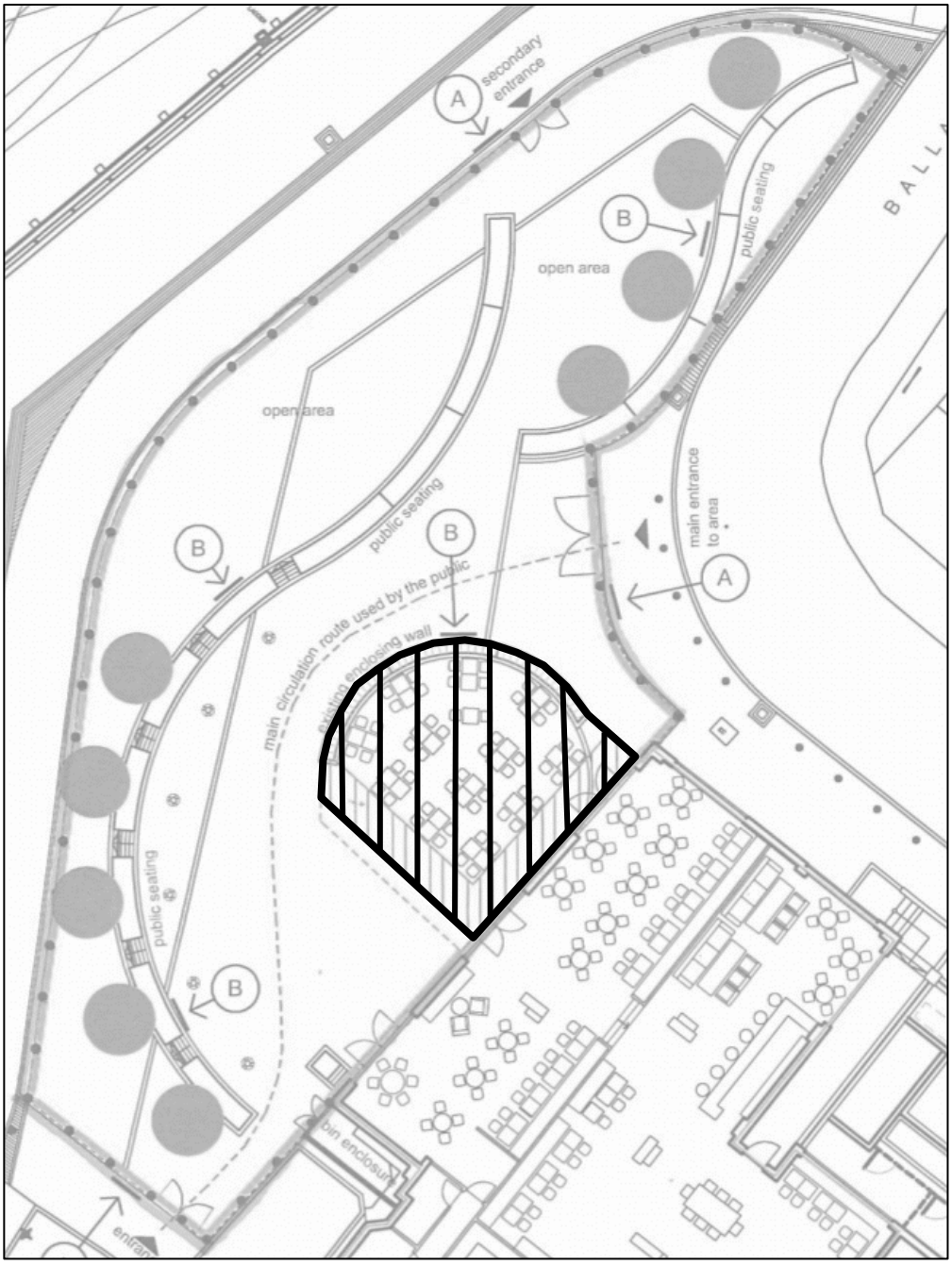
This is the plan referred to in the Lawful Development Certificate dated:25 March 2020

by Andy Harwood CMS MSc MRTPI

Land at: Land at Midpoint Restaurant, Anchor Iron Wharf, Lassell Street, Greenwich, London SE10 6PJ

Reference: APP/E5330/X/19/3235822

Not to Scale



NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.