



Appeal Decision

Site visit made on 25 February 2020

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 April 2020

Appeal Ref: APP/X5990/X/19/3230642 105 Baker Street, London W1U 6RP

- 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 Sam Moloney on behalf of Joe & The Juice UK Limited against the decision of City of Westminster Council.
 - The application Ref 19/00182/CLEUD, dated 10 January 2020, was refused by notice dated 15 April 2019.
 - 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: Use of the ground floor as a juice bar with ancillary seating and food reheating (Class A1).
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Decision

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

Preliminary Matter

2. The extent of the planning unit and the description of development are not clear from the application form. So I have taken the description of development in the heading above from the Council's decision notice. This describes the use in a manner which is consistent with the appeal form and the appellant's statement, whilst also excluding the floors of the building which were not the subject of the application.

Main Issues

3. The main issue is whether the Council's decision to refuse the certificate was well-founded or not.

Reasons

4. The ground floor of the appeal site contains a juice bar which opened in 2017. It is common ground that the lawful use of the ground floor of the appeal building is a retail unit within Class A1 of The Town and Country Planning (Use Classes) Order 1987 (the Order). The dispute between the main parties in this case centres around whether the juice bar use operates in a manner consistent with Class A1, or, whether it is a mixed use comprising a juice bar **and** café establishment (as is alleged by the Council in its decision notice), or, whether it is a **mixed** Class A1/A3/A5 establishment (as is alleged by the Council in its

appeal statement). The consequence of either of the latter would be that the use is not lawful and planning permission is required.

5. Included in the definition of Class A1 in the Order are shops for the retail sale of goods other than hot food, shops for the sale of sandwiches or other cold food for consumption off the premises, and, shops used as an internet café where the primary purpose of the premises is to provide facilities for enabling members of the public to access the internet. The evidence in this case indicates each of the above Class A1 use types are relevant. Also relevant in this case is the sale of hot food and the consumption of food on the premises, neither of which fall within Class A1.
6. The juice bar in this case serves juices, shakes, yoghurts, sandwiches and coffees in disposable packaging. Neither glasses nor crockery are provided. Cutlery provided is disposable. There is no table service. The evidence indicates juices and shakes are freshly made to order meaning customers wait on the premises during production, which takes approximately 3-5 minutes. Areas for waiting are provided and these areas contain seats. Sandwiches for sale may be heated on request in a sandwich heater.
7. Open access to Wi-Fi facilities is provided for enabling access to the internet. There is no requirement to purchase goods in order to connect to the Wi-Fi. At the time of my site visit, almost without exception, every patron was using a laptop or mobile device and it was evident that not all of those seated had purchased goods for consumption. In my judgement, this element makes the premises similar to an internet café, and, not all seats occupied in this way should be assumed to contribute to a café or restaurant function.
8. The food menu is limited to six sandwich types and four yoghurt bowls. Other than heating sandwiches, no other food heating is undertaken nor is any cooking undertaken on the premises. As I saw at my site visit, there is no back of house kitchen, kitchen extraction system or cooking equipment. In my judgement therefore, the sale of hot food is a limited and ancillary part of the business. There is no evidence this is not the case.
9. The appellant has provided a floor plan that indicates that 18%, 36% and 46% of the floor area is used for the preparation bar, waiting area and seating area respectively. The evidence indicates seating is provided for 42 customers, some of which is provided within the waiting area. The Council considers that 64% of the floor area is dedicated to seating and that this suggests a material change of use has occurred and the unit has a character more akin to a restaurant.
10. However, of the seats provided, approximately half is made up of high stools intended for customers waiting for their order and bar chairs and sofas rather than dining chairs. I therefore accept a significant proportion of seats are for short-term waiting rather than dining although it is likely some customers may not use those seats for the purpose for which they are intended. Considering all of the above points, in this case, I do not consider the furniture or floor area indicate that the unit has the character of a restaurant or that the number of seats indicates the use is not Class A1.
11. The appellant has provided sales figures for a period from August 2017 to August 2018 which indicates that 11.4% of turnover is based on eat/drink-in sales and 88.6% of sales were for consumption off-site. I find these figures

- compelling. In my judgement, they indicate that the degree of consumption of food on the premises is an ancillary part of the business.
12. However, the Council disputes this evidence, based on observations from a visit to this store on 6 January 2019 and visits to two other stores within the same chain. The Council alleges it is not common practice for staff to ask customers whether they are dining in or taking away and so therefore sales figures cannot be relied upon.
 13. Whilst I have sympathy with this argument, I do not accept practice in other stores is necessarily indicative of practice in this store. Moreover, I am not satisfied observations on a single afternoon at this store is indicative of normal practice in this store either and so in this case I favour the sales figures evidence provided by the appellant.
 14. The appellant has also provided dwell time data for the store collected between 0900 – 1002 on Tuesday 11 December 2018, 1200 – 1406 on Monday 8 April 2019 and 1000 – 1112 on Thursday 18 April 2019. The evidence indicates that during the survey consumption off the premises accounted for 71% of transactions overall, 29% of transactions were for consumption on the premises and of those seated half were using laptops.
 15. The Council disputes the dwell time data also and considers that the proportion of customers taking their purchases away would be disproportionately high at times when the survey was undertaken. However, there is no evidence this is the case considering the range of times when data was collected by the appellant.
 16. The Council has provided its own data in this regard from a survey undertaken on 6 January 2019 where it recorded 64.5% of customers consumed products on-site. But the Council's data does not indicate what proportion of those customers may have been using facilities for accessing the internet (eg laptops) and I am not satisfied that this one survey undertaken by the Council between 1430 – 1600 on what appears to be a Sunday is representative of how the business normally operates, compared with the appellant's survey undertaken over three different time periods.
 17. The Council has also drawn my attention to Google maps dwell time data which indicates people typically spend 20 minutes to 1 hour on the appeal premises. The Council consider this gives the impression of a large proportion of people dining in. I do not accept this is the case given that the appeal premises provides facilities for enabling members of the public to access the internet (thereby elongating their dwell time) and given Google's users have to opt in to sharing their data. The Google data does not differentiate between those dining in and those using the premises as an internet café. Moreover, there is no evidence customers who quickly purchase products for consumption off the premises would have opted into sharing their data with Google to be counted in this regard. The data may therefore represent only a fraction of the total number of visits and so I do not find it reliable.
 18. My attention has been drawn to other premises operated by the appellant company. But the facts and circumstances of those cases will likely be different and so I am not satisfied that findings on other sites may be applied in this case. The appeal premises provides a customer toilet, relatively loud music and a limited amount of retail displays. But in this case, I am not satisfied any of

these features are determinative factors in deciding whether the use is Class A1 or not. In particular, toilets and music are not uncommon in shops.

19. Considering all of the above points, in my judgement, the use in this case overall is consistent with Class A1 of the Order. I accept there is an element of other activity within the appellant's format. This includes the sale of heated food and the sale of food for consumption on the premises. but based on the information available the primary use of the premises is as a juice bar the character of which falls within Class A1.

Conclusion

20. 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: Use of the ground floor as a juice bar with ancillary seating and food reheating (Class A1), at 105 Baker Street, London W1U 6RP, was not well-founded and that the appeal should succeed. I exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

L Perkins

INSPECTOR



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(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 10 January 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Based on the information provided, in the particular circumstances of this case, the use overall is consistent with Class A1 of The Town and Country Planning (Use Classes) Order 1987. Other activity, including the sale of heated food and the sale of food for consumption on the premises, is ancillary and the primary use of the premises is a juice bar, the character of which falls within Class A1 in this case.

Signed

L Perkins

INSPECTOR

Date: 01 April 2020

Reference: **APP/X5990/X/19/3230642**

First Schedule

Use of the ground floor as a juice bar with ancillary seating and food reheating (Class A1).

Second Schedule

Land at 105 Baker Street, London W1U 6RP

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 01 April 2020

by L Perkins BSc (Hons) DipTP MRTPI

Land at: 105 Baker Street, London W1U 6RP

Reference: APP/X5990/X/19/3230642

Scale: Not to scale

