



Appeal Decision

Site visit made on 7 July 2022

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 19 July 2022

Appeal Ref: APP/R0660/X/22/3293465

Lyme Breeze Restaurant, Wood Lane East, Adlington SK10 4PH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 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 Wilshaws of Bexton Limited against the decision of Cheshire East Council.
 - The application Ref 21/1494M, dated 17 March 2021, was refused by notice dated 18 November 2021.
 - The application was made under section 191(1)(a) of the 1990 Act as amended.
 - The use for which a certificate of lawful use or development is sought is described as "Ancillary use of 'Lyme Breeze Restaurant' (Class E) for functions and events, including weddings and civil ceremonies, wedding breakfasts, parties, christenings, funeral teas / wakes and conferences / meetings".
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Wilshaws of Bexton Limited against Cheshire East Council. This application is the subject of a separate Decision.

Preliminary Matters

3. In this type of appeal, the onus of proof is firmly upon the appellant. The Courts have held that the relevant test of the evidence on matters such as an LDC application is the balance of probabilities. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal, provided their evidence alone is sufficiently precise and unambiguous.
4. The planning merits of the use are not relevant, and they are not an issue for me to consider in the context of an appeal under section 195 of the 1990 Act as amended. I must examine the submitted factual evidence, the history and planning status of the site in question and apply relevant law or judicial authority to the circumstances of this case.
5. The appellant refers to caselaw, which I have summarised for completeness. *Hughes v SSETR & South Holland DC* [2000] JPL 826 concerned abandonment. The Court of Appeal established that the test was the view to be taken by a reasonable man with knowledge of all the relevant circumstances. The

appellant argues that the café use has not been abandoned and also cites *Hartley v MHLG* [1970] 2 WLR 1, *Nicholls v SSE & Bristol CC* [1981] JPL 890 and *Trustees of Castell-y-Mynach Estate v SSW* [1985] JPL 40, among others. However, this is not relevant. There is no question of abandonment but whether an unauthorised change of use has occurred. It is necessary to consider whether that unauthorised use occurred continuously throughout the relevant period, such that the Council would have been able to take enforcement action at any time, but this is a different issue.

6. *Wall & Ors v Winchester City Council* [2015] EWCA Civ 563 related to the implementation of a planning permission and restrictions to that permission and is of no specific relevance to the matters before me.
7. *Islington LBC v SSHCLG & Maxwell Estates* [2019] EWHC 2691 (Admin); [2020] JPL 532 dealt with the issue of continuous occupation following an unauthorised change of use, which is necessary to establish lawfulness applying the principles in *Thurrock*¹ and *Swale*². *Sage v SSHCLG & LB of Bromley* [2021] EWHC 2885 (Admin) provided that environmental impact can be relevant as evidence that a material change has occurred, because a use of the new character may be capable of yielding environmental impacts or have done so already. In *Hertfordshire CC v SSCLG & Metal and Waste Recycling Ltd* [2012] EWCA Civ 1473 it was held that the intensification of a use is capable of constituting a material change of use. In essence, the test for whether there has been a material change of use is whether there has been a change in the definable character of the use. I have had regard to the above as relevant judicial authority.
8. The appellant further draws my attention to *Burdle & Williams v SSE & New Forest RDC* [1972] 1 WLR 1207, which concerns the identification of the planning unit. In this appeal, there is no dispute about the planning unit which is the agreed unit of occupation. What I must focus on is whether a change of use has occurred from a café/restaurant to a mixed use as a café/restaurant and a functions/events venue. A mixed use being two or more primary uses operating within the same planning unit where one is not ancillary to the other.

Background and Main Issues

9. Section 191(2) of the 1990 Act provides that uses and operations are lawful at any time if (a) no enforcement action may 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). Time limits are set out in Section 171B. The relevant time limit for a change of use is (3) the end of the period of 10 years beginning with the date of the breach.
10. The application sought to confirm that the use of the appeal premises for functions and events, including weddings and civil ceremonies, wedding breakfasts, parties, christenings, funeral teas/wakes and conference/meetings, is ancillary to the main use of the site as a restaurant, Class E of the Town and Country Planning (Use Classes Order) 1987. Furthermore, the appellant argues that the uses are lawful by virtue of the fact that they have been on-going for a continuous period in excess of 10 years.

¹ *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226.

² *Swale BC v FSS & Lee* [2005] EWCA Civ 1568.

11. The Council acknowledges that the site is used as a business and has been occupied since 2007, although it does not go as far as accepting a lawful use of the premises as a café/restaurant. Further, the Council considers a change of use has occurred subsequently for which planning permission would be required.
12. I must decide whether the appellant has shown, on the balance of probabilities, that the use of the premises for functions and events does not constitute a change of use for which express planning permission would be required. I must also consider whether the appellant has shown, on the balance of probabilities, that the use of the premise as a café/restaurant with ancillary functions and events occurred 10 or more years prior to the date of the application, and took place for a continuous period thereafter, such that it is too late for the Council to take enforcement action.
13. The main issue is whether the Council's refusal to grant an LDC was well-founded.

Reasons

Evidence

14. There is no dispute that the planning unit is as shown on the applicant's site location plan. This includes the building, car park and associated garden area. During my site visit, which took place during the late morning on a weekday, I saw the premises was in operation as a café with a small number of customers. There was signage displaying the opening hours, 11am to 4pm Tuesday to Sunday. There were two rooms within the building. The larger was more akin to a restaurant, whereas the smaller room had the appearance of a café with three tables. There was outdoor seating on a terrace. I saw a serving counter and there were menus on each table. There was an operational kitchen and store. I noted that the garden area could also be used, although there was no seating at the time of my visit. A member of staff was serving customers and taking table bookings by telephone.
15. There is no record of any planning permission for the use of the premises as a café or restaurant, although the appellant explains that the planning history includes several planning permissions for development and signage at 'Ken's Café', Wood Lane East, Adlington, dated 1993 to 1998. Subsequently, a freezer enclosure at the site 'Lyme View Café' was approved in September 2000.
16. By way of evidence, the appellant has submitted a premises licence permitting music, dancing, the sale of alcohol and late night refreshments (dated 13 September 2017) and an email from a solicitor advising on matters relating to the licence. There is an email from the Registrar confirming the first approval for marriages and civil partnerships was granted in February 2010, which is corroborated by Cheshire East Registration Service. Also submitted is a certificate(s) approving the premises as a venue for Civil Ceremonies (2016 and 2019) and there is a food hygiene certificate dated 13 July 2021. I understand that screenshots from webpages and social media are available.
17. In addition, there is a statement from the Managing Director on behalf of the appellant. This states that the appellant has operated the premises continuously as a hospitality business since August 2017, aside from periods during the COVID-19 pandemic. It is explained that the premises functions as a

'casual kitchen', it sells food and drink to visiting members of the public for consumption on the premises. The premises also hosts functions and events, which has a separate website and social media accounts. It is explained that the Electronic Point of Sale System (EPOS) shows that, since 3 August 2021 to 18 February 2022 which amounted to 144 trading days, trading in the casual kitchen took place on 107 days and on 29 days for a range of events.

18. Also, it is explained that 34 events were held at the premises between the period September 2017 to December 2019 and there were 50 event bookings scheduled for the period from submission of the application to December 2022. It is argued that this represents the level of bookings for the period 2020, 2021 and 2022, which is stated is an average of 16 events [per year].

Analysis

19. I do not doubt that marriages and civil partnership celebrations have been taking place at the premises since 2010, when a licence was first obtained. I also accept that a wider range of events has been operating since 2017, when a premises licence was obtained. There is sufficient evidence from the Council's Revenues Section that Lyme Breeze Restaurant has been in existence since April 2007. However, this does not show how the premises has been used and occupied throughout the relevant period. There is very little information from the period prior to the appellant's involvement in the premises which would allow me to reach a sound finding on its prior use.
20. Furthermore, the balance of activities at the premises is not apparent. There is some information about the number of events held since 2017 but the numbers provided are ambiguous. The statements are not backed up with any evidence such as accounts information, booking records, types of event, attendees or data from the EPOS. Although the statement from the Managing Director is useful, it is not sworn evidence and is not sufficiently corroborated.
21. From the limited evidence before me, it appears that the site has been in use as a café, which hosted occasional weddings or civil partnerships, since around 2010. However, whether or not that use has continued uninterrupted over a 10 year period is unclear. It also seems that there was a change in the character of the use around 2017 when the range and number of events taking place was expanded by the appellant. I reach this view on the basis of the appellant's own evidence. Off-site effects can be taken into account where they would have planning consequences and local people describe changes in the operation of the premises since 2017, such as noise and disturbance and highways matters. The lack of statutory nuisance does not mean that offsite effects do not occur, only that they do not reach the relevant threshold.
22. Unfortunately, the appellant's evidence is ambiguous and incomplete. I find that, on the balance of probabilities, it has not been shown that the use of the premises for functions and events does not constitute a change of use. Neither has it been shown that the use of the premise as a café/restaurant with ancillary functions and events occurred 10 or more years prior to the date of the application, and continued for a continuous period thereafter, such that it is too late for the Council to take enforcement action.

Conclusion

23. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of 'Lyme Breeze Restaurant' (Class E) for functions and events, including weddings and civil ceremonies, wedding breakfasts, parties, christenings, funeral teas/wakes and conferences/meetings 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.

Debbie Moore

Inspector