



Appeal Decision

Site visit made on 5 October 2023

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 17 January 2024

Appeal Ref: APP/X5990/X/22/3311920

12-14 Lodge Road, London NW8 7JA

- 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 STC Investments against the decision of the City of Westminster Council.
 - The application Ref 21/01422/CLEUD, dated 5 March 2021, was refused by notice dated 26 May 2022.
 - 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 described as: Use of ground floor premises as a sui generis café / restaurant and the front area as a shisha terrace.
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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 existing use which is found to be lawful.

Preliminary Matters

2. No description is provided on the application form and so I have taken the description in the heading above from section E of the appeal form. This is consistent with the Council's decision notice and the covering letter and supporting statement provided for the application.
3. Section E of the appeal form indicates that there is an effective enforcement notice on the site. But no copy has been provided and the Council has stated that a notice has not been served at this address. I have dealt with the appeal on this basis.

Main Issue

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

Reasons

5. Under section 191(1) of the 1990 Act, if any person wishes to ascertain whether any existing use of buildings or other land is lawful, they may make an application for the purpose to the local planning authority specifying the land and describing the use.

6. Section 191(2) of the same Act states that for the purposes of this Act uses are 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.
7. Section 191(4) provides that if, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
8. Planning Practice Guidance (PPG) states that the applicant is responsible for providing sufficient information to support an application¹. In the case of applications for existing use, it states that if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. This test is known as the *Gabbitas* principle (*Gabbitas v SSE & Newham BC* [1985] JPL 630).
9. Section 171B of the 1990 Act provides time limits within which enforcement action may be taken. For the use described by the appellant in this case, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.
10. So based on the evidence provided, I must consider whether the appeal premises changed to the use described and continued to be so used for 10 years after the date of the change and before the date of the application, such that the Council could have taken enforcement action at any time during that 10 year period.
11. The Council has indicated its understanding that the relevant 10 year period is that immediately prior to the date of the application. But this reflects a fundamental misapplication of section 171B(3) of the 1990 Act, which is clear that the 10 year period begins with the date of the breach.
12. The appellant has stated that an exact date that the use began is not known. However, a Statutory Declaration has been provided by Emma Whitby-Smith, dated 28 March 2022. From the information provided, she has been employed since May 2000 as part of a group which has responsibility for the management of a freehold which includes the appeal site. She declares that from her personal knowledge, the premises have been used as a shisha bar and restaurant since September 2000 to date.
13. The Council considers that Emma Whitby-Smith's declaration is imprecise, ambiguous and contradicted by an email, dated 1 December 2020, from her colleague, Oliver Dunthorne. He states that the tenant opened for business in Quarter 1 of 2019, whereas she states they have been in occupation since September 2018 and she refers to the September 2000 date noted above.

¹ Lawful development certificates, Paragraph: 006 Reference ID: 17c-006-20140306

14. But these three dates represent different events. One is given as the date the use began, one is given as the date the current tenant occupied the premises and the other is given as the date they opened for business. As such, I am satisfied they are not contradictory.
15. The Council states that the Statutory Declaration does not give "conclusive evidence" of the continuous lawful use. But this is not the relevant test for a section 191 LDC. In the absence of any substantiated contradiction, imprecision or ambiguity, I have no reason not to accept what is said in the Statutory Declaration. As such, this indicates that immunity would have been achieved by September 2010, if the use were continuous.
16. A letter dated 25 March 2020 from a local dry-cleaning business states that the appeal site has been operating as a 'shisha café' for about 13-14 years, ie since about 2006/2007. Another letter, of the same date, has been provided from another local business, Clive Sutton. This states that the premises have been a 'shisha café' for around 13 years or more, ie since 2007 or earlier. Whilst both letters contain limited detail and are unsworn, they are consistent and nothing has been provided by the Council to contradict them.
17. In 2008, records maintained by the Council's Licencing Team show that they had a case (Ref: 08/44486/EF1FH) concerning the burning of charcoal in an open burner on the public pavement or close to it. This is consistent with the front of the premises being used as a shisha terrace.
18. In Google Streetview images provided from 2008 to 2022, there appears to be no one smoking shisha or no shisha equipment on the terrace. Moreover, according to the Council, there was no evidence of any shisha smoking taking place, no advertisements for shisha and no evidence of shisha paraphernalia, when a Council officer inspected the premises in relation to a separate investigation concerning tables and chairs, on 18 March 2009 (Ref: 09/41793/O).
19. But no times have been provided for any of these images or this inspection. Bearing in mind the evidence indicates that shisha smoking generally takes place in the evening, the above may simply mean that no customers had ordered shisha at the relevant time. Moreover, in some images the external seating is empty or hardly occupied and, in such circumstances, I consider it unlikely that shisha pipes would be left lying around or visible.
20. An abatement notice, dated 27 June 2009, unambiguously indicates that shisha smoking occurs on the private forecourt of the appeal premises.
21. A complaint letter, dated 29 June 2009, from a resident of 6 Strathmore Court which immediately abuts the appeal premises, unambiguously identifies the appeal premises as a 'shisha bar'.
22. In August 2011, a local newspaper story unambiguously identified the appeal premises as a café where customers smoke shisha. It makes no difference whether signs of shisha smoking happen to be seen in any of the photographs associated with that story or not.
23. A website review, dated 16 March 2013, notes that the appeal premises offers shisha. The Council states that there is no evidence to corroborate that the review was posted the same date shisha was smoked. But I do not find it likely that such a review would be posted any significant length of time afterwards.

24. In any event, in an LDC application, evidence should not be rejected simply because it is not corroborated.
25. An online city guide includes photographs from the appeal site, added in June 2013, June 2014, October 2015 and January 2016, each of which shows the presence and/or use of shisha pipes on the terrace of the appeal site.
26. A Council licensing committee report dated 2 February 2017 contains an Environmental Health representation which reports that the external seating area at the front of the appeal premises is used for eating, drinking and shisha smoking.
27. My attention has been drawn to 2010 and 2012, years for which there is said to be no evidence of the use. But the lack of evidence from then does not mean the use was not continuing during these years. On the balance of probability, it most likely was and nothing has been provided to lead me to a different conclusion.
28. I have also had regard to the period beginning 1 December 2017, when the tenant was evicted, to Quarter 1 of 2019, when the replacement tenant opened for business. The evidence indicates that during this time the premises were refurbished. There is nothing unusual about a period of vacancy between tenants, particularly when refurbishment works are undertaken which facilitate the continuation of the use, as seems to be the case here.
29. The above period makes no difference in this case as by this time immunity from enforcement action had already been achieved. At best, this was by September 2010 (based on the Statutory Declaration noted above) and, at worst, this was by March 2017 (based on the 25 March 2020 letters noted above). In other words, the use had already become lawfully established, because of the time limit set out in section 171B(3) of the 1990 Act, before the eviction of the tenant in December 2017.
30. The Council has described the premises as “empty, closed and boarded up with the use of fully opaque glazing and no signage”, during the above period, in January 2018. But “boarded up” is not what the relevant Google Streetview image shows.
31. I am satisfied with the appellant’s explanation that “fully opaque glazing” was not in use and that instead the glass was painted on the inside to conceal refurbishment activity. This is common practice during such commercial refurbishments and means that the Council could not be certain that the premises were “empty”, as has been suggested.
32. The premises being closed and with no signage is of no relevance during a period when the premises were undergoing refurbishment and a change in tenants. Nothing in the information provided has led me to believe that the lawfully established use was lost during the above period, rather than merely dormant or inactive, consistent with the *Panton* case referred to by the appellant (*Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461).
33. My attention has been drawn to an appeal elsewhere (Ref: X/21/3278691). But that was for an entirely different use and the nature of LDC applications is that they are highly fact sensitive. So I cannot be certain that the Inspector’s findings in that case are relevant to the appeal before me.

34. Finally, in an LDC application it is not sufficient for the Council to simply label the appellant's evidence as "inadequate" or for it to "expect" specific evidence to be provided. This is because doing so is not consistent with the requisite approach from the PPG or the *Gabbitas* principle, set out above.
35. Taking all of the above into account, I am satisfied that the appellant's evidence is sufficiently precise and unambiguous to demonstrate on the balance of probability that the appeal premises changed use to the use described and continued to be so used for 10 years after the date of the change and before the date of the application, such that the Council could have taken enforcement action at any time during that 10 year period.

Conclusion

36. 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 ground floor premises as a sui generis cafe / restaurant and the front area as a shisha terrace', 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.

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 5 March 2021 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:

The appeal premises changed to the use described and continued to be so used for 10 years after the date of the change and before the date of the application, such that the Council could have taken enforcement action at any time during that 10 year period.

Signed:

L Perkins
INSPECTOR

Date: 17 January 2024

Reference: APP/X5990/X/22/3311920

First Schedule

Use of ground floor premises as a sui generis cafe / restaurant and the front area as a shisha terrace.

Second Schedule

Land at 12-14 Lodge Road, London NW8 7JA

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: 17 January 2024

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Reference: APP/X5990/X/22/3311920

Scale: Not to scale

