



Appeal Decision

by **Grahame J Kean BA (Hons), Solicitor (HRA), MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 4 August 2025

Appeal Ref: APP/X5990/X/24/3338289

45-49 Edgware Road, LONDON, W2 2HZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Breathfull 1786 Ltd against City of Westminster Council.
 - The application ref 23/03920/CLOPUD is dated 12 June 2023.
 - 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: use of ground and part basement as Class E. Use of part basement as Class E(g)(i) office.
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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 proposed use which is found to be lawful.

Preliminary matters

2. In reviewing the file, it appeared that the appeal could be determined without a site visit and without causing injustice to any party, given the evidence now submitted.
3. The description of proposed development is taken from the description agreed between the Council and the applicant before the appeal was made. I am satisfied that the modification reflects the intentions of the appellant.

Legal framework and main issue

4. Section 191(2) of the 1990 Act states that a use is lawful at any time if 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 it does not constitute a contravention of the requirements of any enforcement notice then in force.
5. The application was made under s192(1)(a) to establish the lawfulness of a proposed use of the appeal premises: as to the ground floor and part basement, use in Use Class E as a restaurant, and as to part of the basement, an office use.
6. The main issue is whether, if the Council had refused to grant an LDC in respect of the proposed use, that refusal would not have been well-founded. The planning merits of the development are not relevant to the appeal, the decision rests on the facts of the case. Where an LDC is sought, the onus of proof is on the appellant and the standard is the balance of probability.

Reasons

7. The application premises are a ground floor and basement retail unit on the west side of Edgware Road at the junction with Connaught Street. The application sought a LDC to confirm that the basement and ground floors could operate within Class E of the Use Classes Order, with part of the basement as offices (also within E). Plans submitted show the ground floor to be in use as Class E restaurant and the basement as part Class E restaurant and part "office use only".
8. The premises have a long planning history but of relevance is that their historic lawful use was Class A1 use. Use within Class A1 was approved in a 2005 planning permission with, it is said, no conditions preventing changes of use that would be otherwise permitted. However, on 1 September 2020 a new Use Class E (Commercial, Business and Service) was created to provide more flexibility across commercial uses in a changing market. Due to the amendments to the Use Classes, Use Class A1 no longer exists.
9. The partial use of the basement as offices was approved under a 2013 permission Ref 13/01639/FULL but in connection with a delicatessen and businesses at other addresses. Condition 2 required these offices to be used only for administrative functions associated with the ground floor and basement premises at 45-49 Edgware Road and the other associated businesses. The existence of Condition 2 was the reason why a previous LDC application was refused in May 2023, ie for a change of use to another use including other uses within Class E which would not therefore have been lawful.
10. In July 2023 the Council responded to the application saying it did *"not consider that your description of development or statement suitably captures the restriction to the use. I therefore recommend the following amended description of development: Use of ground and part basement as Class E. Use of part basement as Class E(g)(i) office. Should you accept this I would likely recommend the application for approval."*
11. The decision the Council would have made would have been based on the submitted drawings: 3486-00-01; 3486-00-02 Rev A; 3456-00-03; and the covering letter dated 12 June 2023 from J Butterworth Planning Limited. The covering letter confirms that the ancillary office use would be retained, the Class E restaurant use would relate to the unrestricted areas of the premises, and the office use would include additional toilet facilities but that this would not be unlawful under the terms of Condition 2. It was also acknowledged that the proposed restaurant use would be subject to any additional consents required for alteration works.
12. It is significant that also in July 2023 the appellant clearly confirmed to the Council that it would accept the slightly amended description of the proposed development. However, for some reason unknown to me, the Council was unable to deal with the application before the appellant appealed against non-determination in February 2024.
13. Unlike appeals concerning planning applications, there is no time limit for appeals against non-determination of an LDC application (although the guidance¹ is that *"in*

¹ <https://www.gov.uk/government/publications/certificate-of-lawful-use-or-development-appeals-procedural-guide/procedural-guide-certificate-of-lawful-use-or-development-appeals-england>

the interests of efficiency, [PINS] would expect to receive a timely appeal (usually, within 6 months of the LPA's decision or failure to determine)."

14. The Council told the appellant on 15 June 2023 that if no decision was received by 7 August 2023 an appeal could be made. The appeal was not actually made until 6 February 2024, so it can hardly be said that the appellant jumped the gun, as the tenor of the delegated report of April 2024, suggests is the case.
15. The Council did tell the appellant in July 2023 that the application was put forward for approval and it would be informed if there were any "issues." Unfortunately, there was no follow up until the appellant chased the Council in November 2023. The Council did not deign to reply to that reminder until February 2024 when an appeal was made. The Council told the appellant that it "*can still*" recommend the application for approval saying in terms: "*I can put forward this recommendation to provide you with confidence that such a recommendation would be accepted if the appeal was withdrawn*", but by then it was too late.
16. The Council seemed to be pre-occupied with concerns that allegedly, the current use of the premises was a mixed sui generis use requiring planning permission and was liable to enforcement action. It also has concerns on other matters such as tables and chairs being placed in the footway that require a "pavement licence". Whether these concerns are justified is irrelevant to this appeal. However, the fact remains that the Council says that it would have approved the application. The delegated report confirmed this, stating that the application would have been approved and a certificate issued in terms that:

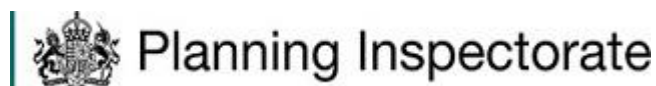
"the proposed use of the ground and part basement as a restaurant falls within Class E and that the use of part basement as an office falls within Class E(g)(i) and therefore these uses would of [sic] been lawful based on the information provided with this application".
17. Accordingly, it is difficult to understand why permission could not have issued from the Council from the moment the appellant confirmed that it agreed to the minor change in description of the development and before the appeal was made.
18. The Council suggested to the appellant that it could withdraw its appeal before the appeal process was "started" within the Planning Inspectorate and reminded the appellant of this in April 2024 but no reply was received. However, the appellant cannot be criticised for not withdrawing the appeal and waiting for a decision.

Conclusion

19. For the reasons given above I conclude, on the evidence now available that, had the Council refused to grant a certificate of lawful use or development in respect of the proposed use within Use Class E restaurant (ground floor and part basement) and retention of office use (part basement), that refusal would not have been 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).

Grahame Kean

INSPECTOR



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 12 June 2023 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged red on Plan No 3456-00-03, coloured green on Plan No 3486-00-01 and coloured green and mauve on Plan No 3486-00-02 Rev A, all attached to this certificate, would have been lawful within the meaning of section 192 of the Town and Country Planning Act 1990 (as amended), for the following reason:

By article 7 of the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 premises in use as Class A1 or B1 of the time of the previous Order on 31 August 2020, are to be treated after 1 September 2020 as being used for the purpose specified in Class E as on 31 August 2020, permission is not required to change between any of the uses within the new Class E, therefore the proposed use of the ground and part basement as a restaurant falls within Use Class E and the proposed use of part basement as an office falls within Use Class E(g)(i) (an office to carry out any operational or administrative functions) of the Town and Country Planning (Use Classes) Order 1987 (as amended) and would be lawful uses.

Signed

Grahame Kean

Inspector

Date: 4 August 2025

Reference: APP/X5990/X/24/3338289

First Schedule

Use of ground and part basement as Class E. Use of part basement as Class E(g)(i) office.

Second Schedule

Land at 45-49 Edgware Road, LONDON, W2 2HZ

IMPORTANT NOTES – SEE OVER

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 uses 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 uses described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plans. 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.

Plans

These are the plans Nos 3486-00-01; 3486-00-02 Rev A; 3456-00-03; referred to in this decision dated: 4 August 2025

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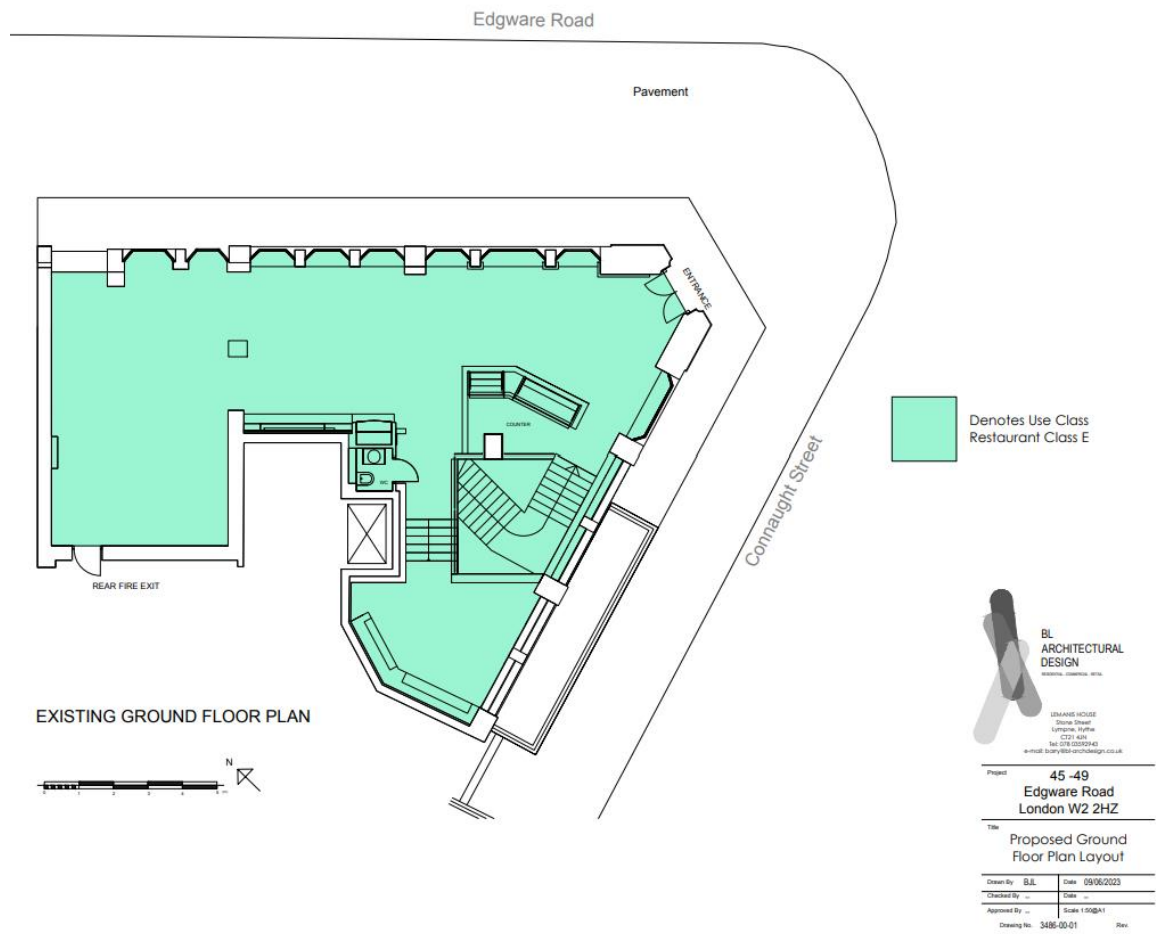
Scale: Not to Scale

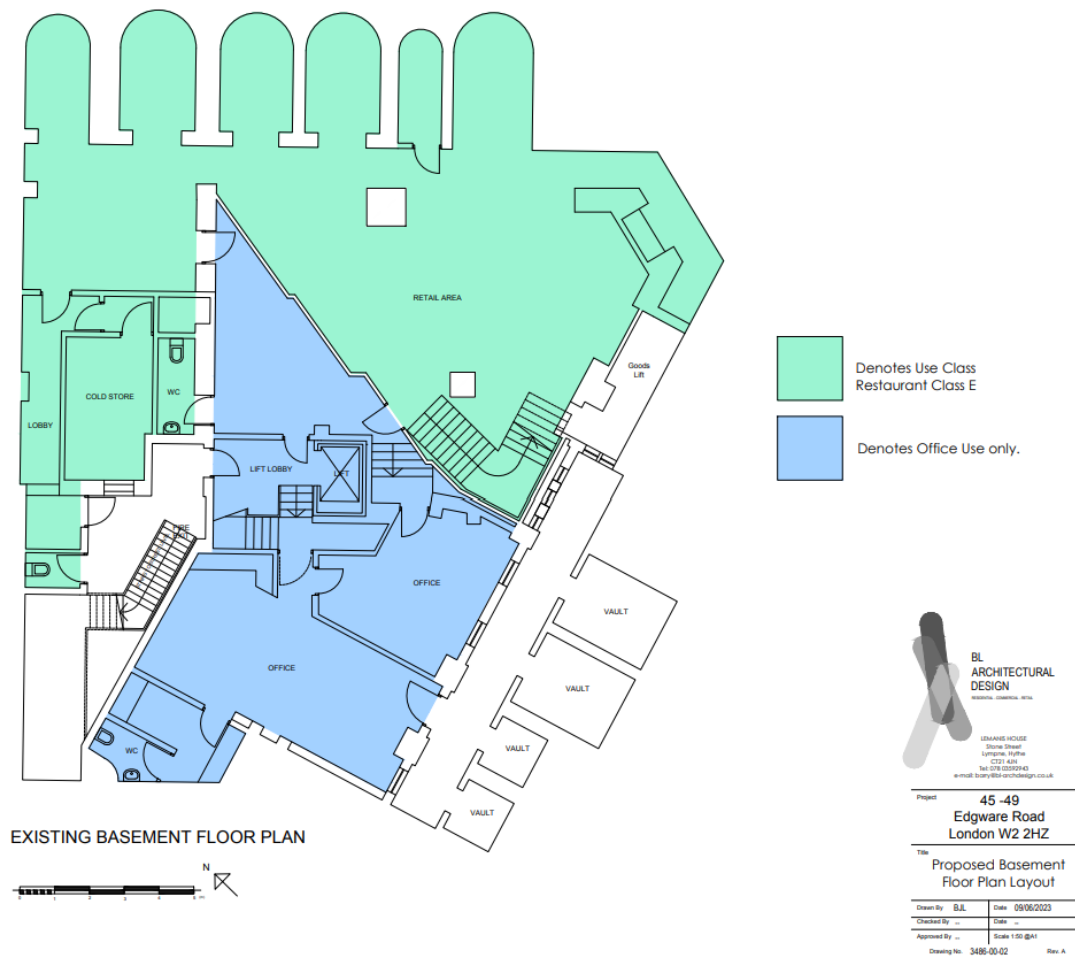


All dimensions and levels to be checked on site by contractor prior to construction of any proposed work and compliance with all applicable planning and building regulations. The drawings are prepared for the purpose of illustrating the proposed work and are not to be used for any other purpose without the written consent of the architect. The drawings are to be used in conjunction with the architect's verbal instructions and any other documents relating to the project. The drawings are to be used in accordance with the architect's verbal instructions and any other documents relating to the project. The drawings are to be used in accordance with the architect's verbal instructions and any other documents relating to the project. Please refer to Planning Act.



Project	
45 -49 Edgware Road London W2 2HZ	
Title	
Block & Location Plan	
Drawn By: B.J.L.	Date: 10/02/2023
Checked By: --	Scale: --
Approved By: --	Scale: --
Drawing No: 3456-00-03	Rev: --





End