

<b>LDC (Existing) Report</b>		<b>Application number</b>	2023/4726/P
<b>Officer</b>		<b>Expiry date</b>	
Fast Track Team – Geri Gohin		13/02/2024	
<b>Application Address</b>		<b>Authorised Officer Signature</b>	
104 West End Lane London NW6 2LS			
<b>Conservation Area</b>		<b>Article 4</b>	
South Hampstead		Basements Land Use	
<b>Proposal</b>			
Use as a hot food takeaway (Sui Generis).			
<b>Recommendation:</b>		Grant lawful development certificate.	

### Site description

The application site refers to a 2.5 storey building on West End Lane comprising of a lower ground, ground, first and second floors. Daakoo, a takeaway place occupies the lower ground and ground floors and is the subject of the current application.

The site is located within the South Hampstead Conservation Area however it is not listed.

### Proposal

This application seeks to demonstrate that the lower ground and ground floors have been in operation as Sui Generis use, a hot food takeaway (formally class A5 prior to the changes to the Use Class Order in September 2020) for more than 10 years, such that this use is now lawful and no enforcement action may be taken in respect of it.

The applicant is required to demonstrate, on balance of probability, that the site has been used in this way for a period of 10 or more years.

### Planning History

**2023/4732/P** – Rear two storey extension and rear external flue. Currently under consideration

**2007/0426/P** - (104 West End Lane & 198a Broadhurst Gardens) - Variation of condition 2 of planning permission granted on 17/12/06 (2006/3481/P) for use of the premises as Class A4 (Drinking Establishment), to permit staff on the

premises until 0200 Monday to Saturday and Sundays preceding a Bank Holiday.  
Granted 23/03/2007

**2006/3481/P** - (104 West End Lane & 198a Broadhurst Gardens) - Use of the premises as Class A4 (Drinking Establishment), as a revision to unimplemented planning permission granted 12/06/06 (reference 2006/0496/P) for change of use of 198A Broadhurst Gardens from workshop (Class B1) and 104 West End Lane from retail (Class A1) with ancillary office space above to restaurant (Class A3), with external alterations. Granted 07/12/2006

**2006/0496/P** - (104 West End Lane & 198a Broadhurst Gardens) - Change of use of 198A Broadhurst Gardens from Class B1 (Workshop) to Class A3 (Restaurant) and change of use of 104 West End Lane from Class A1 (Retail) to Class A3 (Restaurant) with ancillary office space above, plus external alterations including the provision of a new shopfront, erection of a glazed link between the two buildings, erection of a steel gate with canopy on the Broadhurst Gardens elevation, and the installation of various ventilation and extraction equipment. Granted 12/06/2006

**9401072** - The installation of a new shopfront. Granted 13/10/1994

**16978** - Alteration to the shopfront. Permission 14/10/1973

### **Enforcement history**

**EN16/1126, EN16/1127, EN16/1128, EN16/1129 & EN16/0130** – Estate agents boards. Cases closed as breach ceased 12/06/2017

**EN13/1130** - Illuminated flashing sign. Case closed as breach ceased 20/12/2013

**EN13/0308** - Building a kitchen in a shop. Case closed as no breach found 30/04/2013

**EN11/0753** - Kebab restaurant operating until 6am in the morning. Case closed as duplicate complaint (EN11/0299) 14/10/2011

**EN11/0299** – Two storey "lean-to" structure which it is advertising as a sheesha lounge. Case closed as immune from enforcement action 15/03/2013

**EN10/0881** - Operating as cab station without planning permission. Failure to sign s106. Case closed as planning permission granted 13/12/2011

### **Licensing history**

A premises licence (PREM-LIC\3223) was granted on 18/05/2010 to Rings Restaurant which authorises the carrying out of licensable activities at the property between 00:00 – 23:59 Monday to Sunday, with hours for Late Night Refreshment 23:00 – 03:00 Monday to Thursday and Sunday, 23:00 – 04:00 Friday to Saturday.

### **Applicant's evidence**

The applicant has submitted the following information in support of the application:

- Statutory Declaration by Antony Spencer, joint owner of 104 West End Lane since 1990. His declaration states that the lower ground floor and ground floor of the site have been used as a hot food takeaway for more than the last 10 years. This is accompanied by photographs that were taken by the then Head of Property Management on 18<sup>th</sup> February 2013 and 22<sup>nd</sup> February 2013.
- Statutory Declaration by Anthony Green, joint owner of 104 West End Lane since 1990. His declaration states that the lower ground floor and ground floor of the site have been used as a hot food takeaway for more than the last 10 years. This is accompanied by photographs that were taken by the then Head of Property Management on 18<sup>th</sup> February 2013 and 22<sup>nd</sup> February 2013.
- Statutory Declaration by Robert Reifft, Commercial Estate Agent at Dutch and Dutch for the last 38 years. Dutch and Dutch were the estate agents responsible for the letting of the premises from 24<sup>th</sup> October 2018. Robert Reifft states that he has walked past the property on a regular basis almost every working day on his way to and from work for over 10 years. His declaration states that the premises have been used solely as a hot food takeaway for more than the last 10 years.
- Statutory Declaration by Tony Matthews, Director at the Residential and Commercial Estate Agents Dutch and Dutch. His declaration states that in 2000 his office moved to 174 West End Lane which is a 4 minute walk from the premises. From his personal experience the premises have been used solely as a hot food takeaway for more than the last 10 years.
- Google Maps Images from July 2014 to August 2022 confirming the site continuous use as a takeaway since July 2014
- Photographs
- Takeaway Reviews dated 01/10/2015, 02/10/2015, 08/10/2022 and from 2 and 6 years ago.

The applicant has also submitted:

- Location Plan and Floor Plans
- Cover Letter and List of Appendices from hgh dated 1<sup>st</sup> November 2023

### **Council's evidence**

A review of the planning history of the site suggests that 104 West End Lane (and 198a Broadhurst Gardens) has benefitted from permission for use as a Drinking Establishment (Class A4) on 7<sup>th</sup> December 2006 (2006/3481/P), with a variation of condition granted on 23<sup>rd</sup> March 2007 (2007/0426/P). There does not appear to be any other relevant planning history for No. 104 West End Lane.

*Officer note: 104 West End Lane and 198a Broadhurt Gardens now operate as separate premises.*

An enforcement investigation was opened in March and July 2011 (references EN11/0299 and EN11/0753) alleging a breach of the original planning condition requiring no one on premises “*between 0800 hours and 0000 hours Monday to Thursday, 0800 hours to 0030 hours Friday, Saturday and Sunday preceding a Bank Holiday and 1000 hours to 0000 hours on Sunday, excluding those Sundays preceding a Bank Holiday*”. The case was closed as immune from enforcement action on 15<sup>th</sup> March 2013.

Officers noticed at the time of their visit (06/08/2011) that the premises was used as a takeaway rather than a restaurant.

Furthermore, a Google search found an article from the West Hampstead Life dated 27<sup>th</sup> September 2013 and mentioning the opening of “Adam’s Grill”. Our records show that when “Adam’s Grill” took over from the previous business “Naila” in September 2013, they were operating as a takeaway.

The Council’s retail survey demonstrates that the premises has been in use as a hot food takeaway from 2014 onwards demonstrating a continuous use of ten years.

## **Assessment**

The Secretary of State has advised local planning authorities that the burden of proof in applications for a Certificate of Lawfulness is firmly with the applicant (DOE Circular 10/97, Enforcing Planning Control: Legislative Provisions and Procedural Requirements, Annex 8, para 8.12). The relevant test is the “balance of probability”, and authorities are advised that if they have no evidence of their own to contradict or undermine the applicant’s version of events, there is no good reason to refuse the application provided the applicant’s evidence is sufficiently precise and unambiguous to justify the grant of a certificate. The planning merits of the use are not relevant to the consideration of an application for a certificate of lawfulness; purely legal issues are involved in determining an application.

The size and layout of the unit also lends itself to a takeaway use with a small public area (less than 4m<sup>2</sup>) at ground floor level in front of the counter. The remainder of the ground floor and all of the basement level are used as a kitchen and staff area with no public access. Therefore, there is no space for dining in. The applicant’s evidence demonstrates through a combination of statutory declarations, photographic evidence and online reviews that the premises has been used as a hot food takeaway for a continuous period of 10 or more years with a layout similar to that described above. The Council’s evidence includes the annual retail study which records the unit as a hot food takeaway for the past 10 years, and visits during the enforcement investigation in 2011.

The Council does not have any evidence to contradict or undermine the applicant’s version of events. The evidence available to the Council appears to corroborate the applicant’s version of events.

Therefore, the information provided by the applicant is deemed to be sufficiently precise and unambiguous to demonstrate that “on the balance of probability” the ground floor and lower ground floor have been in Sui Generis use as a hot food takeaway (formally class A5) for a period of more than 10 years as required under the Act. Furthermore, the Council’s evidence does not contradict or undermine the applicant’s version of events.

**Recommendation: Approve**