

LDC Report		19/01/2010
Officer		Application Number
Katrina Christoforou		2009/5605/P
Application Address		Drawing Numbers
285 - 287 Kentish Town Road London NW5 2JS		See decision notice
PO 3/4	Area Team Signature	Authorised Officer Signature
Proposal		
Existing use of basement and ground floors as a mixed use (Sui Generis) comprising hot food take-away (Class A5) and restaurant/cafe (Class A3) .		
Recommendation: Refer to Draft Decision Notice		
Assessment		
The application has been submitted to confirm that the lawful use of the ground and basement floors of the premises at 285-287 Kentish Town Road is a mixed A3 restaurant/ A5 hot food takeaway by reason of the use having been in operation for a period of 10 years or more.		
<u>Planning History</u>		
The site has an extensive planning history relating to the use of the property as outlined below:		
TP3927/8073: (285 & 287) To extend the ground floor rear room as an office in connection with the betting office. Granted 09/08/1962.		
TP3927/11/05/64: (285) To use the ground floor shop premises at No. 285, Kentish Town Road, St. Pancras, as an extension of the existing limited betting office at No. 287, Kentish Town Road. Granted 25/06/1964.		
8700777: (285) Change of use of ground floor of 285 from betting office to retail shop. Granted 06/07/1987. Condition 1: The shop shall not be used for any purpose other than a purpose falling within Class A1 of the schedule of the Town and Country Planning (Use Classes) Order 1987.		
2004/1576/P: (285 & 287) Alterations to ground floor cafe/restaurant; retention of A3 use at ground floor and change of use of basement storage to restaurant use, extension of existing restaurant extract duct at rear; rear extension to first and second floor flats; and roof extension to create new self-contained flat. Planning permission refused (06/08/2004).		
2006/2064/P: (285 & 287) Change of use of the ground floor of 285 Kentish Town Road from retail use (Class A1), and the ground floor of 287 Kentish Town Road from cafe (Class A3) to		

flexible use restaurant/takeaway (Class A3/A5) with ancillary storage in basement. The application was in part for retention of the existing Class A3 use ongoing at No.285. **Planning permission refused** (19/10/2006).

A planning enforcement investigation was undertaken following reports in 2006 that the use was unauthorised (reference **EN06/0861**). However, formal Enforcement Action was not taken following the refusal of applications **2004/1576/P & 2006/2064/P** as at the time the planning authority did not have solid evidence to prove that the use was unlawful (i.e. that the use had not already been in operation for more than ten years).

2008/4577/P: An application for a Certificate of Lawfulness for an Existing Use was submitted in 2008 to establish that the premises had been in use as an A3 restaurant and café plus an A5 takeaway for 10 years or more and that the use was therefore established. On the basis of the evidence submitted it was considered that on the balance of probability an A3 use had been occurring at the premises since 1998 and that the use as a café/restaurant had now become lawful. However, it was considered that the A5 element of the business was on the balance of probability ancillary to the A3 use. The Certificate was therefore granted for the A3 use only on the 26/02/2009.

2009/2509/P: A further application for a Certificate of Lawfulness was submitted in 2009 to establish that the premises had been in use as an A5 hot food take-away for 10 years or more and that the use was therefore established. On the basis of the evidence submitted it was not considered that the established use of the premises was as an A5 hot food takeaway. The application was refused on the 24/07/2009.

Evidence submitted on behalf of the applicant

The evidence submitted with the application was as follows:

- Basement and ground floor plans of the premises (Drawing numbers 122/1 and 122/2) dated December 2003.
- Land Registry title details.
- Business Rates bills dated 23/06/1998, 15/12/1999, 06/01/2000, 13/03/2000, 13/03/2001, 14/03/2002, 10/03/2004, 05/03/2007, and 10/03/2008.
- Catering Equipment bills dated 03/06/1998, 22/07/1998
- Letter from the valuation office dated 23/11/1999
- Cheques and bank giros made payable to the London Borough of Camden.
- Letter from More Than Insurance dated 28/10/08
- Affidavit of the applicant Mr. Michael Patsalides x3 and deputation x1
- Statements x3
- Affidavits x15
- Petition of 460 signatures
- Previous application details (application form etc)

Floor plans

The floor plans show the area of the premises at ground and basement level. The plans are dated 2003 and are labelled as 'café restaurant' and 'kitchen' at ground floor level and 'storage area' in the basement. The ground floor plan shows an opening in wall that would have originally divided number 285 from number 287. A site visit confirmed that the ground floor of no.287 is laid out with a service counter and kitchen beyond, a fridge and a few tables and chairs. There is a sizable opening in the wall leading through to no. 285 which includes tables

and chairs for more than 30 covers.

Land registry

The details taken from the land registry confirm the applicant Constantinos Michael Patsalides and Maureen June Patsalides as the freeholders of the property at 285, 287 & 287A Kentish Town Road as of 16/04/1998.

Bills, cheques and insurance

The copies of bills and the insurance indicate that the premises at 285 and 287 Kentish Town Road was in use as a café since 1998. The invoices for kitchen equipment and tables and chairs date from 1998 around the time the applicant purchased number 285.

Affidavits

The affidavits submitted on behalf of the applicant are from a series of regular customers of the premises and the owner himself. The affidavit of the owner and applicant explains that Mr. Patsalides purchased the lease to number 287 in 1979 at which time the small unit was a take-away with benches bolted to the wall and a few stools. The applicant states that between 1979 and 1998 most of the trade from 287 was take-away.

In 1998 Mr. Patsalides purchased the neighbouring property at number 285 and expanded his business putting tables and chairs out to increase the eat-in trade. The applicant states that this was alongside the take-away side of the business which carried on the same as before. The applicant states that his business has been historically based on the take-away trade and that this is not ancillary to the eat-in trade.

Mr. Patsalides outlines the planning history in relation to the previous applications for certificates of lawfulness, references 2008/4577/P and 2009/2509/P. The applicant states that he is seeking a certificate of lawfulness for both A3 and A5 use and does not mind if the certificate is for a joint A3/A5 use and consequently the existing certificate for A3 use is cancelled or if a certificate for A5 use is issued which will exist alongside the existing certificate for A3 use.

The other affidavits submitted are from a range of customers of the premises, many of whom have been in the area for 10 years or more and have regularly used the premises at 285 & 287 Kentish Town Road. The affidavits indicate that a great many customers have bought hot and cold take-away food from the premises for a period in excess of 10 years and that at least half of the overall sales are take-away.

Petition

A petition of 460 signatures collected in March 2009 has been submitted in support of the application. The petition header states 'I hereby confirm that I purchased hot and cold take away food/drink from Brassino Café...at the above address (285-287 Kentish Town Road).

Evidence submitted by Interested parties

As the application is for a certificate of lawfulness, there was no statutory public consultation exercise and no specific consultation was carried out. However, given the controversial history of the site, the application attracted attention and the Council received correspondence from a

number of interested parties as outlined below:

- Objections from 4 individuals
- Objection from local group Kentish Town Road Action (KTRA)
- Objection from local group Leighton Road Neighbourhood Association
- Objection from Councillor Ralph Scott

A number of the objections refer back to the submissions of the interested parties for previous applications which included a number of affidavits.

Assessment

Through a combination of the evidence submitted and the Council's records on the balance of probabilities, the following appears to be the case:

- in the 1960's, both 285 and 287 were lawfully in use as a betting shop.
- in the late 1980's, planning permission was granted for the change of use of 285 to an A1 retail shop.
- In 1979 the applicant purchased number 287 and operated the premises as a snack bar. The use appears to have been unlawful.
- In 1998 the applicant purchased the property next door at 285 and expanded his business. An opening in the wall between the two shops and more tables and chairs were provided increasing the capacity for eat-in trade.
- Since this time the commercial premises at 285/287 Kentish Town Road has operated as one planning unit.
- At present the premises is laid out as a café with tables and chairs for at least 40 covers, a sandwich counter and kitchen, with hot and cold food prepared on the premises sold for consumption both on and off the premises.
- The menu was written on a board around the sandwich counter. Both eat-in and take-out orders are placed at the counter.
- According to the applicant, a high proportion of the trade is hot and cold food/drink take-away.
- The applicant believes the business has been operated as a mixed or dual A3/A5 use for a period in excess of 10 years.
- Local interested parties believe that the primary use of the business is A3 café/restaurant.

Definitions:

- On the application form for planning application 2004/1576/P submitted by the current owner, the description provided by the applicant seeks the 'retention of the A3 use of ground floor area of 285' and the 'extension of existing restaurant' and describes the present use as 'café/restaurant at ground floor level'. Application 2006/2064/P submitted by KFC also describes the existing use as a restaurant.
- The planning officer for both applications 2004/1576/P & 2006/2064/P describes the existing use as A3.
- Under the Use Classes Order 1987, Use Class A3 'Food and drink' covered '...sale of hot food or drink for consumption on the premises or of hot food consumption off the premises'
- Under the amended Use Classes Order 2005, additional Use Classes of A4 'Drinking establishments' and A5 'Hot food takeaway' were created. The definition of Use Class A3 'Cafes and restaurants' was amended to be 'use for the sale of food for consumption on the premises' The definition of A5 use class is 'sale of hot food for consumption off the premises'.

The business is being operated as one planning unit with some mix of A3 and A5 uses within it

(see further discussion below). The applicant is effectively requesting the grant of 2 Certificates for 2 uses operating simultaneously (ie. The A3 use granted in 26.2.09 and a A5 use as part of this application); however this is unlawful and impossible within current legislation and the premises can only have one lawful use, either A3 or A5 or a Sui Generis mix of both together. It is not therefore considered that a dual use of both A3 and A5 uses has been established. The applicant has also asked the Council to consider a mixed A3/A5 use which would fall under the Sui Generis use class. At the time of the previous application 2008/4577/P for a certificate of lawfulness for mixed A3/A5 use, it was considered that on the basis of the evidence submitted at that time, the lawful use was A3 and that any A5 element was ancillary. Following the granting of the certificate for A3 use, another application 2009/2509/P was submitted seeking a certificate of lawfulness for A5 use. Further evidence of the takeaway element of the business was put forward at this time in the form of affidavits, statements and a petition from customers of the business. However, the evidence was not considered sufficient to grant the certificate and the application was refused. The same evidence has been submitted with this application seeking to establish the mixed use.

It is accepted that an A3 premises can have an element of A5 trade and vice versa, provided that the use is ancillary. It is therefore considered likely that a mixed A3/A5 use would only occur where two separate businesses (one A3 and one A5) are operating from the same premises or where a single business operates with elements of A3 and A5 trade that are roughly equal in terms of floorspace and business turnover, or where each element is too significant to be considered ancillary.

The evidence submitted suggests that the existing use as “Brassino Café” includes eat-in and take-away trade. The applicant’s evidence suggests that the level of take-away trade is equal to or greater than eat-in trade. However, the submissions of the objectors, including the affidavits submitted in relation to the previous application (2009/2509/P), dispute this and state that the business is primarily A3. The Council suggested that the applicant further supplement the statements submitted with book-keeping accounts, till receipts, VAT receipts etc. that would give a more conclusive measure of eat-in vs. take-away trade in terms of business turnover, and would be less open to dispute. Such evidence was not provided.

The evidence submitted by the applicant, whilst indicating a take-away element equal to or greater than eat-in trade, fails to distinguish between cold food/drinks takeaways and hot food takeaway. The A5 use class relates only to the takeaway of hot foods and would not therefore include items such as sandwiches, coffee/tea etc that would fall under A1 shop use class. The evidence indicates that a proportion of trade is in cold food/drinks takeaways. Therefore, if roughly half the trade at the premises is eat-in and half take-away, but the take-away trade is divided into hot and cold food sales, the proportion of hot food take-away is considered likely to be ancillary to the primary A3 café use.

Conclusion

The premises already has lawful A3 status as per Certificate of lawfulness 2008/4577/P. It is not disputed that a proportion of the trade is A5 hot food take-away and has been for a period of 10 years or more, as implied by the evidence submitted and the Council’s knowledge of the premises. However, the evidence fails to demonstrate what proportion of the business is hot food take away and whether this element is as significant as the A3 element, rather than ancillary to it.

The evidence of the objectors contradicts the evidence submitted by the applicant and suggests that the business has primarily been in A3 use since expansion into number 285 in 1998. The

primary basis of the evidence submitted by both sides is reliant on the statements of local interested parties and is therefore highly dependent on personal judgement and interpretation which is in some cases ambiguous. It is not a requirement to substantiate an application for a certificate of lawfulness with independent or documentary evidence. However, given the disputed facts in this case, its absence leaves a degree of doubt.

Taking into account the evidence submitted by the applicant, the evidence submitted by the objectors and the Council's knowledge of the planning history of this site, it is not considered that the evidence provided indicates beyond doubt that on the balance of probabilities the premises has been in a genuine mixed A3/A5 (sui generis) use for a period of 10 years or more.

Recommendation:

Refuse certificate of lawfulness.

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