

## IN THE MATTER OF

## DELIVEROO EDITIONS

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### ADVICE

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#### INTRODUCTION

1. We are asked to advise Roofoods Ltd (trading as “Deliveroo”) (“**Deliveroo**”), with regard to its “Deliveroo Editions” commercial kitchen concept (“**the Editions**”) which the company is now expanding across London and elsewhere.
2. In particular, we are asked to advise on whether the Editions concept falls with Use Class B1(c) of the Town and Country Planning (Use Classes) Order 1987 (“**the UCO**”) as currently defined in November 2017.

#### FACTUAL BACKGROUND

##### Deliveroo

3. Deliveroo is an online food delivery company, which was founded in 2013.
4. The concept of the business has, until now, been focused on providing customers with meals once thought unobtainable in the takeaway market, through arranging deliveries directly from existing restaurants to the customer.
5. Since Deliveroo was founded, the delivery market has fast evolved, and Deliveroo is developing new concepts in order to expand their operation and improve accessibility to customers.

##### Deliveroo Editions

6. One of the new initiatives recently launched by Deliveroo is the “Deliveroo Editions” concept. The Editions are regarded as beneficial in terms of alleviating pressure on kitchens within the existing restaurants and improving access to restaurant food for customers in high demand areas.

7. The Editions are purpose-built kitchen units, which are owned and maintained by Deliveroo.
8. The restaurants, who provide their own staff and food, use the purpose-built kitchen units in order to cook food solely for Deliveroo customers. Customers can then order food via the Deliveroo mobile “app”. Deliveroo riders, who use a combination of push bikes and scooters, will then collect the food from the Editions and deliver the food to customers.
9. Sales do not take place at the Editions and there is no ability for customers to collect an order at the Editions site themselves.
10. The Editions sites usually comprise 5-10 separate kitchen units. These are located either within existing buildings or in mobile portacabins on sites with car parks or redundant land.
11. The Editions are fitted with full-length extraction canopies and ventilation louvres. These represent advanced odour mitigation technology, and are commonly used in restaurants and cafes across London.
12. The hours of operation vary between Editions sites. Typically, the Editions can be accessed from 12.00, seven days a week, by the restaurants, and customers are able to place orders on the “app” from 17.00 on Monday – Friday and 12.00 on Saturday and Sunday.
13. The last orders on the “app” are typically at 22.45, and the last pick up is typically at 23.00, with the site closing at 24.00.
14. The Editions mirror casual dining in that they are busiest between the hours of 19.00 – 21.00. the volume of orders significantly reduces after 21.00.

### **Deliveroo Editions: on-site mitigation measures**

15. Deliveroo adopts a standard set of mitigation measures that are employed at each Editions site to ensure that the use is compatible with residential amenity. These measures are subject to on-going monitoring and review.

16. Deliveroo also has a dedicated email that is monitored to provide a point of contact for nearby residents.
17. The mitigation measures include a Travel Plan, a Delivery Management Plan and an Operation Management Plan.
18. The Travel Plan includes the following:
  - 18.1. The provision (where necessary) of an on-site Traffic Marshall, who is responsible for managing riders' arrival/departure and their behaviour on site to ensure minimal disturbance;
  - 18.2. Ensuring that riders are only 'ordered' when the order is nearly ready to be despatched in order to prevent riders congregating on site (this is further controlled via the Deliveroo app);
  - 18.3. Ensuring that all food orders are collected from within the units/buildings with rider waiting areas and welfare facilities provided to further minimise disturbance;
  - 18.4. The provision of rider assembly points in areas as far from any nearby residential properties as possible, and controlling how riders access a site (as monitored, where necessary, by a Traffic Marshall);
  - 18.5. Guaranteeing that Deliveroo riders are required to complete a training package;
  - 18.6. The provision of signage on site reminding riders to leave the area as quietly as possible once the order has been despatched; and
  - 18.7. Encouraging site staff to use sustainable measures such as cycling or public transport when arriving/departing;
19. The Delivery Management Plan includes as follows:
  - 19.1. Each of the restaurant brands are required to provide Deliveroo with full details of the number and frequencies of deliveries to the site during the week. This information is subsequently reviewed by Deliveroo and where

possible deliveries to the site will be combined with the other operators to reduce traffic movements;

19.2. Waste collection and delivery vehicles are provided with specific delivery windows to minimise any potential for disturbance. The Deliveroo On-site Manager will be responsible for monitoring deliveries to the site within the agreed times and taking action where appropriate.

20. Finally, the Operation Management Plan, which prescribes measures for both prior to and after the launch of each Editions site, includes the following:

20.1. Prior to the launch of an Editions site:

20.1.1. Before selecting a Deliveroo Editions site, a robust appraisal process is undertaken with input from the professional consultant team, including planning, transport, noise and plant/ventilation advice. This process is critical to determining the suitability of the site and enables principles and parameters to be established to address any particular site-specific impacts;

20.1.2. For example, the noise survey will assess the background noise levels for each site and will confirm what is an acceptable noise level for the site to operate within having regard to each respective local authority's policies and local circumstances. Similarly, the plant/ventilation engineer advises Deliveroo on the siting and routing of any plant equipment together with the level of acoustic mitigation required to meet the specified noise requirements and any required mitigation from odour;

20.1.3. Following the appraisal process, bespoke measures are tailored to each site in line with site specific circumstances which complement the standard set of mitigation measures which are employed across all sites;

20.2. After the launch of an Editions site:

- 20.2.1. Operating each Editions site within the noise levels identified as acceptable within the completed noise survey (as monitored by the on-site Manager);
- 20.2.2. Review of noise reports annually (or more if deemed necessary);
- 20.2.3. Ensuring temporary generators are only used where strictly necessary, and then only used within strict operational times;
- 20.2.4. The implementation of a strict maintenance programme for any plant equipment to ensure all filters are regularly cleaned and replaced (where appropriate) in line with manufacturer's recommendations.

## **LEGAL ANALYSIS**

21. In terms of the legal analysis, we will address the following, 1) the relevant law, 2) whether the use of the Editions is within Use Class B1(c) of the UCO, and 3) whether the use of the Editions is sui generis or within Use Class A5 of the UCO.

### **1) Introduction to the relevant law**

22. Section 55(1) of the Town and Country Planning Act 1990 (“**the TCPA**”) provides that a “*material change in the use of any buildings or land*” constitutes “*development*”, and section 56(1)(c) sets out that where development consists of a change in use, the development will be taken to have begun at the time when the new use is instituted.
23. Under section 57(1) of the TCPA, planning permission is required for the carrying out of any “*development*” of land.
24. However, section 55(2) of the TCPA sets out a number of operations and uses of land which will not be taken to constitute “*development*” and thus will not require planning permission. This includes section 55(2)(f), which effectively provides that where the use of buildings or land falls within a class specified in an order made by the Secretary of State, the use of the buildings or other land for any other purpose of the same class will not require planning permission.

25. The UCO, which was made pursuant to section 55(2)(f), prescribes a number of classes of use of buildings and land. As set out above, if a particular use falls within a prescribed use class in the UCO, then any change of use within the same use class does not require planning permission (section 55(2)(f) of the TCPA and regulation 3(1) of the UCO). Where a use does not fall within any of the specified use classes in the UCO, it will be considered “*sui generis*” and will require planning permission.
26. Finally, the Town and Country Planning (General Permitted Development) (England) Order 2015 (“**the GDPO**”) also prescribes a number of specified unilateral use changes, by reference to the use classes in the UCO, which are classed as permitted development, for which planning permission is deemed to be granted.

**2) Is the use of the Editions within Use Class B1(c)?**

27. As explained above, the UCO prescribes a number of classes of use of buildings and land. This includes Use Class B1(c), which is defined at paragraph 1, Part 2 of Schedule 1 of the UCO as follows:

**“Class B1: Business**

*Use for all or any of the following purposes—*

*(a) as an office other than a use within class A2 (financial and professional services),*

*(b) for research and development of products or processes, or*

*(c) for any industrial process,*

*being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.”*

28. If a use falls within Class B1, any change of use within Class B1 will not require planning permission. In addition, Class I of Part 3, Schedule 2 of the GDPO also

provides that a change of use to Class B<sub>1</sub> from a use within Class B<sub>2</sub> (general industrial) or B<sub>8</sub> (storage or distribution) is permitted development.

29. On the basis of the definition above, the question of whether the Editions fall within Use Class B<sub>1</sub>(c) in particular, involves analysis of two elements of the definition, i) whether the use is “*for any industrial process*”, and ii) whether the use is one “*which can be carried out in a residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.*” We will examine these in turn.

Is the use of the Editions “for any industrial process”?

30. The first element of the definition of Class B<sub>1</sub>(c), is a use “*for any industrial process*”. The term “*industrial process*” is defined within the UCO, at Article 2, as:

“... a process for or incidental to any of the following purposes: —

(a) *the making of any article or part of any article (including a ship or vessel, or a film, video or sound recording);*

(b) *the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article; or*

(c) *the getting, dressing or treatment of minerals;*

*in the course of any trade or business other than agriculture, and other than a use carried out in or adjacent to a mine or quarry;”*

31. As a starting point, when interpreting the UCO, the focus should be on the wording of the provisions themselves, rather than stretching or restricting these provisions (*Foxhurst Ltd v Secretary of State for the Environment* (1982) 46 P&CR 89, page 106). Further, Hodgson J in *Foxhurst* (at page 106) made it clear that there is no principle that unusual activities should be treated as *sui generis* (departing from Widgery J’s observations in *Tessier v Secretary of State for the Environment* (1976) 31 P & CR 161).

32. In relation to the interpretation of “*industrial process*” in particular, the following are relevant:

32.1. In *Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 2 WLR 604, the High Court found that a building used as a cooking centre by caterers who prepared and cooked school meals was a “*light industrial building*”. This was on the basis of an earlier version of the UCO, which has materially similar wording to the current version. In particular, the court held that the cooking centre was an industrial building because:

“...*the use involved the carrying on of processes for or incidental to the making of an article required by the definition.*”

32.2. The Land Use Gazetteer lists a “*food preparation place with no sales to visiting members of the public*” as falling within Use Class B1(c).

32.3. In the appeal decision in *Wickham Laboratories Ltd v Winchester CC* [2006] PAD 7, the inspector found that the term “*making of an article*” in Class B1(c) “*implies production by conscious human action*” of an “*end product*”.

32.4. In an appeal decision at *1 Crutchfield Lane, Walton-on-Thames, Surrey* (APP/K3605/C/00/1050278), the inspector concluded that a building used for the preparation of hot and cold snacks and packed lunches, for distribution to customers, was an industrial use.

32.5. Finally, Tower Hamlets Council has recently granted two planning permissions for two Editions sites (PA/16/03491 dated 18 January 2017, and PA/16/03605 dated 15 February 2017), which were described as the “[*e*]rection of [*seven / six*] Class B1(c) commercial kitchen pod units...”

33. The definition of “*industrial process*” in the UCO, namely “*a process for...the making of any article...in the course of any trade or business*”, is broad. On a straightforward interpretation of the wording (see *Foxhurst*), the preparation and cooking of meals at the Editions site is clearly is a “*process for...the making of any article.*” The operation is also plainly “*in the course of any trade or business*”.



34. The use of the Editions does not involve any sales on site and no members of the public visit the sites. Rather, the use is solely the “*production by conscious human action*” of an “*end product*” (see the *Wickham* decision). This is mirrored in the previous decisions where judges, inspectors and local authorities have found that commercial kitchens are used for an industrial process (see *Rael-Brook* and *1 Crutchfield Lane*) and that the Editions sites in particular are a B1(c) use (see the *Tower Hamlets* decisions).

Is the use of the Editions “carried out in any residential area without detriment to the amenity of that area”?

35. The second element of the definition of Class B1(c) is the limitation that the use must be one “*which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.*”

36. The following points of interpretation are relevant here:

36.1. The definition lays down the emissions which are capable of constituting detriment, namely, noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

36.2. These emissions must not cause a “*detriment to the amenity of that area*”. There is no guidance as to the level at which at which such emissions will cause a detriment. This must in law be essentially a matter of planning judgment for the decision maker.

36.3. The reference to “*any residential area*” is general, and not specific to the actual area surrounding the site. Thus, it is irrelevant if the actual site is in a noisy area or a quiet area (*W. T. Lamb Properties Ltd v Secretary of State for the Environment* [1983] JPL 303).

36.4. The definition encompasses all aspects of the use and the impacts of the use (rather than the definition of “*light industrial building*” in earlier versions of the UCO, which focused on the inherent processes and machinery of the industrial use). The Government Circular 13/87 on “*Changes of use of*

*buildings and other land: The Town and Country Planning (Use Classes) Order 1976*” (now withdrawn) explained that this change in emphasis means that there will normally be no material change of use requiring planning permission until an intensification or change in the nature of the use is such that the use would no longer satisfy the limitation in Class B<sub>1</sub>(c).

36.5. In assessing the impact of the use, account can be taken of mitigating measures. In *Blight & White Ltd v Secretary of State for the Environment* [1993] 1 PLR 1, the Judge stated that:

*“the definition of light industrial building allows account to be taken of the measures which can, and now customarily are, put in place to control the escape of offensive emissions and mitigate their polluting effect. Noise insulation and dust extraction are obvious examples of such measures.”*

36.6. In *Blight & White* itself, the Judge found that it was not “*self-evident*” that the use in that case, namely the production of structural and engineering fabrications, must cause detriment to the amenity of any residential area, bearing in mind the mitigating measures which might be put in place to eliminate or reduce those emissions.

36.7. Similarly, Ministerial Decisions and decisions by Inspectors’ have acknowledged that the installation of mitigation measures can change a use from general industrial (i.e. Use Class B<sub>2</sub>) to light industrial (i.e. Use Class B<sub>1</sub>(c)) (see Ministerial Decision at [1978] JPL 781 and the Inspector’s decision in *1 Crutchfield Road*).

37. The use at the Editions will not result in the release of a number of emissions specified in Class B<sub>1</sub>(c), namely, vibration, smoke, soot, ash, dust or grit. The emissions that will potentially be released from the Editions sites will be noise, smell and fumes.

38. Thus, the key issue is whether the release of noise, smell and fumes from the Editions sites will cause “*detriment to the amenity*” of “*any residential area*”.

39. The following can be said in this regard:

- 39.1. As a general point, Tower Hamlets Council has recently granted two planning permissions for the Editions sites (PA/16/03491 dated 18 January 2017, and PA/16/03605 dated 15 February 2017), described as the “[e]rection of...[seven / six] Class B1(c) commercial kitchen pod units...” The emissions caused by these Editions were not considered to cause a detriment to residential amenity.
- 39.2. In relation to smell and fumes from the preparation and cooking of meals at the Editions, the following can be said:
- 39.2.1. As explained above, account must be taken of mitigation measures when assessing the impact of the use (*Blight & White*).
- 39.2.2. The Operation Management Plan ensures that a robust appraisal process is carried out prior to selecting an Editions site, which includes a plant/ventilation engineer advising on the siting of plant equipment to minimise odour.
- 39.2.3. Further, the Editions are fitted with advanced odour mitigation technology and the Operation Management Plan ensures that all filters are regularly cleaned and replaced.
- 39.2.4. Finally, the Delivery Management Plan means that waste is regularly removed from the site.
- 39.2.5. Given this, it is unlikely that the release of smell and fumes will cause detriment to amenity.
- 39.2.6. In other words, it is not “*self-evident*” that the smell and fumes from the Editions cause detriment to the amenity of any residential area, bearing in mind these mitigating measures (*Blight & White*).
- 39.3. In relation to noise at the Editions, the following is relevant:
- 39.3.1. The Editions do not involve the sale of food for take-away and there are no visiting customers at the sites. Thus, any noise usually generated by visiting customers and increased pedestrian activity,

which is associated with takeaway restaurants, will not be an issue that affects the necessary planning judgment.

- 39.3.2. The use at the Editions has limited hours of operation, namely 12.00 to 23.00. It follows that any noise which is generated is not constant and there are periods of respite.
- 39.3.3. As a general point, in relation to noise caused by Deliveroo riders and/or deliveries, account must be taken of the fact that “*any residential area*” will have noise from regular vehicle movements in any event.
- 39.3.4. The mitigation measures employed at each Editions site are of particular relevance here (*Blight & White*).
- 39.3.5. The Operation Management Plan ensures that a robust appraisal process is undertaken prior to selecting each Editions site, which will include noise surveys.
- 39.3.6. The Operation Management Plan also provides that noise levels will be monitored by the on-site Manager and noise reports will be reviewed regularly.
- 39.3.7. With regard to potential noise generated by Deliveroo riders, the use of an on-site Traffic Marshall (where necessary) managing arrival and departure of riders and assembly points in areas as far from any nearby residential properties as possible, will minimise noise and disturbance.
- 39.3.8. Further, of particular importance is that the Travel Plan will ensure that Deliveroo riders only arrive on site when a food order is ready to dispatch which will prevent riders from congregating on site. When riders do arrive on site, food orders will be collected from within the buildings/units which will minimise noise.
- 39.3.9. With regard to potential noise generated by deliveries, the Delivery Management Plan provides that an on-site Manager will be

responsible for coordinating combined deliveries and specific delivery windows to minimise disturbance.

39.3.10. Given the factors set out above, including the mitigation measures, it would be very surprising if the noise impact from the use at the Editions sites would cause detriment to the amenity of any residential area (*Blight & White*).

40. Accordingly, based on the analysis above, our view is that it is unlikely that the use at the Editions will cause a “*detriment to the amenity*” of any residential area. It follows that our opinion is that typically the use at the Editions sites will fall within Use Class B1(c).

### **3) Is the use of the Editions sui generis or within Use Class A5?**

41. Finally, it is necessary to address the issue as to whether the Editions are *sui generis* or fall within Use Class A5 in the UCO.

42. As explained above, a use is only “*sui generis*” if it does not fall within one of the use classes in the UCO. Based on the analysis above, our opinion is that the use at the Editions does fall within a use class in the UCO (namely, Class B1(c)), therefore it is not *sui generis*.

43. There is an argument that the use at the Editions instead falls within Use Class A5 (rather than Class B1(c)). Class A5 is prescribed as follows:

#### ***“Class A5: Hot food takeaways***

*Use for the sale of hot food for consumption off the premises.”*

44. However, we consider that on a straightforward reading of the wording of Class A5 (see *Foxhurst*), a use within Class A5 integrally involves sales taking place on-site by visiting customers.

45. This is shown in three ways: first, the use of the word “*takeaway*” within Class A5, second, the meaning of “[u]se for the sale of hot food for consumption of the premises”, and third, the historical development of Class A5. This is explained as follows:

- 45.1. First, as a starting point, the Oxford Dictionary definition of a “takeaway” is “a restaurant or shop selling cooked food to be eaten elsewhere”. It follows that there is a link between the meaning of “restaurants” and “shops”, and “takeaways”.
- 45.2. An integral part of both a “restaurant” and a “shop” is that customers visit the premises to make purchases. The difference with a “takeaway”, as illustrated by the definition, is that once customers have visited the premises to buy the food, the food is then *taken away* to be “eaten elsewhere”; this is what “takeaway” means. Thus, in our opinion, the use as a “takeaway” involves sales taking place on-site by visiting customers.
- 45.3. Second, this is reinforced by the description of the Class A5 use. The wording “for the sale of”, implies that a primary purpose of the use is for sales on the site on which the use is taking place.
- 45.4. The wording “for consumption off the premises” means that once this sale has taken place on-site, customers then *take away* the food off-site. This is the “take away” element.
- 45.5. This point is also shown in the Government Circular 03/2005 on “Changes of use of buildings and other land: The Town and Country Planning (Use Classes) Order 1976” (now withdrawn) (“**the 2005 Circular**”) which describes Class A5 as “premises where the existing primary purpose is the sale of hot food to take away.” Again, this implies that the sale to customers occurs on site, and the food is then taken away.
- 45.6. Third, the historical development of Class A5 also indicates that on-site sales by visiting customers is inherent within the use. Class A5 used to be part of the wider Class A3 (Food and Drink) which was described as “[u]se for the sale of food or drink for consumption on the premises or of hot food for consumption off the premises”. The entirety of this use implies on-site sales by visiting customers.

- 45.7. Further, the reason why Class A5 was separated from restaurants and cafes within Class A3 was because takeaways generated different environmental concerns. The 2005 Circular states that the concerns associated with takeaways included increased “*pedestrian activity*”. This implies that customers are able to visit the site.
46. On this basis, for the use at the Editions to fall within Class A5 would be to unjustifiably stretch the wording of Class A5 (see *Foxhurst*). The use at the Editions is not “*for the sale of*” food to be taken away by visiting customers. Rather the use of the Editions is for the preparation and cooking of meals, which are then delivered and distributed to customers. In essence, there is no “*take away*” element, as the sales take place over the internet or via an “app”, which does not involve any on-site sales by visiting customers.
47. In practical terms there is also a real difference between use within Class A5 and the use of the Editions. As explained above, Class A5 was separated from traditional restaurants and cafes within Class A3 because of concerns over the “*take away*” element, e.g. increased pedestrian activity, litter etc. These particular concerns do not arise in the case of Editions, which do not involve any on-site sales by visiting customers.
48. Accordingly, in our opinion, the use of the Editions does not fall within Class A5. Rather, as explained above, typically the use at the Editions sites will fall within Use Class B1(c).

## CONCLUSION

49. On the basis of the analysis above, the Editions use **does** fall within Use Class B1(c) of the UCO as currently defined.
50. If there are any queries arising from the advice contained herein then do not hesitate to contact either of us in Chambers.

16 November 2017.

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