

Mr Alex Costa

20 Heath Street London NW3 6TE

Application for a certificate of lawfulness for use of ground floor and basement for purposes within Class E Town and Country Planning Use Classes Order 1987

Introduction

1. This is an application for a certificate of lawfulness in respect of the proposed use of the ground floor and basement of 20 Heath Street for restaurant and retail gallery purposes.
2. This procedure has been made possible by the recent change in the Use Classes Order 1987 to introduce the new class E. The application was preceded by a change of use application (reference 2020/0635/P). The application has now been withdrawn in the light of the permission granted by the introduction of the new use class as it is considered more expedient to proceed by way of a certificate of lawfulness.
3. The Council has confirmed that it would be prepared to grant such a certificate

Site

1. The site comprises a shop unit located on the east side of Heath Street in Hampstead Town Centre, opposite the end of Church Row.
2. The shop is located in the ground floor and there is a basement below which is not currently usable. These floors provide floorspace of some 114 sq m. Above ground floor there are three residential storeys above, comprising three flats. Two of the upper floors are occupied by the applicant and his family, comprising his wife and children, and his elderly parents. To the south of the unit is the entrance to Oriel Court, the mews service road serving five mews cottages and providing vehicular access to the Waterstones unit at 66-9 Hampstead High Street. Oriel Court also provides access to the residential upper floors of the building. (See Site Plan Document A)
3. The freehold of the frontage and of Oriel Court is owned by London Borough of Camden. The shop was for many years the office of the builders Woodward, and a related joinery and yard was located in Oriel Court. These workshops were converted to residential by the Council in 1977. Subsequent to this the frontage unit was used as a travel agent and an estate agent. The unit is presently in use by the applicant as a retail art gallery. The frontage is display space and there is an

office at the rear. It is undisputed that it has a lawful use that the use fell within class A of the Town and Country Planning (Use Classes) Order 1987.

4. Article 7 of the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 provides that

For the purposes of the Use Classes Order, if a building or other land is situated in England, and is being used for the purpose of one of the following classes which were specified in Part A or B of the Schedule to that Order on 31st August 2020, as—

(a) Class A1 (Shops),

(b) Class A2 (Financial and professional services),

(c) Class A3 (Restaurants and cafes), or

(d) Class B1 (Business),

that building or other land is to be treated, on or after 1st September 2020, as if it is being used for a purpose specified within Class E (Commercial, business and service) in Schedule 2 to that Order.

5. It is now therefore clear that the lawful use of the retail gallery is within the new class E.

Use Class E

6. Use class E was introduced in schedule 2 of Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020, and became operational on 1 September 2020. It inserts a new para 1A into the Town and Country Planning (Use Classes) Order 1987) in the form of a new use class E as follows

Class E. Commercial, Business and Service

Use, or part use, for all or any of the following purposes—

(a) for the display or retail sale of goods, other than hot food, principally to visiting members of the public,

(b) for the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises,

(c) for the provision of the following kinds of services principally to visiting members of the public—

(i) financial services,

(ii) professional services (other than health or medical services), or

(iii) any other services which it is appropriate to provide in a commercial, business or service locality,

(d) for indoor sport, recreation or fitness, not involving motorised vehicles or firearms, principally to visiting members of the public,

(e) for the provision of medical or health services, principally to visiting members of the public, except the use of premises attached to the residence of the consultant or practitioner,

(f) for a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public,

(g) for—

(i) an office to carry out any operational or administrative functions,

(ii) the research and development of products or processes, or

(iii) 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.

7. It is clear that the proposed use as restaurant falls within class E and that no planning permission would be required for it.

8. Commentary

9. There are two important points to make about the drafting of Class E. First the scope of the class specifies '*Use, or part use, for all or any of the following purposes...*'. Second the class is limited by the following words '*... 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.*'

10. **Scope.** The inference that can be drawn from the phrase '*Use, or part use, for all or any of the following purposes...*' is that the uses permitted are not limited to those in the individual sub-paragraphs, but can include mixed or composite uses within which the parts fall within the range of uses permitted in class E.

As the result of Art 7 the existing use for retail gallery falls within paragraph (a) of class E as use for *the display or retail sale of goods, other than hot food, principally to visiting members of the public.* Restaurant use falls within paragraph (b) of Class

E as use for the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises.

The conclusion is that both parts of the use fall within class E.

11. **Limitation.** The limitation that in order to fall lawfully within class E the use must be 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.’ has the following implication. A use which has the capability to fall within class E is one which falls within it. If for some reason the use were not to comply with such requirements when in operation, it would no longer fall within the use class, and would not be lawful: enforcement action could be taken against it.
12. The issue arises in the new procedure as to how the applicant can be required to introduce the necessary mitigation measures in respect of the emission of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit’, as no planning conditions can be attached to a certificate of lawfulness. Of course, it is not necessary that more limits should be set out on a certificate of lawfulness than are contained in the wording of class E. However, it seems that it would be acceptable to include informatives with the certificate granted as required.

Conclusion

13. The existing retail gallery use is lawful and falls within class E.
14. The proposed restaurant use falls within class E.
15. Use of the premises for both retail gallery and restaurant together, as proposed will fall within class E

Informatives

16. In the present case the following informatives would be understood and accepted by the applicant
17. **Noise** ‘Noise audible externally from the premises will have to be kept not that it is not audible above ambient noise level externally if the use is to remain within Class E Town and Country Planning Use Classes Order 1987 ‘

Smell Fumes. ‘Emission of smell or fumes will have to be above eaves level. If the ducting arrangements to achieve this involve external changes to the appearance of the building you will have to apply for and secure planning permission for the duct. If you start to operate without this permission the use will not be within Class E Town and Country Planning Use Classes Order 1987.’

Refuse storage. 'Inappropriate or absent arrangements for refuse storage will be required to be in place before the use begins. If you start to operate without such arrangements the use will not be within Class E Town and Country Planning Use Classes Order 1987.'

Hours of operation. 'If you operate the restaurant outside the hours of 0800 – 2300 the use will not be within Class E Town and Country Planning Use Classes Order 1987.'

External alterations. You will need to get permission for any external alterations which are required.

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Ian Trehearne MRTPI is a chartered town planner and sole practitioner. He has lived in Hampstead since 1973 and, over the last 40 years has lived within 500m of the application site. From 1979-1985 he worked for the London Borough of Camden as Area Planner for the part of the Borough including Hampstead. He is also legally qualified and spent the years 1985-2015 in the Planning and Environment department of a leading City law firm, which he latterly headed.