

USE CLASSES ORDER: WLA BUSINESS SEMINAR

The amended Use Classes Order took effect in 2005 and therefore activities that were for instance previously A3 uses automatically are recast as being A3 or A4 etc. There is no need to apply for a change of use. However the entertainment industry is one in which uses may fluctuate for commercial reasons. For instance an activity may move from a predominantly bar operation to one which is either a restaurant one or is split between bar and restaurant. If subsequently it is proposed to move back from restaurant to a bar, it will be necessary to obtain planning permission for change of use.

Assessing whether there is a need for planning permission from one use to another (or to a combination of uses) entails a consideration of what are the prime or ancillary uses of the planning unit. This is not something which needs to be addressed on an individual basis, and readers are reminded that the content of this advice is not a substitute for legal/planning advice in given cases and readers should seek such advice. RadcliffesLeBrasseur will be pleased to advise. Relevant factors are space, turnover and the activities of customers. Till roll analysis and actual survey data could be crucial to help demonstrate the prime and ancillary elements. As far as turnover is concerned although there is no established law to this effect, if more than 30% of the turnover is ascribable to one activity, it will make it more difficult to successfully contend that it is ancillary. Similarly if more than 50% of space is given over to certain activities it will be very difficult to contend it to be ancillary and conversely the further below that element is the space the easier it becomes. However the assessment of what is prime or ancillary is a cumulative exercise which entails a consideration of many factors, these being particularly important ones.

The use rights of premises will be of particular concern to vendors and purchasers. Applications for Certificates of Lawfulness of Use are one mechanism, although this will entail being able to prove that a use has been in existence for 10 years. Similarly in making applications for planning permission, applicants can make concurrent applications under The General Permitted Development Order. The effect of this is that if granted concurrently a permission for another use, that use can be reverted to within a ten year period should the operator wish to move from the implemented use. Of course it is for vendors and purchasers to ensure that their proposed uses will be acceptable to their landlords and freeholders.

Again, in some instances it may be that what is being proposed, since the uses are so intermingled can be viewed as being a Sui Generis use i.e. one not covered by The Use Classes Order. In such cases obviously such consents may not have the same degree of marketability as consents for uses specified in the Use Classes Order. On the other hand if the planning authority can be convinced that the uses are genuinely Sui Generis, they may then regard such consents as being more acceptable since they do not create precedents and may thus be more in keeping with local policies and conditions.

There is no doubt that the existence of an increasing number of residences in the same vicinities as particular types of entertainment uses has increased the tensions. Tensions can of course be created vice versa where new entertainment uses are proposed or extensions applied for in such areas. There does need to be a more sensible approach, which is reflected in policy. This was recently illustrated in one of my cases where we obtained by judicial review the quashing of a decision by Westminster City Council to grant a residential development in an incompatible position to a night club. The basis of the decision was that the council had not taken into account relevant noise considerations as acknowledged in central government advice. Similarly I have acted in a case in Coventry where a planning permission was granted for an apartment block next to a night club, but without taking into account the noise from the night club or ensuring that the apartment block was adequately insulated from such noise. In that case a noise abatement notice was issued. In this country it is no defence to nuisance proceedings for the person causing the noise to claim that he was there first. All that he can do is to argue that the residents must have recognised the character of the area. Thus there is a conflict even between the nuisance

and planning law. This thus makes it all the more incumbent upon planning authorities to ensure that residential developments are only consented in appropriate locations. There is perhaps an understandable perception that some planning authorities are keener to ensure that entertainment uses proposed next to residential uses are compatible than vice versa.

In a recent case in Soho, we have obtained a new planning consent for a night club to operate until 3.30 a.m., there previously having been a night club which had a "personal" consent to operate until that time, such consent therefore not extending to anyone else. In this case we ensured that residents and amenity organisations were lobbied in advance. In the event there were no objections, although a nearby similar proposal was refused as a result of extensive opposition.

Any planning application will be subject to the public consultation process and of course those who comment will include the local voters. It is thus vital that prior to any applications being made, there should be a proper planning evaluation which will identify the issues and how the evidence will be presented. This should also assess the extent to which local residents and councillors should be contacted.

RadcliffesLeBrasseur were pleased to ensure the attendance of various councillors at a recent highly topical and successful event entitled Leisure in London: Is it Out of Control? That the event was so well attended was proof of the concern expressed by all sides to the debate.