

Item 3c **15/00023/CLEUD**

Case Officer **Nicola Hopkins**

Ward **Chorley North East**

Proposal **Application for a Certificate of Lawfulness for an existing A1 retail use of 4,500 m² of floorspace at Botany Bay (located on the ground, first, second and third floor of the building) incorporating the sale of: Books,CD's,Toys,Stationery and Hobby / Crafts Products (10% of the floor area); Clothing, Footwear and Jewellery (11% of the floor area); Food and Drink (for consumption off the premises) (15% of the floor area); Furniture, Carpets and Soft Furnishings (22% of the floor area); Household Goods (42% of the floor area).**

Location **Botany Bay
Canal Mill
Botany Bay**

Applicant **Fifedale Trading Ltd T/a Botany Bay Trading**

Consultation expiry: **N/A**

Decision due by: **19th March 2015 (time extension agreed until 17th July)**

Recommendation
Grant Certificate of Lawfulness

Assessment

1. This certificate relates to Botany Bay Mill building and seeks confirmation that the building identified in the application has been in continuous use for more than ten years for retail purposes (Use Class A1)
2. The National Planning Policy Guidance is clear that the test when considering such an application is whether the applicant's evidence is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.
3. Members should be aware that the application is being reported to committee for their information in the wider public interest and because of the fact that this site forms part of the larger Botany Bay site allocation for a mixed use development. However Members are advised that the only matters for consideration are matters of evidence rather than the planning merits of the case and these must relate to the lawfulness of the use during the ten years preceding the application.

Planning History

4. Planning permission was granted in 1994 for the conversion of the existing Mill building (formerly known as Gilbraith Mill) to an Antiques Centre (93/00386/COU) for the display and sale of antiques, collectibles and memorabilia with associated refreshment and office facilities over all 5 floors of the mill building along with the attached former workshop building. The change of use was granted consent on 30th November 1994 subject to a number of conditions including:

7) The permission hereby granted is for the use of the premises for the display and sale of collectables, memorabilia and antiques with associated offices and sale of hot and cold food for consumption on the premises only and, in particular, for no other purpose within Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any Statutory Instrument revoking and re-enacting that Order). No food or drink shall be sold other than for consumption on the premises. No more than 300 square metres of the ground floor of the building shall be used for the sale of new goods.
Reason: To define the permission and to ensure that unrestricted retailing, which would be detrimental to the vitality of Chorley Town Centre, does not take place at the site.
5. Concerns were raised by the case officer at the time of the application in 1993/94 that an unrestricted retail use may have a damaging effect on the town centre and other retailing locations and as such the above condition was attached to limit the amount of new goods sold on the ground floor as it was not considered that the upper floors posed the same planning impact.
6. At the time of the 1993/94 planning application the submitted plans detailed 5981m² of retail floorspace. The plans also included a world museum (6241m²), a fire station museum (401m²), a café, a comedy club (309m²) and a themed bar (139m²) all at ground floor level with a night club (211m²) and a Cajun restaurant (171m²) at first floor level.
7. In 1997 the Council received a letter from a local wholesale curtain fabric business raising concerns that a large-scale fabric retailers were planning to open a retail outlet at the Mill which would conflict with the above condition. A letter was sent to the owners of Botany Bay in November 1997 reminding the owners that any unrestricted retail sales would require the submission of a planning application. At this time the owner was also made aware that the area of the ground floor approved as a comedy/night club, which does not appear to be in use in 1997, needed to adhere to the above condition restrictions. The response from Botany Bay confirmed that in order to relinquish the nightclub consent an application for retail use would be submitted however there is no record of this submission.
8. A site audit was carried out in 1999 following concerns raised by Chorley's Chamber of Trade and the owners of Botany Bay were advised that the Council considered there to be a breach of the above condition and invited the owners to either:
 - Comply with the requirements of the condition or
 - Apply to vary the condition albeit in the 'spirit' of the original consent (to ensure the continued vitality and viability of Chorley Town Centre).

9. Notwithstanding the above correspondence no formal action was taken, no enforcement notice for the breach of condition was issued and no formal planning application was received to regularise the situation.
10. Since the original change of use consent the fire station museum area has been converted into a garden centre and the world museum has been converted into Puddletown Pirates children's soft play centre, both with the benefit of planning permission. This certificate of lawfulness therefore does not relate to these parts of the building.

Certificate of Lawfulness

11. Details of what must be included in each type of lawful development certificate can be found in section 191(5) and 192(3) of the Town and Country Planning Act. Precision in the terms of any certificate is vital, so there is no room for doubt about what was lawful at a particular date, as any subsequent change may be assessed against it. It is important to note that:
 - A certificate for existing use must include a description of the use, operations or other matter for which it is granted regardless of whether the matters fall within a use class. But where it is within a "use class", a certificate must also specify the relevant "class". In all cases, the description needs to be more than simply a title or label, if future problems interpreting it are to be avoided. The certificate needs to therefore spell out the characteristics of the matter so as to define it unambiguously and with precision. This is particularly important for uses which do not fall within a "use class" (i.e. "sui generis" use).
12. A lawful development certificate may be granted on the basis that there is an extant planning permission for the development; however that development still needs to comply with any conditions or limitations imposed on the development by that grant of permission, except to the extent specifically described in the lawful development certificate.
13. The applicants have sought legal advice in respect of this certificate application and their Counsel considers that the certificate should be granted for an open, unrestricted A1 retail use without further limitation. It is however clear from Botany Bay's own web-site and the witness statements that the retail offer is not unrestricted. A number of the witness statements differentiate the goods sold on a floor by floor basis. Taking into account paragraph 12 above a two staged approach is considered appropriate which involves, firstly, identifying the primary categories of goods which have been retailed over the 10 year period. Secondly a percentage (maximum, minimum or actual) needs to be attributed to the amount of the floorspace on which the specific goods were sold.
14. This certificate application seeks to establish that a percentage of the floor space has been continuously in breach of the condition for in excess of 10 years. The originally submitted certificate included 117,000sqft (10,870m²) of floorspace including communal areas; ancillary uses such as offices (6,764sqft/ 628m²), toilets and the restaurant (8,610sqft/ 800m²); and the circulation space surrounding the individual shops, stalls and cabinets. As such it has been established early on that the total floorspace available to rent is less than the total floorspace.
15. The agents for the application do however consider that the communal areas and circulation space are associated equally with the compliant and non-complaint uses. As such the applicants originally sought confirmation that all of the floorspace, minus the restaurant and office area, have been in breach of the condition for in excess of 10 years (this equates to approximately 84% of the floorspace). It is considered appropriate to include communal areas and circulation spaces within the floor area for a use of this type.
16. The range of goods which the applicants assert have been sold from the premises for in excess of 10 years which are new goods and in breach of the condition are as follows:
 - Furniture
 - carpets
 - soft furnishings
 - household goods
 - clothing
 - footwear
 - Jewellery

- Books
- CDs
- Toys
- Stationery
- Hobby/ Crafts Products
- Food and Drink (for consumption off the premises)

17. Condition 7 specifies a number of authorised activities, and these include '... sale of hot and cold food for consumption on the premises only ...'. This provision is underwritten by the following restriction: 'No food or drink shall be sold other than for consumption on the premises'. The restaurant operation is therefore in accordance with and not in breach of condition 7 and the floorspace occupied by it should not properly be certified as having a lawful use otherwise than in accordance with condition 7. The food preparation area/kitchen and seating area are properly considered to be part and parcel of the floorspace occupied for the activity described in the condition. This is also applicable to the café area on the ground floor.
18. In light of the wording of condition 7 it is not considered necessary or appropriate to consider whether the restaurant is also not in breach of condition 7 because it is ancillary to the retail use of the premises. The ancillary nature of the operation is confirmed by the Botany Bay website as a matter of fact as follows: 'Smethurst's restaurant is located on the 4th floor, providing the ideal stop off to refuel ready to shop your way back to the ground floor or have a wholesome meal before leaving for home. ...'.
19. Following full consideration of the evidence submitted in support of the certificate application and review of the planning history, it was identified that the floorspace which the applicants related the certificate to also included the internal sales area for the approved garden centre. When the 1994 application to which this certificate relates was approved the internal garden centre area was detailed as a museum and when consent was granted for the garden centre the following condition was attached:
The permission hereby granted is for the area, as shown edged red on submitted drawing no.3 received 10 April 2003, to be used for the display and sale of products associated with a garden centre and for no other purposes within Class A1 of the schedule to the Town and Country Planning (Use Classes) Order 1987 or in any provision equivalent to that Class in any Statutory Instrument revoking and re-enacting that Order.
Reason: To define the extent of the permission and to ensure that unrestricted retailing which would be detrimental to the vitality and viability of Chorley Town Centre does not take place at the site.
20. This appears to still be the case at the site and as this certificate application only relates to the condition on the 1994 permission this part of the building will be removed from the red edge for certification.
21. Queries were also raised with the agent about the amount of floorspace applied for (117,000sqft) as the plans submitted in support of application 93/00386/COU detail a floor area of approximately 1594m² per floor. The agents for the application agree with utilising the floor area detailed on the originally submitted plans and have confirmed that their originally submitted floor area included the garden centre addressed above.
22. Following the above agreement on the floor area, concerns were raised also with the agent in respect of the fourth floor and whether this has been continuously in breach of the condition for 10 years. In terms of the evidence submitted the witnesses provide different statements in terms of the use of this space as follows:

Gerald Joseph Wood:

Fourth Floor

Approximately a third of this floor was taken up by the restaurant. We also had a small Penny Arcade on this floor as well as other displays (such as a display about the Titanic).

I would say that around half this floor was used for retail purposes, pretty much exclusively for furniture. It was also used as a seasonal shop and for clearance goods.

Susan Beckett:

2013 Fourth Floor

On this floor we have a restaurant and function area. The rest of the space is taken up by our Christmas section which sells and displays new Christmas decorations etc.

1999 Fourth Floor

This floor was used as an attraction/museum and also had a penny arcade

Claire Sharp:

1997 Fourth Floor

This floor was difficult to let. We actually had a big aeroplane in the middle of the floor. We also had a concession selling sofas, living room and dining room furniture. This furniture was standard and utilitarian —not what could be classed as collectable.

It was clear that even in 1997 we were most definitely in breach of condition 7 of the 1994 planning permission:

- The majority of the ground floor was selling new general goods*
- We were selling food and beverages for consumption on and off the premises.*
- The whole of the 2nd floor was being use for selling new mass produced furniture*
- A proportion of the goods on the third floor were not collectibles.*
- Part of the fourth floor was selling new dining and living room furniture.*

2002 Fourth Floor

Seasonal shop, clearance goods and restaurant

Current Fourth Floor

Christmas shop (part of year), Clearance (part of year), and restaurant.

23. This is supported by the applicants submitted advice from Counsel in para 3.1: *In general terms each floor, save for the top, is devoted to retail.*
24. Whilst it is clear that part of the fourth floor is used as a Christmas Shop, which is well documented on the Company's web-site, this is seasonal and only for part of the year. As such it is not a continuous breach. The agents cited the Westminster Case (2013, EWHC 23) in this regard, where the Court was invited to consider the lawfulness of the use of an area of pavement outside a restaurant which had been repeatedly used for the placing of seats and tables to enable al fresco pavement dining, but where the furniture had been packed away each evening and during inclement weather. The Court concluded that an overall view has to be formed of the activity which had taken place and the question was whether the area of land was in habitual use in breach of planning control even if there had been brief (and explicable) periods of ostensible compliance. The agents for this certificate considered that, in light of this case law that the use of the fourth floor (excluding the permitted restaurant) would constitute a breach of condition and should therefore be included within the certificate.
25. A site visit was undertaken in early March 2015 where it was noted that the area of the fourth floor used as the Christmas shop was empty and inaccessible and only some of the floor space was used for clearance goods. Whilst some of the witness statements refer to the use of the fourth floor for clearance goods it is also clear that lettings on this floor have historically proven difficult and there is no evidence to confirm that use of this floor has been used continuously in breach of the condition for 10 years.
26. The key issues about continuity in the Westminster case concerned:

- (a) the overnight storage of furniture and
- (b) winter use or non-use of the outside seating area.

27. It is not considered that there is anything in this certificate akin to the overnight storage at (a), and as such the Westminster case is not applicable. In terms of (b) the Council has sought legal advice and concluded that the Westminster case does not support the grant of a CLEUD on the footing that a breach of condition during the period the Christmas shop is in situ each year is a continuous breach of planning control.
28. The evidence does not demonstrate, on the balance of probability, continuity of use of the whole of the fourth floor in breach of condition over ten years. The Christmas Shop is not itself a continuous breach of planning control and the evidence about the remainder of the year does not show that or how retail use was maintained continuously year-on-year. As such it is not considered that the fourth floor should be included within the certificate.
29. Based on the above consideration and the floor space plans which the Council has on file the following floor split is considered in respect of this certificate:

Floor	Exclusions	Floor area (m2)
Ground	excluding the café area (171m ²) and garden centre sales area	1,423 (food= 688m ² , other= 735m ²)
1st	excluding the reception/ office area (334m ²)	1,260
2nd	excluding the staff only area (334m ²)	1,260
3rd	excluding the penny arcade (180.6m ²)	1,414
TOTAL		5,357m²

30. This certificate relates to 84% of the above floor area (as a percentage of the floor area is not in breach of the original condition) which equates to 4,500m².
31. In respect of the 2nd part of the approach for this certificate based on the floor plans and what is evident at the site the area of food and drink sales on the ground floor is set by the small individual 'shop' like units which exist on the ground floor. Over the past 10 years the percentage of floor area occupied by the new goods sold has fluctuated however based upon an average floor space (based upon the letting information) the following percentages and floor area are attributed to the various categories as follows (covering all floors in the table above):

Category	Percentage of Non-Collectable Floorspace	Max Floor Area (m2)
Books, Cd's, Toys, Stationery and Hobby/ Crafts Products	10	450
Clothing, Footwear and Jewellery	11	495
Food and Drink	15	675
Furniture, Carpets and Soft Furnishings	22	990
Household Goods	42	1,890
TOTAL		4,500

32. The agent for the application agrees with this assessment.

Overall Conclusion

33. Based on the evidence submitted not only by the applicant, it is considered that on the balance of probability that 4,500m² of the floorspace has been used continuously for 10 years for the sale of the above new goods (Use Class A1) based upon the floorspace specified within the above table.

Planning History

Reference	Description	Decision	Date
74/00847/FUL	Commercial Vehicle Repair Garage	approved	9 June 1975
74/00359/FUL	Pipe storage	approved	8 July 1974
76/00806/FUL	Commercial vehicle repair and maintenance workshop with offices and toilets	Approved	4 January 1977
77/00803/FUL	Elevational improvements to existing commercial vehicle repair depot	Approved	21 August 1978
84/00285/FUL	Extension to form testing bay	Approved	10 July 1984
89/01216/FUL	Temporary siting of three Portakabins for office accommodation	Approved	9 July 1990
93/00386/COU	Change of use to Antiques Centre with associated facilities	Approved	30 November 1994
94/00946/COU	Change of use of part of existing mill to licensed public house and night club	Refused	15 March 1995
95/00220/COU	Change of use of part of existing mill to licenced public house and comedy club	Approved	24 May 1995
95/00710/COU	Use of part of Mill as Indoor Childrens' Play Area	Approved	5 December 1995
96/00138/FUL	Change of use of part of mill buildings to indoor children's play area with alterations to elevations and provision of fire escape	Approved	30 April 1996
98/00508/FUL	Provision of open air, hand operated car wash	Approved	2 September 1998
99/00203/FUL	Single-storey extension to kitchen/cafe	Approved	29 April 1999
99/00204/FUL	Single-storey extension to cafe	Approved	29 April 1999
00/00237/FUL	Temporary access road from A674 roundabout/access to canal mill	Approved	19 May 2000
01/00173/FUL	Extension of approval for temporary access road from new roundabout / access on A674 to Canal Mill until 31.03.2002	Approved	3 April 2001
02/00312/FULMAJ	Extension of approval for temporary access road from roundabout access on A674 to Canal Mill until 31.03.2003	Approved	11 June 2002
03/00076/FULMAJ	Extension of approval for temporary access road from roundabout on A674 to Canal Mill, until 31.03.2004	Approved	29 April 2003
03/00375/COU	Change of Use of museum and part of car park to garden centre	Approved	13 August 2003
03/00895/FUL	Retrospective application for temporary helicopter hangar for	Approved	17 June 2004

	18 months		
04/00116/FULMAJ	Extension of approval for temporary access road from roundabout on A674 to Canal Mill for a further 12 months until 31.03.2005	Approved	31 March 2004
05/00207/FULMAJ	Extension of approval for temporary access road from roundabout on A674 to Canal Mill for a further 12 months until 31.03.2006	Approved	7 April 2005