

<u>APPLICATION NO:</u>	24/00321/CLU	<u>CASE OFFICER:</u>	Maxine Wishart
<u>WARD:</u>	St Gabriels	<u>PARISH:</u>	Tarbock Parish Cou
<u>LOCATION:</u>	The Chapel Brook , Wilson Road, Huyton		
<u>PROPOSAL:</u>	CERTIFICATE OF LAWFULNESS TO CONFIRM THE EXISTING OF THE SITE AS A RESTAURANT CLASS E (b)		

Recommendation

That a certificate of lawfulness be granted for an E3(b) use of the Premises i.e. *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 Application

1. Application no. 24/00321/CLU ('Application') is made pursuant to s.191 of the Town & Country Planning Act 1990.
2. The Application relates to premises known as 'The Chapel Brook', Wilson Road, Huyton, Knowsley L36 6AD ('Premises') shown edged red on the location plan which accompanied the Application.
3. The Application is dated 17 June 2024 ('the Operative Date') and is made on behalf of Whitbread PLC who is identified on the Application as the owner of the Premises.
4. The use alleged to be lawful in the Application is '*E(b) – sale of food and drink for consumption mostly on the premises*'. It is claimed that the use began more than 10 years before the date of the Application on 01 January 1990.
5. The Application was accompanied by a covering letter written by the applicant's agent. The covering letter makes it clear that the Application relates to an area of approx. 0.2ha comprising part two storey and part one storey building together an outdoor seating area. Two flats, used as manager's accommodation ancillary to the restaurant use, is also included within the red line,

Site Description

The Premises is located off Wilson Road, Huyton at the junction of Wilson Road and the A5080 (Cronton Road).

The Premises form part of an 'L' shaped building being attached to a two storey structure comprising a 40 bedroom hotel (Premier Inn). The Premises is surrounded by associated car parking, outdoor play area / equipment, outside seating areas and associated landscaping. Access is taken off Wilson Road.

It is understood that the Premises ceased trading after the date of the Application. The adjacent Premier Inn remains open.

Relevant Planning History

APP. NO: 74/15021/HIST (K/APP/15079)
PROPOSAL: ERECTION OF 40 NO BEDROOM TRAVEL INN AND BREWERS
FAYRE
RESTAURANT AND CONSTRUCTION OF NEW ACCESS
CONDITIONS
DECISION: Granted
DECISION DATE: 8 July 1993

Condition 02. of this permission stipulates that "...the development should be as a joint development of hotel and restaurant and for no other purpose including any uses within Classes C1 (Hotels and Hostels) or A3 (Food and Drink) ...

APP. NO: 00/00716/FUL
PROPOSAL: REBUILDING OF FIRE DAMAGED PUBLIC HOUSE AND
RESTAURANT
DECISION: Granted
DECISION DATE: 19 December 2000

APP. NO: 09/00069/FUL
PROPOSAL: ERECTION OF NEW ENTRANCE PORCH, RECLADDING TO
SECTION OF FIRST FLOOR, EXTERNAL ALTERATIONS AT
GROUND FLOOR, AND INSTALLATION OF 4 NO. COLD
STOREROOM IN SERVICE YARD AND ASSOCIATED
POLYCARBONATE ROOFED WALKWAY
DECISION: Granted
DECISION DATE: 22 April 2009

APP. NO: 09/00179/FUL
PROPOSAL: ERECTION OF 2 STOREY EXTENSION TO PROVIDE AN
ADDITIONAL 24 BEDROOMS TOGETHER WITH ASSOCIATED
ALTERATIONS TO CAR PARKING
DECISION: Granted
DECISION DATE: 11 November 2009

APP. NO: 12/00610/RPP
PROPOSAL: APPLICATION TO EXTEND THE TIME LIMIT FOR
IMPLEMENTATION OF
PLANNING PERMISSION 09/00179/FUL FOR THE ERECTION OF
TWO STOREY EXTENSION TO PROVIDE AN ADDITIONAL 24
BEDROOMS TOGETHER WITH ASSOCIATED ALTERATIONS TO
CAR PARKING
DECISION: Granted
DECISION DATE: 5 December 2012

There are also 7 no. applications for advertisements on the wider Chapel Brook site. The applications are for the display of 'Travel Inn and Brewsters' and later 'Premier Inn and Brewer's Fayre'. Other than to indicate the identity of the business occupying the Premises, these consents are not considered relevant to the Application.

LEGAL CONTEXT OF THE APPLICATION

s.191 Applications

This application has been submitted under s191(1)(a) of The Town and Country Planning Act ('the Act'). The application is to ascertain whether the use of the Premises as a restaurant falling with Class E of the Use Classes Order is lawful.

Section 191(1) Certificate of lawfulness of existing use or development sets out that:

If any person wishes to ascertain whether—

- (a) any existing use of buildings or other land is lawful;*
- (b) any operations which have been carried out in, on, over or under land are lawful; or*
- (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,*

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

191 (2) states

For the purposes of the Act uses are lawful at any time if,

- (a) no enforcement action may be taken in respect of them (whether because it did not involve development or require planning permission or because the time for enforcement action has expired for any other reason); and*
- (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.*

191 (3) states that

for the purposes of the Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if

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- (a) the time for taking enforcement action has then expired ; and*
- (b) it does not constitute a contravention of any of the requirements of any enforcement notice or reach of condition notice then in force.*

Section 171B(3)) of the Town and Country Planning Act provides that the time limit for taking action relating to an unauthorised change of use or breach of condition is 10 years beginning with the date of the breach.

Planning Policy Guidance (PPG) states that an LPA must only consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process. 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.

PPG advises that the applicant is responsible for providing sufficient information to support an application. In the case of applications for existing development, if an LPA has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided that the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

The Town and Country Planning (Use Classes) Order 1987 (as amended)

Prior to 1 September 2020 restaurants were in use class A3 (cafes and restaurants) and pubs were in use class A4 (drinking establishments).

After 1 September 202 these relevant uses were reclassified as follows:

- A3 (cafes and restaurants) became Class E (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.*
- A4 (drinking establishments) became 'sui generis', and in particular
 - (p) *as a public house, wine bar, or drinking establishment*
 - (q) *as a drinking establishment with expanded food provision"*

Legal Services Advice

It is understood that in order to determine the Application the LPA must decide whether the Chapel Brook operated as a A4, now E3(b) (café restaurant) or some other type of use. The premises has planning permission as a restaurant and was trading at the date of the application. The only other likely type of use that the premises may have been put to appears to be an A4 drinking establishment (now a sui generis use).

The terms 'public house' and 'drinking establishment' are not defined in the Use Classes Order or in the Act and the status of the use will depend on the facts and circumstances of each case.

Taylor v Courage [1994] is a useful case which (for landlord and tenant purposes) dealt with the question of whether a public house with a purpose-built dining-room and kitchen which served good quality food and wine as well as ales and bar meals amounted to "premises which are... used, for a business which comprises... the carrying on of a restaurant" within the meaning of s.43 of the Landlord and Tenant Act 1954. At the time, the 1954 Act gave a tenant of a restaurant the right to have a new tenancy, but the tenant of a public house would not have the same right.

Taylor took a five-year lease of a traditional public house, and extended it to form a dining-room, where tables could be booked in advance or were otherwise laid up as required, with a substantial kitchen behind it. The menu for the day was chalked up on a blackboard on the wall by the bar server, and food could be ordered either from an a la carte menu or a bar menu and eaten in the dining room or at tables in the bar itself. There was a wine list typical of a small restaurant. All orders for food or drink were placed at the bar server and brought to the table by a waiter when ready.

The Court of Appeal held that

- i. the question should be judged on its facts; and
- ii. on those facts whilst the premises as a whole would not be regarded as a restaurant alone, they provided the facilities of a restaurant and the activities taking place there comprised overall the carrying on of a restaurant.

Factors to be taken into account when determining whether the Premises is operated as a restaurant or public house may include:

- the percentage of the takings which relate to alcohol. If alcohol comprises more than 50% of the takings it is likely that this is the main activity at the premises
- lay-out and adaptation of the premises
- whether customers can drink at the bar
- whether people actually do drink at the bar when not waiting to eat

- whether food can be ordered at the bar and/or at the table
- whether everyone receives the same menu and service, or is there a bar menu and a restaurant menu
- whether people can have only a drink at the dining tables or whether people only having a drink are kept separate from the dining area
- whether tables are laid up in advance
- whether the premises contains e.g. a bar; bar stools; a dart boards/pool table; tables not laid for dining

What the Applicant Must Prove

For a certificate to be granted on the terms requested the applicant must demonstrate on a balance of probabilities that for a period of at least 10 years prior to the date of the application (17 June 2024) the primary function of the Premises has been as a restaurant (Use Class E(b)) i.e. *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 Planning Unit

To determine the lawful use of the Premises the LPA must determine what the relevant planning unit is. The general rule is that the planning unit the whole of the area in the same ownership or the same occupation, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

The Premises was constructed pursuant to planning permission 74/15021/HIST (K/APP/15079) which included an adjacent two storey hotel. Condition 02 of the 1993 consent required the hotel and restaurant to be operated as a joint concern. Immediately prior to the date of the Application, the Premises was branded as a Brewers Fayre with the adjacent hotel being a Premier Inn. Although both brands are part of the Whitbread Group each brand is a separate company. In 2000 the restaurant was seriously damaged by fire. Permission 00/00716/FUL gave permission for the rebuilding of the restaurant. This is considered to start a 'new chapter in the planning history of the site' and did not repeat condition 02 of the 1993 consent.

The building on the wider Chapel Brook site is 'L' shaped. The vehicular entrance to the site is off Wilson Road. The pedestrian entrance to the Premises is on the eastern side of the building with a car park between it and Wilson Road. The Premier Inn is to the west (to rear of the Premises) with its entrance and car park on the north side of the building. Although the two parts of the building are physically connected it is unlikely that customers of the Premises would use the north entrance or that customers of the hotel would use the east entrance.

The applicant has not submitted a breakdown of the income derived from hotel guests and non-hotel guests. Although the Premises is now closed, the hotel currently advertises that food is available for guests. The selection is rather limited in comparison to that indicated on the menus submitted in support of the application (see below).

While the Premises may have been available for use by hotel guests, the layout of the Chapel Brook site means that it is physically independent from the hotel and its primary function was to serve food and drink to members of the public in general; not just or even primarily, hotel guests.

In the circumstances, it is concluded that the planning unit for the purpose of this Application is the Premises i.e. the area shown edged red on the plan submitted with the Application.

Consultations

There is no statutory requirement to consult third parties including parish councils or Neighbours on s.191 applications.

Tarbock Parish Council - No Comments Received.

Cadent Gas Limited - Although not consulted by the Local Planning Authority, Cadent have submitted comments advising that they have no objection and request an informative not is required relating to the prevention of damage to their assets. In this instance, given the type of application there is no requirement to take these comments into consideration or to pass this detail onto the applicant.

Legal Services - Has advised on and contributed to this report.

Representations

One letter of objection has been received on behalf of CAMRA (the Campaign for Real Ale) the grounds of objection are summarised below:

- Whitbread plc closed 115 of its pubs that lie adjacent to Premier Inns wishing to integrate premises into the adjoining hotel making them resident-only, or converting them to hotel accommodation or both. Premises are public houses and been so years, invariably since they first opened.
- Distinction between a pub and a restaurant is that when visiting the former you can purchase and consume just a drink. In restaurants you generally have to purchase a meal if you also want to have a drink.
- The Chapel Brook has always operated as a pub.
- Since 2020 pubs have been in a Sui Generis class meaning any change of use requires planning permission.
- Pubs enjoy significant level of protection under national and most local planning policies. Changing use of a restaurant to another use is much easier than if it were a pub, sure this is the reason for the application.
- Applicants argue certificate should be granted as majority of the business has been sale of food. However, in this day and age, that applies to very many food-led pubs. Accepting this principle would set a dangerous precedent.
- The Chapel Brook is, and always has been, a pub in the accepted sense of what constitutes a pub i.e. somewhere you can go to just buy and consume a drink. It is not, and never has been, a restaurant.

Evidence submitted in support of the Application

Covering letter prepared by Walsingham Planning dated 12 June 2024.

This document:

- i. describes the Premises, outlines the relevant law and explains the recent changes to the Use Classes Order.
- ii. submits

- a. Google Street View imagery confirms that the Premises was trading as a Brewers Fayre from at least September 2008 to May 2024
- b. internal layout drawings ref 1877/01B dated Feb 2014 which show the location of tables, the bar area and the kitchen;
- c. Brewers Faye Food and Drinks Menu (Undated).
- d. Brewers Fayre Food and Drinks Menu (dated 4 September 2012).

The relevant law and explanation of recent changes to the Use Classes Order is not disputed.

The Google Street View images are independently generated and are considered to be good-quality evidence that the Premises has been used as a Brewers Fayre since at least 2008.

The internal layout drawings are considered to have moderate to strong evidential weight; the existence of tables and chairs is not determinative of how the Premises was operated however the sizeable kitchen is indicative of a food-led, rather than a drinks-led business.

The menus are generic branded menus and make no specific reference to the application premises; these are considered to have little evidential weight other than to demonstrate the extensive range of food on offer at a Brewer's Fayre and that it is 'pub style food', presumably as opposed to e.g. Italian food or Indian food.

Site Location Plan referenced PP-12863054v2 (scale 1:1250) has been generated on behalf of the applicant and as such has little evidential weight.

Sworn Statutory Declaration dated 6 June 2024 of Simon Ewins, Managing Director for UK Hotels and Restaurants, Whitbread PLC. Mr Ewins has been employed by Whitbread PLC in various capacities for 17 years and has personal knowledge of the day-to-day operations of the Premises for over 10 years. Mr Ewins states that

- i. the Premises has operated as a Brewers Fayre for over 10 years.
- ii. the majority of revenue at the Premises between 2013 and 2024 was derived from the sale of food. The Declaration includes a table, extracted as below, which shows the proportion of sales revenue drawn from food and from beverages. Sales of drinks is less than half that of the food sales and the document states that the beverages total includes drinks bought in conjunction with a meal so that figure would be much lower than the figures shown for just beverage purchases.

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Foo	67.86	67.71	67.7%	67.34	68.46	68.85	68.64	68.87	73.26%	70.03	68.27%	69.52%
Drin	32.14	32.29 %	32.3%	32.66	31.54	31.15	31.36	31.13	26.74%	29.97	31.73%	30.48%

Table 1: Trading Date of the Chapel Brook Restaurant 2013-2024

- iii. food was available from 11:30 - 21:00
- iv. customers were greeted at the front door desk by a server who would show them to a table. Orders for both food and drinks were taken at, and delivered to, the table
- v. although there was a small bar area by the front door, and customers could purchase a drink without food, this area was generally used by customers waiting for a table, and the bar did not have a permanent member of staff working on it exclusively

vi. the restaurant was staffed by 23 servers, 9 kitchen staff and 3 managers.

This sworn statement explains that the Declarant has personal knowledge of the contents of the statement, and is very detailed. In the absence of evidence to the contrary, this statement should carry considerable evidential weight.

Undated Assured Shorthold Tenancy Agreements

Relating to Flat 1 and Flat 2 within the premises. The agreement is between Whitbread Group Plc (the Landlord) and a named tenant dated 26 June 2023. For the purposes of this application the applicant is identified as Whitbread Plc.

The tenancy agreements indicate that employees (a Restaurant Manager and a General Manager) live(d) in the Premises. This evidence should be afforded limited weight because live-in staff are also commonly found in hotels and pubs.

Other evidence available to the Local Planning Authority

In addition to the evidence submitted by the applicant other information available to the Local Planning Authority can be a consideration and is set out below :-

Google Maps Posted Photographs

Interior photographs of the premises uploaded by both the owner and customers onto Google Maps show a number of interior photographs of the areas within the premises. They show tables and chairs formally set out for dining with either menus or laid with cutlery and menus. These photographs show an establishment which is primarily geared towards the provision of food, albeit 'pub style' food.





Google Maps Photographs 2017



Google Maps Photograph 2019

The bar area is shown in most of the photographs without bar stools apart from one photograph that shows a few people sat at the bar on high stools. These appear to be the same type of seating at nearby a high level table set for dining purposes and could well have been moved from the dining area in this instance.





Google Maps Photographs



Google Maps Photograph

Soft Play / Activity Area

In addition, there was a children's indoor soft play / activity area within the premises. Access to the play area was from within the Premises only. Due to its size and branding this area appears to have been ancillary to the primary use of the Premises.



Google Maps posted Photographs 2022



Google Maps posted Photo December 2022

Outdoor Play Area / Seating Areas

Outdoor play equipment is located to the south west of the building. Outside tables and seating is provided to the front of the building and adjacent to the fenced off play equipment.



Google Maps Streetview June 2022



Google Satellite Imagery

Premier Inn Hotel Accommodation

Attached to the premises is a Premier Inn Hotel which is still operational. The hotel

currently offers food in the restaurant to hotel residents only.



Premises 14 November 2024

It is understood that this arrangement will cease in the coming weeks and a new dining area with associated kitchen has been installed in the hotel which will serve residents of the hotel.





Premier Inn 14 November 2024

The photographs attached to the Google reviews support the claim that the Premises primarily operated as a restaurant with ancillary drinks provision. The reviews and photographs should be afforded considerable weight as they were produced over a number of years and by members of the public not associated with the application.

Site Visit

A site visit was conducted on 14 November 2024. By that date the Premises was no longer open for business to the general public although a limited menu was available for guests of the hotel.

Assessment

The original planning permission for the Premises was as a restaurant, as part of a wider hotel and restaurant scheme. There is no indication that that permission was not implemented, nor that there was a change of use of the restaurant prior to the Operative Date

The evidence available to the LPA and not contradicted by other evidence is that

- i. the Premises was operated as a Brewer's Fayre from at least 2008 until the Operative Date
- ii. the majority of the income from the Premises from at least 2013 to the Operative Date was derived from the sale of food, rather than the sale of drink (bearing in mind much of the drink sold will have been purchased by people eating food at the Premises);
- iii. the Premises has a very large kitchen
- iv. although customers could have a drink in the bar area without purchasing food, this area is small with no indication of low tables, easy chairs, a dart board, pool table etc such as might be found in a pub

- v. the public area of the Premises is primarily laid out to chairs and tables – with cutlery and menus on each table
- vi. customers were taken to their table by the staff of the Premises, that orders were taken at the table, rather than at the bar, and that the food was delivered to the table by waiting staff
- vii. the Brewers Fayre menus submitted in support of the application indicate that the type of food served in such establishments is 'pub-style' food, this does not equate to the Premises being a pub.

The above is sufficient clear precise and unambiguous evidence to demonstrate on a balance of probabilities that the lawful use of the Premises on the Operative Date (17 June 2024) was a restaurant (Use Class E(b)) with ancillary sale of alcoholic drinks. This use is in accordance with planning permission 00/00716/FUL.

Recommendation

That a certificate of lawfulness be granted for an E3(b) use of the Premises i.e. *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.*

**Signed Case
Officer¹:**

M Wishart

**Signed Authorising
Officer²:**

K Foster

Date:

6 December 2024

¹ I confirm that I do not have a personal relationship with the applicant, agent or other interested parties; I also confirm that I do not have a financial interest in the site or the development proposed

² I confirm that I do not have a personal relationship with the applicant, agent or other interested parties; I also confirm that I do not have a financial interest in the site or the development proposed

