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When is a shop not a shop?

When it's a restaurant, or at least that's what some planning authorities might say. Whilst Eric Pickles, the Secretary of State for Communities and Local Government, recently announced changes to the planning system about residential uses, there was a missed opportunity as regards the High Street where in some areas, there remains an unsatisfied demand for A3 uses.

This has resulted in an intensification of A1 café units, or as now being dubbed by some agents 'A1 (food)' with tenants operating food business from, in planning terms, premises which should be a shop.

The Town and Country Planning (Use Classes) Order 1987 defines A1 use as "*Shops, retail warehouses, hairdressers, undertakers, travel and ticket agencies, post offices, pet shops, sandwich bars, showrooms, domestic hire shops, dry cleaners, funeral directors and internet cafes*". Not a whole lot of fun there!

A café or restaurant is obviously within use class A3, the predominant use of which is the sale of hot food and drink on the premises. There is a further distinction between A3 and A5 in that the latter allows for premises where the predominant use is hot food takeaway. However, a cafe serving food and perhaps drink which may have a different appearance to a sandwich shop, has always been a grey area. Indeed, this has caused confusion in terms of how some premises can operate and indeed how local authorities consider such uses.

Aside of the statutory definition set out above, there is no definition or useful guidance as to what an A1 use is. The predominant use must remain as retail but other ancillary uses can take place within the planning unit e.g. seating which would normally be A3.

To start with, an assessment of what constitutes a lawful use under A1 depends on a matters of fact and degree. 15% of seating is not a bad rule of thumb to start from. However, depending upon the amount of cold food and takeaway sales, that percentage and amount of seating could potentially be more, or it could be less. High street sandwich chains have struggled with this issue for a number of years. As a result of the cut backs at local authorities, many Council's do not have the resources to enforce marginal breaches of use.

Heating up food on the premises, subject to the amount of hot food being dispensed, would not in itself constitute a change of use. Even moderate preparation of hot food might not. One has to consider the complete offer, including all sales on and off the premises and the amount of hot food to come to that conclusion.

Many A1 uses are now operating as cafes and since the A use class was split into further sub categories, such uses are often a sui generis use of A1/A3 and perhaps even a little bit of A5. Therefore, on the basis that such uses are growing in number and demand, should central and local government encourage such uses, particularly on High Streets with a high number of vacant units?

With appropriate controls and conditions such as operating hours, extract, conditioning the amount of seating, particularly outside the premises, some local authorities can be persuaded to accept a

change of use to A1/A3 in order to regularise the position and also to exert control over what would be otherwise an unconditioned planning use.

Some Councils, particularly Westminster, have a policy against loss of A1. However mixed changes of use can and have been approved where an A1 frontage can be retained and a sui generis use is presented with appropriate controls. The difficulty of course is whether some Councils might see this as an opening of the floodgates and view the change of use as a precedent to degeneration of the high street and retail image on a broader scale.

The reality however is that both local and central Government have to accept that with the recent demise of Jessops, HMV and the like, there is an abundance of empty retail units in and around the high street and still a dearth of restaurant/café units. These would be better and more approximately used and conditioned should either a relaxation be made by local Government or local authorities take a more informed view in relation to changing and conditioning such uses.

There is of course the balance of accepting what is a marginal use and taking the risk of enforcement action but some operators would want to be absolutely satisfied before committing to a long lease that they have the lawful use. In some cases, this can be achieved by applying for a certificate of proposed lawful use setting out the proposed split of cold, hot food sales, on and off etc. That would give a proposed tenant comfort should the certificate be granted but can be a reasonably time consuming process.

The sale of alcohol is also a commonly asked question in relation to A1 units. In itself, there is no reason why a retail unit cannot be granted a premises licence under the Licensing Act 2003. Where there is often conflict between the planning and licensing systems is that some councils, including Westminster, have a policy that they will only grant licences where alcohol is only sold with food in areas such as the West End. When applying for an alcohol licence in an A1 use, this obviously and potentially contradicts the A1 use and ancillary issue.

Very seldomly do planning authorities comment upon licensing applications and indeed the statutory guidance makes it clear that they are too separate regimes. There is though a balance to be found and operators must remember the ancillary nature of both alcohol on sales and food on-sales in this context.

Tables and chairs are normally granted planning consent and a highways licence separately but, in some cases, the grant of such consent for al fresco dining can give more prominence to the "A3" use of the unit and again raise the issue of whether that use remains within A1.

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