

Planning

Growth & Development

Delegated officer report for planning application

Application no. 142454/LE/2025
Date registered valid: 17 March 2025
Proposal: Use of property as a Hot Food Take Away (sui generis)
Address: 26 Portway, Manchester, M22 1UB
Ward(s): Woodhouse Park Ward

Applicant: Harjani Menari UK Ltd
Agent (if any): Mr Alexis Anderson-Jones MRTPI Serviam Planning
Case officer: Robert Tyrer
Tel: 0161 234 4068
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Recommendation: Refuse
Date of recommendation: 30 May 2025

Application details

Type of application: Certificate Lawful Development Existing

Development type: Certificates of lawfulness

Date of site visit: Not Required

Standard consultations:

No consultations have been printed and sent.

Neighbour notifications

Printed: 3 April 2025 Expired: 26 April 2025

Site notice

No site notice has been produced

Press advert

No press advert had been published

Departure from Development Plan: No

Environmental Statement: Not required

Description of site/building and area

26 Portway refers to the ground floor commercial unit within a parade of seven units (although one premises has a double unit) on Portway, located in the Woodhouse Park ward of Manchester.

The upper first and second floors are used as residential dwellings.

Woodhouse Park is a residential ward located in the southern part of Manchester, approximately 8 miles (13 km) from Manchester City Centre, making it a convenient location for commuters. The area has developed primarily as a suburban neighbourhood, with a mix of post-war semi-detached and terraced housing, alongside more recent developments of modern apartments and family homes. The community benefits from a range of amenities including supermarkets, several primary and secondary schools rated 'Good' by Ofsted, and the Woodhouse Park Lifestyle Centre, which offers sports, leisure, and community activities.

Public transport links are strong, with regular bus services and proximity to Manchester Airport and the Airport Metrolink line, providing easy access to the city centre and beyond.

Listed building: Not applicable

Conservation area: Not applicable

Tree Preservation Order: Not applicable

Description of development

The applicant is seeking a certificate of lawfulness of existing use or development (CLEUD) for use of property as a Hot Food Take Away (sui generis)

Consultations & Notification Responses

Publicity – Notification letters were sent to nearby residential properties (appendix 1).

Local residents/public opinion – No objections, comments or representations in support of the application have been received.

Legislative Issues

Sections 191 and 192 of the Town and Country Planning Act 1990 provide for anyone (not just a person with a legal interest in the land) to apply to the local planning authority (LPA) for a lawful development certificate (LDC). A certificate is a statutory document certifying:

(1) in the case of an application under section 191, the lawfulness, for planning purposes, of existing operations on, or use of land, or some activity being carried out in breach of a planning condition; or

(2) in the case of an application under section 192, the lawfulness of proposed operations on, or use of land.

The onus of proof in regard to (1) is firmly on the applicant and the issue of a certificate will depend on the on factual evidence provided about the history and planning status of the building or other land and the interpretation of any relevant planning law or judicial authority. The relevant test of the evidence in this matter is “the balance of probability” and the applicants own evidence does not need to be corroborated by independent evidence. If the LPA have no evidence to contradict the applicants version of events or make them less than probable, there is no good reason to refuse the issue of a certificate.

In regard to (2), this provides that, if the LPA are supplied with information satisfying them that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect; and, in any other case, they shall refuse the application.

In short, the purpose section 192 is to enable any person who wishes to find out whether any proposed use or operations would be lawful to apply to the LPA for that purpose

The application needs to describe the proposal with sufficient clarity and precision to enable the LPA to understand (from a written description and plans) exactly what is involved in the proposal; and to submit whatever supporting information or legal submission that are to be relied upon in order to satisfy the LPA that a certificate should be granted for the proposal.

In making their decision on an application under section 192, the LPA ask themselves the hypothetical question - "If this proposed change of use had already occurred, or if this proposed operation had commenced, on the application date, would it have been lawful for planning purposes?" In doing so, the LPA will not only consider whether the proposal would involve "development" requiring an application for planning permission, but whether it would involve a breach of any existing condition or limitation imposed on a grant of planning permission which has been acted upon, and which therefore constrains what can be done on the land. The LPA will not make a proposal fit a scenario; the only question is whether the proposal made by the applicant is lawful at the time of submission.

The Application

This application is pursued under subsection (1) of section 191 which provides for an application to determine whether a specified existing use, operation, or failure to comply with a planning condition or limitation, which has already been carried out on land is lawful for planning purpose.

Section 191(2)(a) of the 1990 Act sets out that uses are lawful at any time if no enforcement action may be taken in respect of them because either: they did not involve development or require planning permission; or, the time period for enforcement action has expired and they do not constitute a contravention of any enforcement notice then in force.

The applicant is seeking a certificate of lawful development existing use of property as a Hot Food Take Away (sui generis)

In a case of this type, the onus is on the applicant to substantiate his or her case, on the balance of probability. The applicant needs to demonstrate that the use of property as a Hot Food Take Away (sui generis) commenced more than ten years prior to the date of the application (i.e. by 17th March 2015) and continued without a significant break for ten years.

Use Class

Hot food take-aways were reclassified as sui-generis uses on 1 September 2020. This change was part of the updates to the Use Classes Order introduced by the Business and Planning Act 2020. Prior to this, hot food take-aways were classified under Class A5.

Assessment of Evidence

Planning history

Planning history for the site shows that there have been no previous planning applications at this address.

Applicants Evidence

The evidence provided by the applicant to demonstrate at least ten years includes the following:

- Application form
- Lease Document
- Transfer of Lease Document
- Google Street View images July 2024 and October 2012.

The application form describes that the property was originally designated as Class A3 under the Use Class Order (now Class E) but has been operating as a hot food take-away previously Class A5 and now classified as a sui generis use due to the lack of seating, advertisement of hot food and that the majority of food being consumed off the premises.

In addition to this point, the applicant states the Local Planning Authority (LPA) has acknowledged this position and offered the applicant the option to apply for full planning permission or a Certificate of Lawfulness; however, this statement is not qualified in any of the submissions that form part of this application.

The applicant's research, including Google Maps history and online reviews, indicates the premises has functioned as a takeaway for over 10 years under the name Momma's B, thereby

acquiring lawful use through the passage of time. While there is no direct evidence of an extraction system installation, the nature of operations suggests its likely presence.

The lease document shows that the “Use Allowed” to be a “Sandwich Shop” with a lease period of 19.2.2015 until 18.2.2025 and on the 4th April 2019 this lease was transferred to new owners of the business “Momma B’s sandwich shop”.

Apart from a link to a website for reviews, no additional information was provided in support of the application.

In an application for a Lawful Development Certificate (LDC), the burden of proof lies with the applicant, as they are best positioned to provide evidence of the site's use and activities. Planning Practice Guidance advises that:

*“In the case of applications for existing use, if a local planning authority 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 the applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.** Paragraph: 006 Reference ID: 17c-006-20140306”*

However, the information provided is light in detail with reliance upon internet weblinks without any information or supporting statements to explain how this show the property has been in use as a Hot Food Take Away. Furthermore, the advice or guidance provided by the LPA referred to in why the LDC should be granted has not been provided.

Not only is the business called “Momma B’s Sandwich Shop”, but the lease also restricts the use to a Sandwich Shop, making no reference to Hot food take-away. However, the previous Use Class Order originally classified a Sandwich Shop as either an A1 or an A3 use, although the latter classification would be dependent on the primary to ancillary relationships of hot and cold food. However, this was widely recognised as a problematic use due to ambiguities in the wording of the Use Classes Order and related circular guidance that applied in England.

The planning history of the site does not reveal anything useful that would help establish or identify the use class of the property.

Other public available information such as a Food Standards Agency described the business use on the 2nd October 2023 as Restaurant/Café/Canteen ([Momma B's | Rating Business Details | Food Hygiene Ratings](#)).

However, the Energy Performance Certificate (EPC) for the same property assessed on 31st March 2017 describes the property type as “A3/A4/A5 Restaurant and Cafes/Drinking Establishments and Hot Food takeaways” ([Energy performance certificate \(EPC\) – Find an energy certificate – GOV.UK](#)).

Whilst the different regulatory schemes may provide differing classifications for their own registration purposes, the crucial point is whether there was some important difference in the character of the activities from that of a hot food takeaway. To that extent, it is a question of fact and degree in each particular case.

There is no evidence to indicate that the property was ever in use as a hot food take-away, indeed the evidence presented raises more questions than it provides answers. In 2009, the premises were openly advertising as “Linda’s Tasty Bites”, although little can be found about that operation

given the passage of time, nevertheless this appears to have been the trading name immediately prior to “Momma B’s, with Google Streetview imagery showing this as “Momma B’s Sandwich Bar” as early as October 2012.

Although this may have started out as a Sandwich Shop falling in the historical Class A1 category, the menu offerings of “Momma B’s” would suggest that over time this had morphed into a Café, and the likelihood being that this included some ancillary hot food take-away element. This change would have at the time have place this in to the then Class A3 category, although this may have been an unauthorised one. Following further amendments in 2015, changes from Class A1 to A3 were permitted, but this was subject to prior approval. However, the Council hold no record of any formal request in that regard.

The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020, at Regulation 7 provides that for the purposes of the Use Classes Order, if a building or other land is situated in England, and was being used as Class A1 (Shops), Class A2 (Financial and professional services), Class A3 (Restaurants and cafes), or Class B1 (Business) on 31 August 2020, 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).

Conclusion

Drawing all of the threads together, whichever way one scrutinises the submitted evidence, it does not show, on the balance of probability that the premises have operated as a Hot Food Take-Away, either in Class A5 prior to 1 September 2020, or as a sui-generis Hot Food Take-Away post 1 September 2020 and up to the date of the application; it is more likely than not that “Momma B’s Sandwich shop” was absorbed into Class E on 1 September 2020.

Other Legislative Requirements

Equality Act 2010

Section 149 (Public Sector Equality Duty) of the Equality Act 2010 requires due regard to the need to: Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act and; Advance equality of opportunity between persons who share a protected characteristic and persons who do not share it. The Equality Duty does not impose a legal requirement to conduct an Equality Impact Assessment. Compliance with the Equality Duty involves consciously thinking about the aims of the Equality Duty as part of the process of decision-making.

Human Rights Act 1998 considerations

This application needs to be considered against the provisions of the Human Rights Act 1998. Under Article 6, the applicants (and those third parties, including local residents, who have made representations) have a right to a fair hearing and to this end the local planning authority must give full consideration to their comments.

Protocol 1 Article 1, and Article 8 where appropriate, confer(s) a right of respect for a person’s home, other land and business assets. In taking account of all material considerations, including Council policy as set out in the Core Strategy and saved policies of the Unitary Development Plan, the Director of Planning, Building Control & Licensing has concluded that some rights conferred by these articles on the applicant(s)/objector(s)/resident(s) and other occupiers and owners of nearby land that might be affected may be interfered with but that that interference is in accordance with the law and justified by being in the public interest and on the basis of the planning merits of the development proposal. She believes that any restriction on these rights posed by the recommendation given is proportionate to the wider benefits of and that such a decision falls within the margin of discretion afforded to the Council under the Town and Country Planning Acts.

Recommendation: Refuse

Condition(s) to be attached to decision for approval OR Reasons for recommendation to refuse

The applicant has failed to demonstrate that the use of property as a Hot Food Take-Away (sui generis) as defined by the Town and Country Planning (Use Classes) Order 1987 (as amended), has continued for a 10-year period up to the date of the application.

Appendix 1 – List of consultees & neighbours notified

30A Portway, Manchester, M22 1UB
24A Portway, Manchester, M22 1UB
105 Cotefield Road, Manchester, M22 1UY
23 Portway, Manchester, M22 1UH
34 Portway, Manchester, M22 1UB
22 Portway, Manchester, M22 1UB
28 Portway, Manchester, M22 1UB
24 Portway, Manchester, M22 1UB
34A Portway, Manchester, M22 1UB
32A Portway, Manchester, M22 1UB
28A Portway, Manchester, M22 1UB
26A Portway, Manchester, M22 1UB
22A Portway, Manchester, M22 1UB
17 Portway, Manchester, M22 1UA
30 - 32 Portway, Manchester, M22 1UB
25 Portway, Manchester, M22 1UH

Appendix 2 – Planning constraints

Article 4 Direction - Removal Of PD Rights Change Of Use From Class C3 To Class C4
Susceptible to Surf Water Flood (Less) -
Area Team Boundary - Name: SOUTH AREA