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Planning Portal Reference: PP-13503748



15 November 2024

Development Management  
London Borough of Richmond upon Thames  
Civic Centre  
York  
Street  
Twickenham  
TW1 3BZ

Dear Sir/Madam,

**Homebase Store, Twickenham Rd, Twickenham, Feltham TW13 6EZ**

**Application pursuant to Section 192 of the Town and Country Planning Act 1990 (as amended) for a Certificate of Lawfulness Existing Use or Development**

We write on behalf of the applicant, Aldi Stores Ltd, ('Aldi/'the Applicant') to submit an application under Section 192 of the Town and Country Planning Act (1990) (as amended) for a certificate of lawfulness of proposed use or development in respect to the site of Homebase Store, Twickenham Rd, Twickenham, Feltham TW13 6EZ.

This application seeks to confirm that the existing use of the retail unit on the Site is any use within Class E of the Town and Country Planning (Use Classes) Order 1987 (as amended), and as such any proposed use of the retail unit within this class would be lawful for planning purposes under s.192 of the Town & Country Planning Act 1990.

**1. Submission Documents**

The following information has been submitted in accompaniment of this application:

- Completed Application Form and Ownership Certificates;
- Covering Letter (this document);
- Legal Opinion (ref. 240802); and
- Site Location Plan (ref: 18960 THPK 00 XX DR A 0101).

An application fee of £216.50 calculated in accordance with Regulation 11(3) (a) of the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 ("The Fees Regulations") has been paid via the Planning Portal to London Borough of Richmond Upon Thames Council.

## 2. The Site and approved development

The Site comprises a single storey, standalone 'Homebase' DIY superstore within a triangular plot of approximately 1.6 hectares. The Site is located in Hanworth, Twickenham within the London Borough of Richmond Upon Thames, and extends beyond the store to include a service yard and external garden centre to its rear and side elevations, with a car park that extends to the front of the building.

The Site is bound by Great Chertsey Road to the north-west, the service yard and residential properties beyond to the north-east, Twickenham Road to the south (and from which vehicular and pedestrian access is gained) and car parking and a drive-thru restaurant ('McDonalds') to the west.

The existing store on the Site was built out in the mid-1990s, with the implemented planning permission being granted on 16<sup>th</sup> January 1995 (ref. 94/3189/FUL) for the following description of development:

*"Redevelopment of site for Class A1 use (non food retail use) associated car parking, servicing and access (amendment to service yard open storage area and garden centre only)."*

The permission was subject to 6 planning conditions, namely: that development begun within five years, that parking spaces be clearly marked and for occupiers and visitors to the premise, that refuse be stored appropriately, regarding delivery times, regarding goods storage and regarding diesel and gas machinery. Although reference is made to retail and the exclusion of the sale of food goods within the description of development, there is no condition attached to the implemented permission which restricts the sale of goods, or that excludes the Use Class Order or restricts the use of the development. The decision notice is included within this submission at **Appendix I**.

Subsequent to this, two amendment applications were submitted and approved (Ref: 95/0623/FUL and 96/1996/FUL) amended the servicing condition stemming from the January 1995 permission.

The informatives to the implemented permission make reference to a previous application, referenced 94/1493/FUL, which had included a condition restricting the food permitted to be sold for DIY and gardening purposes or other non-food items. However, it is understood that the implementation permission is that referenced 94/3189/FUL (the 'latter' permission), in that those amendment applications submitted and approved as set out above were made against. As such, the 94/1493/FUL (the 'former' permission) was never implemented.

The unit has been occupied by Homebase since its construction (for a continuous period of several years) as a DIY-superstore under the former Use Class A1, now Class E(a).

## 3. Use Classes Order

The Town and Country Planning (Use Classes) Order 1987 (as amended) sets out Use Classes for the purposes of planning legislation, and as of 1<sup>st</sup> September 2020 was amended by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 ('the 2020 Regulations'). These amendments include the creation of Use Class E, 'Commercial, Business and Service', under Part A of the Schedule, subsuming the former Use Classes of A1 (shops), A2 (financial and professional services), A3 (restaurants and cafes), Class B1 (business), as well as part of D1 (non-residential institutions) and D2 (assembly and leisure).

The wording of Use Class E as contained within the 2020 regulations is as follows:

*“Use, or part use, for all or any of the following purposes—*

- (a) for the display or retail sale of goods, other than hot food, principally to visiting members of the public,*
- (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,*
- (c) for the provision of the following kinds of services principally to visiting members of the public—*
  - i. financial services,*
  - ii. professional services (other than health or medical services), or*
  - iii. any other services which it is appropriate to provide in a commercial, business or service locality,*
- (d) for indoor sport, recreation or fitness, not involving motorised vehicles or firearms, principally to visiting members of the public,*
- (e) for the provision of medical or health services, principally to visiting members of the public, except the use of premises attached to the residence of the consultant or practitioner,*
- (f) for a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public,*
- (g) for—*
  - i. an office to carry out any operational or administrative functions,*
  - ii. the research and development of products or processes, or*
  - iii. any industrial process, being a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.”*

This legislation was introduced by Government to promote flexibility within the planning system so that it may adjust with agility and effectively to market conditions, in response to changes to the retail landscape and the high street, as set out in the Government’s Explanatory Memorandum accompanying the Use Class Order amendments.

The 2020 Regulations make it clear that a building or land which was used for any of the revoked uses on 31st August 2020 will be treated from 1st September 2020 as falling within the new Use Class E. Specifically, Section 7 of the 2020 Regulations states that:

*“For the purposes of the Use Classes Order, if a building or other land is situated in England and is being used for the purpose of one of the following classes which were specified in Part A or B of the Schedule to that Order on 31st August, as –*

*(a) Class A1 (Shops);*

*(b) Class A2 (Financial and Professional Services);*

*(c) Class A3 (Restaurants and Cafes); or*

*(d) Class B1 (Business).*

*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) in Schedule to that Order."*

The Explanatory Memorandum highlights that flexibility is particularly important as town centres seek to recover from the economic impact of COVID-19. It goes on to state that: *"This new class allows for a mix of uses to reflect changing retail and business models. It therefore, recognises that a building may be in a number of uses concurrently or that a building may be used for different uses at different times of the day. Changes to another use, or mix of uses, within this class do not require planning permission. Bringing these uses together and allowing movement between them will give businesses greater freedom to adapt to changing circumstances and to respond more quickly to the needs of their communities"*.

This position is consistent with Part (2) (f) of Section 55 of the TCPA, which sets out that use of a building and land for a purpose within the same use class does not amount to 'development' and does not require planning permission.

It is against this background that the application should be assessed.

#### **4. Lawfulness of Proposed Use**

Given that the lawful use of the unit is retail, within Use Class E as set out in Section 3 of this letter and confirmed by the planning history and lawful occupation of the unit, confirmation is sought that the use of the unit is Class E and that any Class E use or a mixture of Class E use would not amount to development. Article 3(1) of the Use Class Order sets out that:

*"Subject to the provisions of this Order, where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land"*

This is consistent with Part (2) f) of Section 55 of the Act, which sets out that use of a building and land for a purpose within the same use class does not amount to 'development' and does not require planning permission.

An application for a certificate of lawfulness of proposed use (or development) can be made under s. 192 of The Town and Country Planning Act 1990 [as substituted by the Planning and Compensation Act 1991, s. 10(1)], which provides:

*(1) If any person wishes to ascertain whether—*

*(a) any proposed use of buildings or other land; or*

*(b) any operations proposed to be carried out in, on, over or under land,*

*would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.*

*(2) If, on an application under this section, the local planning authority are provided 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.*

*(3) A certificate under this section shall—*

*(a) specify the land to which it relates;*

*(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);*

*(c) give the reasons for determining the use or operations to be lawful; and*

*(d) specify the date of the application for the certificate.*

*(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness.*

The National Planning Practice Guidance (NPPG) provides guidance on Lawful Development Certificates, and that in the case of applications involving proposed use or development, it states that a local planning authority, provided the applicant describes the proposals with sufficient clarity, shall consider whether on the facts of the case and relevant planning law, the specific matter would be lawful. In the event that it is, the Council has no discretion other than to grant the application: they “shall” issue a certificate to that effect [Section 191(4), the TCPA] (ref. 006 Reference ID: 17c-006-20140306).

The planning history of the Site confirms the existing use is for Class A1 (retail), now Use Class E(a), as per the implemented planning permission (ref. 94/3189/FUL). The description of development for the implemented permission does not refer to the unit, but includes reference to the use. It only establishes what development can come forward, rather than what cannot. Regulation and control of the development or use of land authorised through planning permission must come through conditions under Section 72 of the Town Country Planning Act (1990) (as amended), as has been established through case law<sup>1</sup>. As such, in the light of there being no restrictive conditions on the implemented permission which exclude any Use Class, the Use Class Order or restrict the use or sale of goods of the development, the future use of the unit is not controlled through the permission and its use can change to another within Use Class E without the need for planning permission, as per Section 55 (2) (f) of the Town and Country Planning Act (1990) (as amended).

It is noted that an informative present on the implemented permission, namely informative ‘NI01’, referenced conditions attached to the previous permission granted for the Site, which includes restrictions on the types of goods sold and use of the Site. However, informative notes ‘do not carry any legal weight and cannot be used in lieu of planning conditions or a legal obligation to try and ensure adequate means of control for planning purposes’ as set out in Planning Practice Guidance (ref. 026

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<sup>1</sup> I’m Your Man v SoSE (1993) 77 P. & C.R. 251, R (Altunkaynak) v Northamptonshire Magistrates Court [2012] EWHC 174 (Admin), Winchester City Council v SoSCLG [2013] EWHC 101 (Admin), Cotswold Grange Country Park v SoSCLG [2014] EWHC 1138 (Admin)

Reference ID: 21a-026-20140306). In order to incorporate another document into a planning permission, it must include clear wording of such, and that wording must be in the operative part of the planning permission, which is the description of development as established in *Lewison LJ in Finney v Welsh Ministers [2019] EWCA Civ 1868 at [21]*. Nothing in the operative part of the permission that states a restriction on the use through the 1994 Permission is incorporated into the 1995 Permission. It is only raised in the informative, which is not the operative part of the planning permission.

Consequently, any future change of use within Use Class E does not constitute development, unless specifically brought into the definition of development by the mechanics of an effective condition attached to the relevant permission, which there is not, nor does the sale of any goods not comply with the conditions attached to the implemented consent.

We enclose a Legal Opinion of Phillip Robson of Kings Chambers which supports this position.

As such, the Applicant seeks to confirm that the future use of the development is unrestricted within the uses set out in Class E of the 2020 Regulations, and that the flexibilities now presented by Class E are applicable to the Site. In doing so, this would confirm that the unit can be used within any class specified within the schedule without the need for planning permission and that this would not constitute development, as set out in (2f) of Section 55 of the Act.

We trust that the enclosed sufficiently demonstrates that the current use of the Homebase unit is within Use Class E, and as such, future changes within this class will not amount to development as there is no restriction present within the planning history pursuant to the Site. On this basis the Lawful Development Certificate should be granted. In the meantime, should you have any queries then please do not hesitate to contact Penny Moss ([penny.moss@avisonyoung.com](mailto:penny.moss@avisonyoung.com)) or myself.

Yours sincerely,



**Ben Hood**

Senior Planner

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**For and on behalf of Avison Young (UK) Limited**