



SUPPORTING STATEMENT

38 WHITFIELD STREET, LONDON W1T 2RH

APPLICATION FOR A CERTIFICATE OF LAWFULNESS OF EXISTING USE OR DEVELOPMENT PURSUANT TO SECTION 191 OF THE TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

SUPPORTING STATEMENT

a. Introduction and Overview

This Statement is submitted in support of an application ('the Application') for a Certificate of Existing Use or Development ('CLEUD') pursuant to Section 191 of the Town and Country Planning Act 1990 (as amended) ('the Act').

The Application is in relation to the ground and lower ground floors of 38 Whitfield Street, London W1T 2RH ('the Site') and is submitted to London Borough of Camden ('the Council') on behalf of Estates and Agency ('the Applicant').

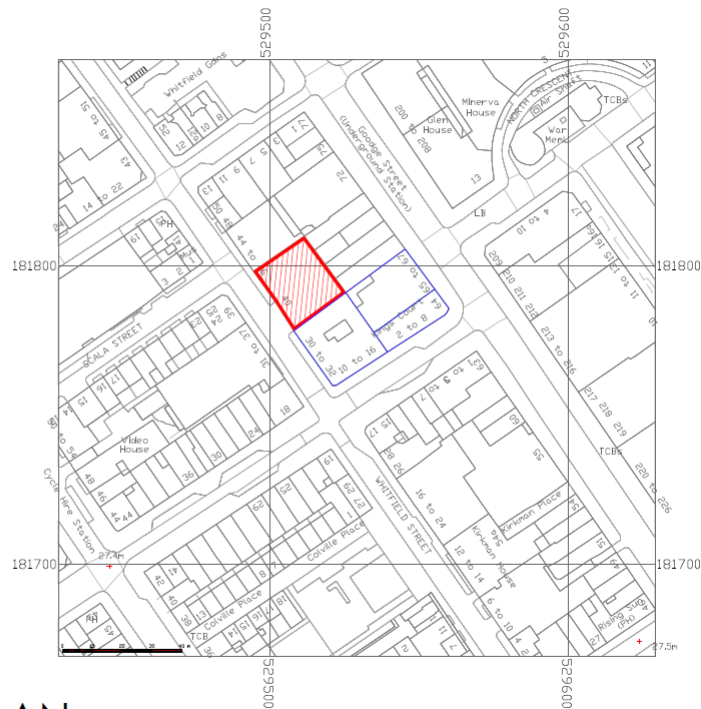
The Council is the local planning authority for the area in which the Site is located.

This Application seeks the Council's confirmation that the existing lawful use of the ground and lower ground floors at 38 Whitfield Street, London W1T 2RH for unrestricted Class E purposes is lawful. This confirmation is sought on the basis that a) the current commercial space at this level is not restricted to one particular use under Class E, b) this space has been used continuously and lawfully as Class E in line with the relevant operative planning permissions, and c) using the space for any use under Class E would therefore be lawful.

The red line Site Location Plan showing the building and land subject to this Application is provided below at **Figure 1**.

This Application's evidence is based on operative planning permissions relating to these floors of the building. These applications confirm that unrestricted Class E use would be lawful. These applications include:

- Application reference 8800483 – granted on 27 February 1991 ('1991 Permission')
- Application reference PS9805221R2 – granted in 2001 under appeal ref APP/X5210/A/00/104/6262 ('2001 Permission').



SITE PLAN

Figure 1: Site Location Plan

Both the 1991 Permission and 2001 Permission relate to the ground and lower ground floor levels of buildings located at 10-16 Godge Street, 30-32 Whitfield Street (in the case of the 1991 Permission) and 38-42 Whitfield Street (in the case of the 2001 Permission). The space these 2 x permissions created at ground and lower ground level was for retail (Class E (a)) purposes for occupation by Tesco. Neither permission contained any restrictive planning conditions limiting the use of this space to retail purposes only.

Recently, Tesco have downsized and have left a section of ground and lower ground floor level located at 38 Whitfield Street vacant. The Applicant therefore wishes to obtain confirmation from the Council that the existing lawful use of this space at 38 Whitfield Street falls under an unrestricted Class E use and the use of this space for alternative Class E uses would not require planning permission as it would not constitute a material change of use.

A full schedule of the Site's planning history is provided at **Annex 1** and copies of the key decision notices and delegated reports are enclosed at **Annex 2** of this Statement

Evidence that Tesco have been using the space at ground and lower ground floor level in line with the 1991 Permission and 2001 Permission and for a period of more than 10 x years are closed at **Annex 3**.

The Applicant has additionally provided a copy of the 'As Built' plans for the ground and lower ground floors which are the subject of this CLEUD application to additional demonstrate that the units remain in Class E commercial use. These are enclosed at **Annex 4**.

This Statement provides further detail and evidence to assist the Council in issuing a CLEUD for unrestricted Class E use.

b. Legislative Framework

The legislative framework for the determination of the Application is summarised below:

1. Section 191 of the Act provides the framework by which a local planning authority can issue a CLEUD (*our emphasis*)

“191 Certificate of lawfulness of existing use or development.

(1) 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.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

(3) For the purposes of this 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—

(a) the time for taking enforcement action in respect of the failure has then expired; and

(b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

(3A) In determining for the purposes of this section whether the time for taking enforcement action in respect of a matter has expired, that time is to be taken not to have expired if—

(a) the time for applying for an order under section 171BA(1) (a “planning enforcement order”) in relation to the matter has not expired,

(b) an application has been made for a planning enforcement order in relation to the matter and the application has neither been decided nor been withdrawn, or

(c) a planning enforcement order has been made in relation to the matter, the order has not been rescinded and the enforcement year for the order (whether or not it has begun) has not expired.]

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5) A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use, operations or other matter 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, operations or other matter to be lawful; and

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

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

(7) A certificate under this section in respect of any use shall also have effect, for the purposes of the following enactments, as if it were a grant of planning permission—

(a) section 3(3) of the M1 Caravan Sites and Control of Development Act 1960 [F4 or section 7(1) of the M2 Mobile Homes (Wales) Act 2013;]

(b) section 5(2) of the M3 Control of Pollution Act 1974; and

(c) section 36(2)(a) of the M4 Environmental Protection Act 1990.”

2. The National Planning Practice Guidance ('NPPG') provides the following guidance regarding lawful development certificates:

How is a lawful development certificate obtained and what does it mean?

If the local planning authority is satisfied that the appropriate legal tests have been met, it will grant a lawful development certificate. Where an application has been made under section 191, the statement in a lawful development certificate of what is lawful relates only to the state of affairs on the land at the date of the certificate application.

Who is responsible for providing sufficient information to support an application?

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.

How is an application for a lawful development certificate determined?

A local planning authority needs to 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.

The NPPG notes that the onus in meeting the above requirements is with the Applicant. As such, information will be provided within this application to demonstrate that the above requirements have been met and that a CLEUD should be issued.

c. The Operative Permissions for 38 Whitfield Street

Planning History

A review of the Council's online planning register has found that there are numerous planning applications listed in relation to the Site, provided in full in Annex 1. The relevant planning applications for the purposes of this Application are listed below.

Both the 1991 Permission and 2001 Permission relate to the ground and lower ground floor levels of buildings located at 10-16 Goodge Street, 30-32 Whitfield Street (in the case of the 1991 Permission) and 38-42 Whitfield Street (in the case of the 2001 Permission). The space these 2 x permissions created at ground and lower ground level was for retail (Class E (a)) purposes for occupation by Tesco.

The 1991 Permission – 10-16 Goodge Street and 30-32 Whitfield Street

Planning application reference 8800483 is the operative planning permission for the 10-16 Goodge Street, 30-32 Whitfield Street. This application granted approval the creation of the existing building which included the ground floor and lower ground floor commercial units. The following description of development was approved:

The erection of a building comprising basement ground and four upper floors for use of purposes within Class B1 Use and Class A1 Use of the Schedule of the Town & Country Planning (Use Classes) Order 1987 on the site of 34-42 Whitfield Street. Continued use of the first second and third floors of 10-16 Goodge Street and 30/32 Whitfield Street for office use. Works of alteration to the service yard at the rear of 10-16 Goodge Street on land at 34-42 Whitfield Street as shown on drawing numbers 2646/P2/06G 07F 08C 09B & 10C and 2646/PE/01-06 revised by letters dated 17th April 1989 14th June 1989 and 24th August 1989

The permission clearly created a new chapter in the planning history of 10-16 Goodge Street, 30-32 Whitfield Street and the works have been completed. With regard to the ground and lower ground floor units, the 1991 permission did not contain any restrictive conditions limiting the use to Class E(a) retail (former Class A1) use only. Therefore, it follows that using the ground and lower ground floors at the Site for any use falling under a Class E would be lawful as it would not constitute a material change of use requiring planning permission.

The 2001 Permission – 38-42 Whitfield Street

Planning application reference PS9805221R2 (granted in 2001 under appeal ref APP/X5210/A/00/104/6262) ('2001 Permission'), is the operative planning permission for 38-42 Whitfield Street. This application granted approval for the creation of the existing building and included the extension of the existing commercial unit occupied by Tesco at 10-16 Goodge Street and 30-32 Whitfield Street.

This permission granted approval for the following description of development:

Demolition of 38-42 Whitfield Street, and redevelopment to provide:

- a) Ancillary storage and bakery use (A1) to basement*
- b) Retail use (as an extension to the existing supermarket to the south of the application site) and business entrance to the ground floor.*
- c) Business use (Class B1) for 1st to 4th floors, as shown by drawing numbers 3387/P/01, 03, 04A, 05A, and 06A.*

As per the 1991 permission, with regard to the ground and lower ground floor units, the 2001 permission did not contain any restrictive conditions limiting the use to Class E(a) retail (former Class A1) use only. Therefore, it follows that using the ground and lower ground floors at the Site for any use

falling under a Class E would be lawful as it would not constitute a material change of use requiring planning permission.

Recent Planning Applications

There have additionally been two recent planning applications approved relating to the creation of new entrance doors at ground floor to the ground and lower ground commercial unit at 40 Whitfield Street. The permissions included:

- Application reference 2022/3007/P – granted on 21 March 2023 for *Replacement of front ground floor window with new entrance door and alteration of external floor*
- Application reference 2023/3391/P – granted on 21 October 2023 for *Replacement of servicing doors and front ground floor window with new entrance doors with associated canopy above, and alteration of external floor, alongside other minor external alterations*

We have enclosed the decision notices and delegated reports for both applications at **Annex 2**. Both of these applications related to construction of an office entrance in place of now redundant service doors to the Tesco unit due it being downsized. The delegated reports clearly reference that the ground and lower ground floor units are in commercial use and both permissions do not contain any restrictive conditions limiting the use to Class E(a) retail (former Class A1) use only. Therefore, it follows that using the ground and lower ground floors at the Site for any use falling under Class E would be lawful as it would not constitute a material change of use requiring planning permission.

Overall conclusion on Planning History

Based on the planning history of the site, the following conclusions can be reached:

- Both the 1991 Permission and 2001 Permission relate to the ground and lower ground floor levels of buildings located at 10-16 Goodge Street, 30-32 Whitfield Street (in the case of the 1991 Permission) and 38-42 Whitfield Street (in the case of the 2001 Permission).
- The space these 2 x permissions created at ground and lower ground level was for retail (Class E (a)) purposes for occupation by Tesco.
- Therefore, the existing use of the ground and basement floors of the site can be confirmed to be Class E(a) retail and both permissions did not contain any restrictive conditions limiting to this use only.
- There have additionally been two recent planning application approved relating to the creation of new entrance doors at ground floor to the ground and lower ground commercial unit at 40 Whitfield Street. The delegated reports clearly reference that the ground and lower ground floor units are in commercial use and both permissions do not contain any restrictive conditions limiting the use to Class E(a) retail (former Class A1) use only.

Based on this, the following sections of this Statement set out why, based on this existing use, that the future use of the ground and basement floors for unrestricted Class E use should be considered lawful.

d. The existing Class E use

The Use Classes Order

The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force on 1 September 2020 and had the effect of updating the Use Classes Order set out within Schedule 2 of the Town and Country Planning (Use Classes) Order 1987.

These regulations amended the Use Classes Order and rescinded the existing Use Classes A1, A2, A3 and B1 use classes (amongst others), which were merged into the new Use Class E along with some uses from Use Classes D1 and D2. The parameters of Use Class E now encompass the following operations:

- **E(a)** Shop other than for the sale of hot food
- **E(b)** Sale of food and drink for consumption (mostly) on the premises
- **E(c)** Provision of:
 - **E(c)(i)** Financial services,
 - **E(c)(ii)** Professional services (other than health or medical services), or
 - **E(c)(iii)** Other appropriate services in a commercial, business or service locality
- **E(d)** Indoor sport, recreation or fitness (not involving motorised vehicles or firearms)
- **E(e)** Provision of medical or health services (except the use of premises attached to the residence of the consultant or practitioner)
- **E(f)** Creche, day nursery or day centre (not including a residential use)
- **E(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.

Prior to the amendment to the Use Classes Order, Use Class E(a) Retail was previously Class A1, which, along with Classes A1/2/3, Class B1 and some uses under Classes D1/2, was converted to Class E in September 2020.

The lawful use of the ground and lower ground floors as unrestricted Class E

The Applicant is seeking a lawful development certificate to confirm that the existing use of the lower ground and ground floor for unrestricted Class E Use is lawful. This is sought pursuant to Section 191 of the Town and Country Planning Act 1990 (as amended) and Paragraph 12 of the NPPG.

For the reasons explained earlier in this statement, both the 1991 Permission and 2001 Permission relate to the ground and lower ground floor levels of buildings located at 10-16 Goodge Street, 30-32 Whitfield Street (in the case of the 1991 Permission) and 38-42 Whitfield Street (in the case of the 2001 Permission). The space these 2 x permissions created at ground and lower ground level was for retail (Class E (a)) purposes for occupation by Tesco. Neither permission contained any restrictive planning conditions limiting the use of this space to retail purposes only.

As a result, any change of use to another use falling with Class E of the Use Classes Order would not amount to development, as defined by Section 55 of the Town and Country Planning Act 1990 (as amended).

Further guidance on this is set out within the NPPG at Paragraph 12 Reference ID: 13-012-20140306 which states with respect of Class E, the following:

“Movement from one primary use to another within the same use class is not development, and does not require planning permission.

The Commercial, Business and Service use class [i.e. Class E] provides for use, or part use, for all or any of the purposes set out in that Class”.

Therefore, as the existing use of 38 Whitfield Street fall under Class E(a) of the Use Classes Order without any restrictions, movement from this primary use (i.e. retail (Class E(a)) to another within the same use class (i.e. offices (Class E(g), café/restaurant (Class E(b) or gym (Class E(d)) would not constitute development and would not require planning permission.

Notwithstanding the above conclusions, in the event that the Council does not agree that the 1991 Permission is the operative permission, then the same conclusion can be reached based on the historic planning and leasing history of the site:

- Both the 1991 Permission and 2001 Permission relate to the ground and lower ground floor levels of buildings located at 10-16 Goodge Street, 30-32 Whitfield Street (in the case of the 1991 Permission) and 38-42 Whitfield Street (in the case of the 2001 Permission).
- The space these 2 x permissions created at ground and lower ground level was for retail (Class E (a)) purposes for occupation by Tesco.
- Therefore, the existing use of the ground and basement floors of the site can be confirmed to be Class E(a) retail and both permissions did not contain any restrictive conditions limiting to this use only.
- Since the grant of these permissions the space at ground and lower ground floors have been occupied by Tesco. A copy of the leases across this period between the Applicant and Tesco Stores Limited are enclosed at **Annex 3**. Even if the Council did not agree that the operative permissions provide evidence of lawful use, the submitted leasing information demonstrates that the units have been occupied as a commercial (Class E) unit for over 10 years.
- The Applicant has additionally provided a copy of the ‘As Built’ plans for the ground and lower ground floors which are the subject of this CLEUD application to additional demonstrate that the units are in commercial use. These plans show office layouts which are considered to be lawful use as it falls under Class E and are enclosed at **Annex 4**.

Therefore, based on the planning history evidence of the Site and on the balance of probability, it is clear that the existing use of the lower ground and ground floors of 38 Whitfield Street is retail use (Class E(a)). As this use is not restricted by condition, changing to another use under Class E would not require planning permission, and therefore the future use of the space for flexible Use Class E would be lawful.

e. Evidence submitted with the Application

We enclose the following evidence in support of this application:

- **Annex 1** - full schedule of the Site’s planning history is provided

- **Annex 2** - copies of the key decision notices for the 1991 and 2001 Permissions.
- **Annex 3** - copy of the lease history from creation of the unit until present day between the Applicant and Tesco Stores Limited are enclosed at Annex 3.
- **Annex 4** – as built plans for the ground and lower ground floors subject of this CLEUD application.
- **Annex 5** – Site Location Plan

The enclosed evidence demonstrates that it would be lawful to use the lower ground and ground floors of 38 Whitfield Street for Class E purposes.

f. Conclusion

In summary, the evidence submitted in support of this Application demonstrates that:

- The current use of the lower ground and ground floors of 38 Whitfield Street are governed by both the 1991 Permission and 2001 Permission. These relate to the ground and lower ground floor levels of buildings located at 10-16 Goodge Street, 30-32 Whitfield Street (in the case of the 1991 Permission) and 38-42 Whitfield Street (in the case of the 2001 Permission).
- The space these 2 x permissions created at ground and lower ground level was for retail (Class E (a)) purposes for occupation by Tesco. Neither permission contained any restrictive planning conditions limiting the use of this space to retail purposes only.
- Recently, Tesco have downsized and have left a section of ground and lower ground floor level located at 38 Whitfield Street vacant. The Applicant therefore wishes to obtain confirmation from the Council that the existing lawful use of this space at 38 Whitfield Street falls under an unrestricted Class E use and the use of this space for alternative Class E uses would not require planning permission as it would not constitute a material change of use
- Changing from one primary use to another primary use within the same use class (i.e. from one Class E use to another Class E use) does not meet the definition of development, as set out by Section 55 of the Town and Country Planning Act 1990 (as amended).
- Therefore, the lawful use of ground and lower ground floors of 38 Whitfield Street for any use falling under Class E of the Use Classes Order must therefore be lawful as it would not be development and it would not be a material change of use requiring planning permission.
- There have additionally been two recent planning application approved relating to the creation of new entrance doors at ground floor to the ground and lower ground commercial unit at 40 Whitfield Street. The delegated reports clearly reference that the ground and lower ground floor units are in commercial use and both permissions do not contain any restrictive conditions limiting the use to Class E(a) retailed (former Class A1) use only.
- The same conclusion can therefore be reached and the future use of the ground and lower ground commercial uses for unrestricted Class E use would be lawful.
- Since the grant of these permissions the space at ground and lower ground floors have been occupied by Tesco. A copy of the leases across this period between the Applicant and Tesco Stores Limited are enclosed at **Annex 3**. Even if the Council did not agree that the operative permissions provide evidence of lawful use, the submitted leasing information demonstrates that the units have been occupied as a commercial (Class E) unit for over 10 years.
- The Applicant has additionally provided a copy of the 'As Built' plans for the ground and lower ground floors which are the subject of this CLEUD application to additionally demonstrate that the units are in commercial use. These plans show office layouts which are considered to be lawful use as it falls under Class E and are enclosed at **Annex 4**.

For these reasons, we respectfully request that the Council grant a CLEUD pursuant to Section 191 of the Act confirming the same.

g. List of Annexures

1. Annex 1 – Planning History
2. Annex 2 – Decision Notices and Delegated Reports
3. Annex 3 – Leases
4. Annex 4 – As Built ground and lower ground floor plans
5. Annex 5 – Site Location Plan

ANNEX 1 – PLANNING HISTORY

Table 1. Site Planning History

LPA Reference	Description of development	Decision
8800483	The erection of a building comprising basement ground and four upper floors for use of purposes within Class B1 Use and Class A1 Use of the Schedule of the Town & Country Planning (Use Classes) Order 1987 on the site of 34-42 Whitfield Street. Continued use of the first second and third floors of 10-16 Goodge Street and 30/32 Whitfield Street for office use. Works of alteration to the service yard at the rear of 10-16 Goodge Street on land at 34-42 Whitfield Street.	Approved 26 10 1989
8900606	Alterations to shopfront	Approved 06-03-1990
9000064	External alterations including new windows and new entrance area and the installation of new roof plant and change of use of 7.9m ² retail floorspace to office entrance hall	Approved 01-05-1990
9180191	Display of one internally illuminated projecting box sign at fascia level measuring 1m x 0.5m	Approved 18-02-1992
9180093	The display of a double sided internally illuminated projecting sign advertising 'Tesco' measuring 1962mm high x 289mm wide x 476mm deep located at first floor level	Refused 13-08-1991
9480190	Display of one internally illuminated projecting sign measuring 500mm by 500mm by 180mm deep.	Approved 13-01-1995
9401054	Variation of additional condition 02 of the planning permission dated 27th February 1991 for the erection of a building comprising basement ground and four upper floors for use for purposes within Class B1 Use and Class A1 Use of the Schedule of the Town and Country Planning (Use Classes) Order 1987 on the site of 34-42 Whitfield Street. Continued use of the first second and third floors of 10-16 Goodge Street and 30/32 Whitfield Street as office use. Works of alteration to the service yard at the rear of 10-16 Goodge Street on the land at 34-42 Whitfield Street to extend the period for submission of reserved matters pursuant to Condition 1 from 3 years to 5 years.	Approved 05-08-1994
9501576	Renewal of permission for the retention of a chiller plant room to serve ground floor retail.	Approved 13-10-1995

LPA Reference	Description of development	Decision
2003/1806/A	The display of an internally illuminated fascia sign and two internally illuminated projecting signs to Goodge Street elevation and the display of an internally illuminated fascia sign and one internally illuminated projecting sign to Whitfield Street elevation.	Approved 01-12-2003
2003/1759/P	Alterations to shopfront including installation of ATM	Approved 01-12-2003
2004/0036/P	The discharge of condition 3 of planning permission dated 1st December 2003 (Ref.2003/1759/P), concerning details of bollards	Approved 03-02-2004
2004/2347/P	Installation of 90cm diameter satellite receiver antenna at roof level of existing retail building.	Approved 01-07-2004
2008/0179/P	Installation of 2 additional cash machines (ATMs) on Goodge Street elevation in connection with existing retail unit (Class A1)	Approved 28-02-2008
2014/7800/P	Relocation of an existing ATM machine and installation of a serving hatch along the southern elevation of existing A1 unit.	Approved 19-02-2015
2015/0061/A	Installation of 1 x static internally illuminated fascia, 1 x static internally illuminated TV media signage, and 2 x non-illuminated signs and 1 x static internally illuminated projecting sign to existing shopfront (class A1).	Approved 19-02-2015
2020/5915/A	2x internally illuminated fascia signs, 2X Illuminated projecting signs and 5x Fascia panels and 2x Vinyl signs	Approved 05-08-2021
2022/3007/P	Replacement of front ground floor window with new entrance door and alteration of external floor.	Approved 25-08-2022
2023/1949/P	Installation of plant equipment including x1 AHU and x2 condenser units to flat roof within associated acoustic enclosure	Approved 24-05-2023
2023/2457/A	Display of non-illuminated building numbering at ground level and internal vinyl lettering to show building name above entrance.	Approved 26-06-2023
2023/3659/A	Display of non-illuminated building numbering and lettering at entrance and internal and external vinyl lettering to show building name and cycle storage	Approved

LPA Reference	Description of development	Decision
		04-09-2023
2023/3391/P	Replacement of servicing doors and front ground floor window with new entrance doors with associated canopy above, and alteration of external floor, alongside other minor external alterations.	Approved 04-09-2023
2023/2691/P	External works to existing ground floor shop front	Approved 22-12-2023