

LDC (Existing) Report		Application number	2024/3179/P
Officer		Expiry date	
Sam FitzPatrick		24/09/2024	
Application Address		Authorised Officer Signature	
40 Whitfield Street London W1T 2RH			
Conservation Area		Relevant article 4	
Charlotte Street		None relevant.	
Proposal			
Use of ground and lower ground floor as Class E (unrestricted).			
Recommendation:	Grant Lawful Development Certificate		

## 1.0 Introduction

- 1.1 The application site is located on the north side of Whitfield Street, close to the intersection with Goodge Street to the east. The building itself was constructed in the late 1980s and has six storeys (including a basement level), most of which are used as office space. It is part of 34-42 Whitfield Street, and connects to 10-16 Goodge Street, so has frontages to both streets. The site is not listed but is located within the Charlotte Street Conservation Area and is not regarded as making either a positive or negative contribution.
- 1.2 The relevant part of the application site (the ground and lower ground floors) has until recently been in use as a retail unit, occupied by Tesco. This retail unit has recently been downsized, leaving a section of the ground and lower ground floor levels vacant.
- 1.3 The application seeks to demonstrate both that, on the balance of probability, the use of the ground and lower ground floors for purposes falling within commercial, business, and service use (Class E) began at least ten years before the date of this application and that the site is not restricted in that it can be lawfully operated as any use within the Class E designation, without requiring planning permission.

## 2.0 Applicant's Evidence

- 2.1 The applicant asserts that the ground and lower ground floors of the site (as shown on drawings 'LG 005' and 'G 005') have been in use as a retail unit that falls within commercial, business, and service use in excess of the requisite ten year period. In addition to this, it is the applicant's position that the unit is unrestricted in that there are no planning conditions in place that secure the use of the unit as falling within a particular sub-category of the Class E use class.
- 2.2 The applicant has submitted the following information in support of the application:
- Cover letter and Supporting Statement;
  - Decision notice for application ref. 2023/3391/P;
  - Decision notice and officer delegated report for application ref. 2022/3007/P;
  - Appeal decision ref. APP/X5210/A/00/1046262 (2001 permission);
  - Legal agreement for application ref. PS9805221R2 (2001 permission);

- Decision notice and legal agreement for application ref. PL/8800483/R3 (1991 permission);
- Lease document between E&A Property Investment Company and Tesco Stores (dated 26/04/2019);
- Lease document between Estates & Agency Holdings and Tesco Stores (dated 11/11/2005);
- Lease document between Shop Developments (Suburban) and Tesco Holdings (dated 20/07/1989).

2.3 The applicant also submitted the following drawings:

- Site Location Plan (ref. S 001 Rev 1)
- Lower ground floor plan, as built (ref. LG 005)
- Ground floor plan, as built (ref. G 005)

### 3.0 Council's Evidence

3.1 There is the following relevant planning history at the application site:

**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. **Planning permission granted 31/10/2023.**

**2023/2691/P** – External works to existing ground floor shop front. **Planning permission granted 22/12/2023.**

**2022/3007/P** – Replacement of front ground floor window with new entrance door and alteration of external floor. **Planning permission granted 21/03/2023.**

**PS9805221R2** – 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 ground floor c) business use (Class B1) for 1<sup>st</sup> to 4<sup>th</sup> floors. **Planning permission refused on 13/01/2001 and allowed at appeal on 08/02/2001 (ref. APP/X5210/A/00/1046262).**

**PSX0005041** – Redevelopment to provide retail (to be an extension of the existing supermarket and office use). **Planning permission refused 21/11/2000.**

Reason for refusal:

- 1) The proposed development does not provide on site servicing for the new A1 (retail) or B1 (office) floorspace and as such, the proposal would result in an unacceptable loss of amenity for local residents by reason of increased general disturbance, noise and increased traffic congestion.

**9000064** – External alterations including new windows and new entrance area and the installation of new roof plant and change of use of 7.9m<sup>2</sup> retail floorspace to office entrance hall. **Planning permission granted 01/05/1990.**

**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. **Planning permission granted 27/02/1991.**

3.2 Information provided from the Council Retail Surveys dated between 2007 and 2022 demonstrates that the application site (specifically at 10-16 Goodge Street, which is the address of the Tesco-occupied retail unit) has been in Class A1 (retail use) prior to 2020 and Class E (commercial, business, and service) from 2020 onwards.

#### 4.0 Assessment

4.1 In regard to applications for a Certificate of Lawfulness, the Secretary of State has advised local planning authorities that the burden of proof in applications for a Certificate of Lawfulness is firmly with the applicant, which is supported by National Planning Practice Guidance. The relevant test is the '*balance of probability*', and authorities are advised that if they have no evidence of their own, nor any from others, to contradict or otherwise make the applicant's version of events less probable, there is no good reason to refuse the application, provided that the applicant's evidence is sufficiently precise and unambiguous to justify the grant of a certificate. The planning merits of the use are not relevant to the consideration of an application for a certificate of lawfulness; purely legal issues are involved in determining an application.

4.2 Section 57 of the Town and Country Planning Act 1990 ("the Act") states that planning permission is required for the carrying out of any development of land. Development is defined by Section 55 of the Act as including "... *the making of any material change in the use of any buildings or other land*".

4.3 However, Section 55 (2) sets out operations or uses of land that are not taken to involve development. This includes, at paragraph (f), changes of use between uses within the same use class. Therefore, movement from one primary use to another within the same use class is not considered to constitute development and does not require planning permission.

4.4 The applicant's evidence asserts that the ground and lower ground floors of the application site have been in use as a retail unit since at least 1991, following the granting of planning permission in both 1991 (ref. 8800483) and 2001 (ref. APP/X5210/A/00/1046262). Both aforementioned permissions established the relevant floors as a commercial retail unit, and neither included conditions to limit the use of the unit to any one particular class. There is no planning history involving a change of use of the unit since these permissions, and the applicant has provided three lease documents dated from 1989, 2005, and 2019, all of which demonstrate agreements between the landowner and tenant, Tesco Stores. As such, the evidence provided appears to demonstrate that the ground and lower ground floors have been in use as a retail unit consistently since at least 1991, and ergo for the past ten years also. This retail use would be consistent with the former Use Class A1.

4.5 The Council's Retail Surveys indicate that the ground floor unit at the application site was in consistent use as a former Use Class A1 retail unit from 2007 until 2019, then as a Class E retail unit from 2022 until the present. The decision notices for planning applications granted since the 1991 and 2001 permissions refer to the commercial unit at ground and lower ground level and do not introduce any new restrictive conditions on the use of the unit. Additionally, independent photographic evidence from Google Maps during the period of 2008-2022 shows the display of signage for Tesco, also providing a similar indication of the likely use of the site for retail purposes.

4.6 Therefore, based on the evidence provided and taking into account all the available planning history, the planning use of the ground floor since at least 1991 is considered by the Council to fall within former Use Class A1 (Shops). The relevant order, the Town and Country Planning (Use Classes) Order 1987 (as amended), sets out the categories of use

classes, and was most recently updated on 01/09/2020. This introduced Class E, which covers a broad number of commercial, business, and service uses. These include (but are not limited to): E(a) “*for the display or retail sale of goods, other than hot food, principally to visiting members of the public*”. Regulation 7 of the Town and Country Planning (Use Classes) (Amendment) (England) Order 2020 states that if a building was being lawfully used for (former) Use Classes A1 (Shops), A2 (Financial and professional services), A3 (Restaurants and cafes), or B1 (Business) purposes as of 01/09/2020, it is to be treated (for Use Classes Order purposes) as being used for a Class E use thereafter.

4.7 Therefore, given that the planning use of the ground and lower ground floor unit at the application site since 2008 is considered to fall within former Use Class A1 (Shops), and that this former Use Class is now classified under Use Class E, it follows that the existing use of unit must fall within Use Class E. Additionally, as there are no conditions from previous permissions in place that restrict the use class or category of use class of the unit, the use of the unit for flexible Use Class E would be lawful.

## **5.0 Conclusion**

5.1 Overall, it is considered that the information provided by the applicant is sufficiently precise and unambiguous to demonstrate that, on the balance of probability, the use of the ground and lower ground floor area of the application site (currently used as a retail unit) for purposes falling within commercial, business, and service use (Class E) began at least 10 years before the date of this application, and has continued to do so until the present time. It has also been demonstrated that no planning conditions exist that restrict the use of this space to any particular Use Class or sub-category of Use Class.

5.2 This being the case, and given that the Council does not have any evidence to contradict or undermine the applicant's version of events, a retention of the current use of the ground and lower ground floor of the property as falling within Use Class E (regardless of primary use within the same class) would be lawful and would not require planning permission.

5.3 In this respect, it is recommended that a Certificate of Lawfulness be granted.

**Recommendation:** Grant Certificate of Lawfulness