

FURTHER WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT

Introduction

1. This written representation has been produced in connection with planning appeal registered under Reference: APP/X5210/X/21/3277179 following the adjournment of the hearing on 15 March 2022.
2. The representations respond to the specific requests issued by the Inspector by email dated 21 March 2022 and can be summarised as covering the following matters:
 - i. The history of the relevant legislative provisions which afford permitted development rights to change between the uses authorised by a planning permission for a period of 10 years from the date of grant of the relevant planning permission;
 - ii. How such permitted development rights applied to Planning Permission: PSX0104561 (**the 2003 Planning Permission**), including the relevance of this to reasons why Condition 3 was imposed on the 2003 Planning Permission; and
 - iii. Confirmation of the existing uses being carried on at the Brunswick Centre and why the wording of Condition 3 as imposed on the 2003 Planning Permission does not operate to prevent changes of use within use Class E.
3. The Appellant's primary submissions have already been provided. These submissions are to be read in addition to those already submitted which contend that Condition 3 does not contain the requisite wording to evince an intention to oust the operation of the GPDO¹.

History of the Relevant Legislative Provisions

4. When the 2003 Planning Permission was granted on 1st September 2003, Schedule 2 Part 3 Class E of the Town and Country Planning (General Permitted Development) (England) Order 1995 ("the GPDO 1995") identified the following as permitted development:

¹ See Appellant's Hearing Statement Paragraph 3.26 together with Appellant's Hearing Statement Appendix 8 Paragraph 3.4, Appendix 13 Paragraph 16 and Appendix 14 Paragraph 26.

“Development consisting of a change of the use of a building or other land from a use permitted by planning permission granted on an application, to another use which that permission would have specifically authorised when it was granted.”

5. Paragraph E.1 of the GPDO 1995 provided:

“Development is not permitted by Class E if—

(a) the application for planning permission referred to was made before the 5th December 1988;

(b) **it would be carried out more than 10 years after the grant of planning permission**; or

(c) it would result in the breach of any condition, limitation or specification contained in that planning permission in relation to the use in question.” (emphasis added)

6. The same permitted development rights can be found in the Town and Country Planning (General Permitted Development) (England) Order 2015 in Schedule 2 Part 3 Class V and remain subject to a longstop date of 10 years.
7. The effect of the grant of the 2003 Planning Permission and Class E of Part 3 of Schedule 2 to the GPDO 1995 was that a change of use of a unit within the Shopping Centre within the range of uses permitted by the 2003 Planning Permission (i.e. Classes A1, A2, A3, B1 and D1) was permitted development for the period of 10 years from the grant of the 2003 Planning Permission. Such a change required no express grant of planning permission or any further recourse to the Local Planning Authority ('LPA').
8. As explained above, the flexibility to change the use of land granted under Class E of Part 3 of Schedule 2 to the GPDO 1995 ceases at the end of 10 years from the date of the grant. The result of this is that the permanent, lawful use of land is the actual use at the expiry of that 10-year period. No further change is permitted without planning permission after that date.

Application of the 2003 Planning Permission

9. The 2003 Planning Permission allowed the proportion of uses to fluctuate between those permitted (via reliance upon Class E of Part 3 of Schedule 2 to the GPDO 1995 as set out above). Accordingly, it is permissive and does not include the restrictive wording necessary to evince an intention to remove permitted development rights².

² See Appellant's Hearing Statement Paragraph 3.26 together with Appellant's Hearing Statement Appendix 8 Paragraph 3.4, Appendix 13 Paragraph 16 and Appendix 14 Paragraph 26.

10. Condition 3 has to be interpreted in the knowledge that the permission was granted expressly to allow changes of use within each unit via the permitted development rights contained within Class E since it is to be approached by a reasonable reader with knowledge of planning law: see ***Lambeth LBC v Secretary of State for Housing Communities and Local Government*** [2018] EWCA Civ 844, [2019] PTSR 143 (although the decision in the case was reversed by the Supreme Court³, it was common ground that this principle remained unaffected).

11. Condition 3 provides:

“Up to a maximum of 40% of the retail floorspace equating to 3,386 sq. m (excluding the supermarket and eye catcher) is permitted to be used within Classes A2 and A3 of the Town and Country Planning (Use Classes Order) 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order.”

12. The reason for the imposition of that condition is:

“To safeguard the retail function and character of the Brunswick Centre in accordance with policies SH1, SH2 of the London Borough of Camden Unitary Development Plan 2000”.

13. Condition 3 did not operate to prevent a change of use of any unit (excluding the supermarket and the eye-catcher); rather it permitted a change of use within a parameter designed to control the total amount of floor space which is used for A2 or A3 purposes. It did this because, as a result of the flexibility provided by Class E, during the 10-year period the 2003 Planning Permission had in built flexibility that would have permitted all of the retail floorspace to be changed to any of the permitted uses without recourse to the LPA. That would have had consequences which the LPA thought undesirable. However, as at the date of the grant of planning permission the reasonable reader with knowledge of planning law would know that after 1 September 2013 (the expiry of the 10-year period), fluctuation in the proportion of retail to non-retail uses would no longer be possible pursuant to Class E of Part 3 of Schedule 2 to the GPDO 1995.

14. A change in the proportion of uses could only occur after 1 September 2013 pursuant to other permitted development rights or with express planning permission granted by the LPA.

15. As at 1 September 2003, the following other permitted development rights in respect of A Use Class uses existed:

- i. Part 3 Class A – Change from A3 to A1;

³ London Borough of Lambeth (Appellant) v Secretary of State for Housing, Communities and Local Government and others (Respondents) [2019] UKSC 33.

- ii. Part 3 Class C – Change from A3 to A2; and
 - iii. Part 3 Class D – Change from A2 to A1.
16. Accordingly, on the day when the 2003 Planning Permission was granted there was no permitted development right which allowed a change from a retail use within Class A1 to any another use. Thus, outside of the operation of Class E, as at 1 September 2003, the permitted development rights then existing did not allow for an increase in the proportion of non-retail uses.
17. Thus, a reasonable reader with knowledge of planning law would know that when the 2003 Planning Permission was granted the permitted development rights were such that, after the expiry of the 10-year period and once the proportion of uses was fixed, there would be no ability to change the use of a unit from one within Class A1 to any other use without an express grant of planning permission.
18. Thus, a reasonable reader would know that after 1st September 2013 there would be no necessity to have a condition in place to control the total amount of floor space which is used for A2 or A3 purposes since the proportion of non-retail uses could not increase other than via an express grant of planning permission.
19. It follows that, in order to protect the proportion of retail floorspace at the Brunswick Centre as at September 2003:
- i. The Council considered that there was a necessity to impose a condition to control the proportion of the uses within Classes A2 and A3 during the 10-year period (given the flexibility afforded by Class E of Part 3 of Schedule 2 to the GPDO 1995); and
 - ii. There can have been no necessity to impose a condition to control the proportion of retail uses beyond the 1st September 2013 since there was no ability to change the use of a unit to a use not within Use Class A1 after that date without an express grant of planning permission.
20. As a result, the reasonable reader would interpret Condition 3 as being imposed to seek to control matters relating to the use of units during the 10-year period but not beyond. They would understand that it was not imposed to remove permitted development rights to change use to a non-retail use, since such permitted development rights did not exist at that date and the wording of the condition is in any event permissive. Further, the reasonable reader would understand that the condition could not have been intended to be effective or operative beyond that date given that any changes to convert retail units to non-retail units after the 10-year period would require

an express grant of planning permission. Put simply, there was no requirement to impose a control and such a condition could not have been deemed 'necessary'.

21. The Council's contention that Condition 3 was intended to remove permitted development rights which would otherwise allow the proportion of retail floorspace to be reduced after the expiry of the 10-year period must be flawed since:
 - i. No permitted development rights existed as at 1st September 2003 which allowed a change of use away from a retail use within Class A1;
 - ii. Control over the proportion of the uses permitted via a condition was not necessary after the expiry of the 10-year period, since express planning permission was required to change the use of any unit away from a retail use within Class A1; and
 - iii. A reasonable reader with knowledge of planning law would not construe a condition as having been imposed to have a consequence which was not necessary at the date of the grant of the planning permission.
22. Consequently, as from 1st September 2013, the lawful use of each unit became fixed (other than as provided for by other permitted development rights none of which allow for an increase in proportion of non-retail use). Thus, in the absence of any further grant of planning permission affecting the position thereafter, the proportion of retail to non-retail units was fixed as at the 1st September 2013. To that extent, the Brunswick Centre was like any other shopping centre as at the date when the new Use Class E came into effect. It contained a series of units each with its own lawful use.
23. The right to use land pursuant to a planning permission can only be lost in very specific circumstances.
24. In respect of the units at the Brunswick Centre, where there has been no further grant of planning permission permitting a material change of use, the lawful right to use the units for the purposes they were in as at 1st September 2013 cannot have been lost through effluxion of time (as 10 years has not yet passed since 1st September 2013 when uses became fixed⁴).
25. Accordingly, the points made by the Council relating to the proportion of floorspace used for 'hot food takeaway' do not and cannot affect the analysis of the lawful use of the floorspace at the Centre nor the determination of this appeal.

⁴ A use in breach of planning condition can only become immune from enforcement action and a lawful use after continued operation for an unobstructed period of at least 10 years (see Section 171B(3) of the Act).

26. Even if the amount of floorspace being used for 'hot food takeaway' in any given unit were considered to represent a breach of planning control, the recourse would be enforcement action to remedy that breach i.e. to return the unit to its lawful use i.e. in the absence of any other planning permission, the use the unit was in as at 1st September 2013. The lawful use of the units at the Brunswick Centre therefore remains within Class E in line with the provisions of the 2003 Planning Permission⁵.
27. It should be noted that Condition 10 attached to the 2003 Planning Permission does not prohibit any and all takeaway use, rather it precludes the primary use of any of the units as a 'hot food takeaway'. The reason being that such an operation fell within the parameters of Class A3 at the time of the grant of the 2003 Permission. Condition 10 states:
- "Units and / floorspace falling within Use Class A3 of the Town and Country Planning (Use Classes) Order, 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order, shall not be occupied by uses constituting hot food takeaways, unless with the express written agreement of the Council."
28. The LPA has also granted a series of planning permissions which expressly allow provision for ancillary 'hot food takeaway' operations at Units 1-3, 9, 11-13, 15-17, 19-21 and 23. All of those units have been and still are used as a restaurant with an ancillary take away function⁶. Details of each planning permission are included at **Appendix 1**.
29. Units which are regulated by a planning permission other than the 2003 Planning Permission are not subject to Condition 3 in any event. These are Units 2, 36 and 52 as set out in the Hearing Statement⁷.
30. In conclusion, Condition 3 was not imposed to prevent a change in the proportion of uses **for all time**, for the reasons set out above; rather, it was intended to regulate matters during the first 10-year period and had no role beyond the expiry of that period.
31. This further supports the original legal submissions / opinions provided on behalf of the Appellant as to why Condition 3 does not evince an intention to explicitly remove the provisions of the Use Class Order and the new Class E since its wording is permissive in effect⁸.

⁵ Other than the Cinema and Unit 2 which have been excluded from the Certificate.

⁶ See the Tenancy History at Appendix 10 of the Hearing Statement and Appendix 2 of these submissions.

⁷ See Section 2 of the Appellant's Hearing Statement.

⁸ See Appellant's Hearing Statement Paragraph 3.26 together with Appellant's Hearing Statement Appendix 8 Paragraph 3.4, Appendix 13 Paragraph 16 and Appendix 14 Paragraph 26.

Current and Lawful Use of the Units at the Property

32. The Schedule at **Appendix 2** provides analysis of the use of each unit at the Brunswick Centre.

It sets out:

- i. The use of the unit as at 1 September 2013 (when the original flexibility allowed by the 2003 Planning Permission expired)
- ii. The use of the unit as at 2 September 2020 (the date the original application was submitted);
- iii. The use as at the submission of these written representations (18 May 2022); and
- iv. A summary of the current lawful use of the unit.

33. Condition 3 does not include any wording whatsoever in relation to the absence of other uses being permitted. It is a positive condition which specifies permitted uses but fails to include the other side of the equation and does not address expressly (or by necessary implication) the removal of the ability to change the use of units at the property without the need for express consent to do so.

34. In all of the case law cited by the LPA, where conditions have been held to oust the operation of the UCO, the wording has included some form of express restriction to the permitted use such as "...and for no other use" or "...and for no other purpose". Royal London is arguably the "lightest touch" judgment which has accepted that wording was sufficient to prevent the operation of the UCO but even in Royal London, the word "only" was used to restrict other uses. No such restrictive or negative terminology whatsoever is present in Condition 3.

35. Moreover, all relevant uses⁹ now fall within Use Class E of the UCO. Accordingly, for example, if a unit is currently being used in a manner which would previously have been described as retail within Class A1, Condition 3 would not operate as a barrier to any change to another use within what is now Use Class E which is permitted by virtue of the UCO (or rather is confirmed not to be 'development' for which planning permission is required¹⁰).

36. The 2020 Regulations provide for an automatic read across in relation to land which was being used for use Classes A1, A2, A3 and B1 to be "treated, on or after 1st September 2020, as if it is

⁹ Uses permitted by the 2003 Permission and in operation at the Brunswick Centre up to 31 August 2020 (i.e. Classes A1, A2, A3 B1 and D1).

¹⁰ Section 55(2)(f) of the Act and Article 3(1) of the UCO are explicit that moving between operations within the same use class is not defined as 'development'.

being used for a purpose specified within Class E.” Accordingly, all land used for a purpose within one of the use classes specified within Regulation 7 of the 2020 Regulations as at 31 August 2020 will be treated after 1 September 2020 as being used for a purpose within Class E and may be used for any purpose within Use Class E without the need for any form of planning permission unless this is clearly excluded by a condition governing the land, which, for the reasons set out above, is not the situation here.

37. However, reliance does not need to be placed on Regulation 7 as a transitional provision. If at any point post the commencement of the 2020 Regulations a unit is operating as a use falling within Class E, the unit falls within Class E and any change to another operation within that same Class is not ‘development’.
38. It should also be noted that not all units that were a ‘Sui Generis’ classification prior to 1 September 2020 continue to fall within that classification. For example, a mix of Classes A1 and A3 (such as that found at Unit 2 operated by Leon), whilst previously a ‘Sui Generis’ classification when originally approved in 2017, now falls entirely within Class E. It is only where a use or mix of uses which include an operation outside Class E would a formal ‘Sui Generis’ classification be correct.
39. Accordingly, the use of all units at the Shopping Centre now fall within Use Class E and changes between them are not development requiring planning permission. For these reasons, the Council’s case is fundamentally flawed. It has failed to construe the 2003 Planning Permission and Condition 3 on any appropriate basis and has failed to have regard to it in its historic context.
40. The Council’s position raised at the Hearing that a series of Units are ‘under dispute’ given the potential for the introduction or an increase in the quantum of ‘hot food takeaway’ is not relevant to the lawful use of the units nor the determination of this appeal. As set out above, as a matter of law, none of those operations could yet have resulted in the loss of the lawful use. The Council has not presented any evidence that operations on site represent a material breach of planning control and in any event, none have been operating for a sufficient time period (namely in excess of 10 years) to result in a loss of the lawful use.
41. It is submitted that the appeal should be allowed and the LDC granted.

Landmark Chambers
180 Fleet Street
London
EC4A 2HG

REUBEN TAYLOR Q.C.



APPENDIX 1: PLANNING PERMISSIONS ALLOWING FOR TAKEAWAY OPERATIONS

Unit	Permission Reference	Description of Development	Date of Approval
Unit 9	2006/2114/P	Variation of condition 10 (no hot food takeaways) of planning permission (ref. PSX0104561) dated 1st September 2003 (for the refurbishment of the Brunswick centre) to allow the sale of hot food takeaway in association with the Class A3 use.	29/08/2006
Unit 19-21	2006/2107/P	Variation of condition 10 (no hot food takeaways) of planning permission (ref. PSX0104561) dated 1st September 2003 (for the refurbishment of the Brunswick centre) to allow the sale of hot food takeaway in association with the Class A3 use.	29/08/2006
Unit 1-3	2004/5260/P	Variation of planning condition 10 (no hot food takeaways) of planning permission for the refurbishment of the Brunswick centre (ref: PSX0104561 dated 01/09/2003), to allow the sale of hot food takeaway (Use Class A3) at Units 1-3 Brunswick Centre.	10/02/2005
Units 11/13, Units 15/17 and Unit 23	2004/2930/P	Variation of additional condition 10 (no hot food takeaways) attached to planning permission to refurbish the Brunswick Centre granted on 1st September 2003 (Reg. PSX0104561) to allow hot food takeaway at unit 11/13, 15/17 & 23.	27/10/2004
Unit 23	2020/1954/P	Temporary use for provision of takeaway food and allow for use within Class A3, Class A4 and Class AA (between 24 March 2020 and 23 March 2021).	26/05/2020

Notes

Example planning condition states:

The applicant is also advised that the primary use of the premises is Class A3 (restaurant) and the variation of condition granted by this notice only allows ancillary use for sale of food and drink for consumption off the premises. Any change of use that would result in takeaways being the primary use (Class A5) will require a separate application for planning permission which is unlikely to be granted.

APPENDIX 2: LAWFUL AND CURRENT OPERATIONS

Unit	Lawful Use at 1 September 2013	Use at Date of LDC Application	Use at 17 May 2022	Lawful Use at 17 May 2022	Controlling Planning Permission
2	Class A1 (French Connection)	Class E (Leon)	Class E (Leon)	Class E	2017/0202/P
4	Class A1 (Space NK)	Class E (Vacant)	Class E (Punkpasta)	Class E	PSX0104561
6	Class A1 (Hobbs)	Class E (Hobbs)	Class E (Hobbs)	Class E	PSX0104561
K2	Class A1 (Whitewall Galleries)	Class E (Revital)	Class E (Vacant)	Class E	PSX0104561
8	Class A1 (Gap Kids)	Class E (Fuwa Fuwa)	Class E (Fuwa Fuwa)	Class E	PSX0104561
10	Class A1 (Benetton)	Class E (Vacant)	Class E (Vacant)	Class E	PSX0104561
12	Class A1 (Oasis)	Class E (Vacant)	Class E (Vacant)	Class E	PSX0104561
14	Class A1 (Office Shoes)	Class E (Office Shoes)	Class E (Vacant)	Class E	PSX0104561
16	Class A1 (Coast)	Class E (Itsu)	Class E (Itsu)	Class E	PSX0104561
18	Class A1 (LK Bennett)	Class E (EE)	Class E (EE)	Class E	PSX0104561
20	Class A1 (Vodafone)	Class E (Vodafone)	Class E (Vacant)	Class E	PSX0104561
22	Class A1 (Joy)	Class E (Ann Summers)	Class E (Vacant)	Class E	PSX0104561
K4	Class A1 (Three)	Class E (Three)	Class E (Vacant)	Class E	PSX0104561
24/26	Class A1 (New Look)	Class E (New Look)	Class E (Tian Tian)	Class E	PSX0104561
28	Class A1 (Crussh)	Class E (Crussh)	Class E (Tian Tian)	Class E	PSX0104561
30/32	Class A3 (Yo Sushi)	Class E (Yo Sushi)	Class E (Pelican State)	Class E	PSX0104561
34	Class A1 (Vacant)	Class E (Cha Time)	Class E (Cha Time)	Class E	PSX0104561
36	Class A1 (Gamesland)	Sui Generis (So Me Beauty)	Sui Generis (Vacant)	Sui Generis	2013/5725/P
38A	Class A1 (Sanrizz)	Class E (Sanrizz)	Class E (Sanrizz)	Class E	PSX0104561
38B	Class A1 (House of Flowers)	Class E (Ben's Cookies)	Class E (Ben's Cookies)	Class E	PSX0104561
40/42	Class A1 (Boots)	Class E (Boots)	Class E (Boots)	Class E	PSX0104561
44/46	Class A3 (GBK)	Class E (GBK)	Class E (GBK)	Class E	PSX0104561
48/50	Class A2 (William Hill)	Class E (Vacant)	Class E (Vacant)	Class E	PSX0104561
52	Class A2 (Halifax)	Class E (Vacant)	Class E (Vacant)	Class E	2017/4645/P
41/64	Class A1 (Waitrose)	Class E (Waitrose)	Class E (Waitrose)	Class E	PSX0104561
70	Class A1 (LMR Vision)	Class E (LMR Vision)	Class E (LMR Vision)	Class E	PSX0104561
68	Class A1 (The Flash Centre)	Class E (Brunswick Gallery)	Class E (Brunswick Gallery)	Class E	PSX0104561
66	Class A1 (SKOOB)	Class E (SKOOB)	Class E (SKOOB)	Class E	PSX0104561
39	Class D1 (Medical Centre)	Class E (Medical Centre)	Class E (Medical Centre)	Class E	PSX0104561
37	Class A1 (Robert Dyas)	Class E (Robert Dyas)	Class E (Robert Dyas)	Class E	PSX0104561
33/35	Class A1 (Superdrug)	Class E (Superdrug)	Class E (Superdrug)	Class E	PSX0104561
31	Class A1 (Specsavers)	Class E (Specsavers)	Class E (Specsavers)	Class E	PSX0104561
29	Class A1 (Holand & Barrett)	Class E (Holand & Barrett)	Class E (Holand & Barrett)	Class E	PSX0104561
25/27	Class A1 (River Island)	Class E (Vacant)	Class E (Funland)	Class E	PSX0104561
23	Class A3 (Nandos)	Class E (Nandos)	Class E (Nandos)	Class E	PSX0104561
K3	Class A1 (Fasticoche)	Class E (Cards Galore)	Class E (Cards Galore)	Class E	PSX0104596*
19/21	Class A3 (Giraffe)	Class E (Slim Chickens)	Class E (Slim Chickens)	Class E	PSX0104561
15/17	Class A3 (Strada)	Class E (Vacant)	Class E (Meat Liquor)	Class E	PSX0104561
11&13	Class A3 (Hare & Tortoise)	Class E (Hare & Tortoise)	Class E (Hare & Tortoise)	Class E	PSX0104561
9	Class A3 (Patisserie Valerie)	Class E (Nostimo)	Class E (Nostimo)	Class E	PSX0104561
7	Class A1 (Starbucks)	Class E (Starbucks)	Class E (Starbucks)	Class E	PSX0104561
K1	Class A1 (Apostrophe)	Class E (Vacant)	Class E (True Dan)	Class E	PSX0104561
5	Class A1 (Butlers)	Class E (Sainsbury's)	Class E (Sainsbury's)	Class E	PSX0104561
1&3	Class A3 (Carluccios)	Class E (Vacant)	Class E (Riding House Café)	Class E	PSX0104561

Notes

* Note that the retail use of the operation by Fasticoche (sale of primarily old food and drinks for consumption off the premises) was certified as being lawful under Application Reference: 2010/3588/P.

** Where planning permissions have been granted to vary Condition 10 to allow 'hot food takeaway' operation it does not supersede the 'primary' operation allowed by the 2003 Permission.