Camden
ENVIRONMENT

PLANNING SERVICES

Town and Country Planning Act 1990

Response to Additional Hearing Statement
London Borough of Camden

APPEAL SITE

The Brunswick Centre, Bloomsbury, London, WC1N 1BS

APPELLANT

Lazari Properties 2 Limited

SUBJECT OF APPEAL

Non-determination appeal relating to a Lawful Development Certificate submitted on the 2nd September 2020 "*To certify that the existing use of the Brunswick Shopping Centre in Bloomsbury, London for use within Class E is lawful.*'

This is the response to the appellant's additional statement dated May 18th following the adjournment of the hearing on the 15th March 2022

COUNCIL REFERENCE: 2020/3988/P

PLANNING INSPECTORATE REFERENCE: APP/X5210/Q/21/3277179

1.0 Introduction

1.1 This written submission examines and challenges the points raised in the further written submissions submitted by the appellants on the 18th May following the adjournment of the hearing on the 15th March and requests by the Inspector on 21st March for additional information covering a new line of argument from the appellants that the 2003 Permission was a flexible or dual planning permission and confirmation of the existing uses of the individual units on the date of the application.

1.2 It is filed further to the request from the Inspector on 6 June for a written response to ensure the relisted hearing finishes in good time.

2.0 Analysis

Interpretation of consent as "Flexible" and interpretation of Condition 3 as only intended to last for 10 years in that context

2.1 This argument is without merit. It is telling that it ignores the obvious planning purposes of this consent, and is advanced so late. This consent was for the refurbishment of an established retail and residential estate, the Brunswick Centre, at the time recently listed as a heritage asset. It was intended as a consent (in fact, two consents, the planning consent and the listed building consent) which enabled the Brunswick Centre's ongoing, effective management (and at a time where it was recognised in the Officer's Report that it was in a "*state of continuing decline"* and needed re-development and further investment to secure the quality of the built environment), but in a way which balanced the mix of uses (retail and residential) which make up that heritage asset. Neither the consent, not the conditions, should be read in isolation, as the Appellant does.

2.2 The first key step in the Appellant's argument is that they argue that the 2003 Permission PSX 0104561 benefits from "flexible" planning permissions that allows occupiers to switch between specified planning uses without the need for multiple planning permissions, but (they say) only for 10 years. The right to switch lasts for ten years and the use in operation at the end of the ten year period becomes the lawful use of the property from that date onwards. This right stems from Class E, of Part 3 of the Town & Country Planning (General Permitted Development) Order 1995 (now Class V of Part 3 of the 2015 GPDO). The second key step is that they argue that this is necessarily part of Condition 3's interpretation and purpose.

2.3 Importantly, both are wrong.

2.4 Class E, as in force in 2003, is simply a permitted development right. It provides:

> *E. Permitted development*
> ***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.***
> *E.1 Development not permitted*
> *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.*

2.5 It is important to consider also the development description of the 2003 Permission is (with key points underlined, for the purposes of this point);

> *Refurbishment of The Brunswick Centre; the forward extension of the existing retail units fronting the pedestrian concourse; the creation of a new supermarket (Class A1) across northern end of the pedestrian concourse; creation of new retail units (Class A1) within redundant access stairs*
> *to the residential terrace; erection of new structure above Brunswick Square for potential alternative use as retail (Classes A1, A2, and A3), business (Class B1) or as non- residential institutions (Class D1); redesign of the cinema entrance; redesign of existing steps and ramps at the Brunswick Square, Handel Street and Bernard Street entrances; removal of two existing car park entrances at pedestrian concourse level; installation of retail display windows within Bernard Street elevation; redesign of the existing southern car park stairway; replacement of waterproofing layers to the pedestrian concourse and the residential terrace; concrete repair works and introduction of new hard and soft landscaping surfaces and works, as shown on drawing numbers:*

2.6 The Council does not agree with the Appellant for multiple reasons, which are addressed below. However, there are three particularly key reasons:

(1) The consent does not say that it is "flexible" having regard to Class E, which is what required in a description of development, and an informative is placed on the consent, which is what the ordinary reader would expect if it was being granted within Class E. Rather, this is simply a consent granted upon its own terms, in response to its own application, which was for the "*refurbishment of the Brunswick Centre*", i.e. the shopping centre as a whole;

(2) The purpose of Condition 3, having regard to its terms, its reason, and the officer's report, has nothing to do with Class E "flexible" consents. It has everything to do with the very purpose for which it was imposed, i.e. to safeguard the retail function and character of the Brunswick centre but having a mix of uses to preserve the function and its character. There is nothing to suggest it was intended to expire in 10 years.

(3) This is consistent with the consent read as a whole, read fairly with all its conditions, in its proper context. The consent is and intends to have control over the mix of retail uses for the lifetime of the development at the Brunswick Centre as a consequence of the proper interpretation of the relevant consents, including Condition 3 (controlling the mix of uses, overall), but also Condition 5 and 6 (controlling a supermarket use); Condition 8 (ventilation and extraction systems); Condition 10 (controlling the amount of hot food takeaway, with its obvious amenity impacts); Condition 11 (controlling that certain areas could not be within Condition 3; and the conditions on the Listed Building consent (in particular, Condition 3, controlling internal floor plans). This is clearly set out in paragraph 6.8 of the Officer's Report (and amenity issues are at 6.19 and 6.20) (Appendix 2, the Council's Statement). It has nothing to do with Class E.

Thus, it is not a "flexible" Class E consent, nor was Condition 3 only intended to operate for 10 years, but rather two consents for the management of the whole of the Brunswick Centre as an existing shopping centre and a Listed Building with residential uses, for its lifetime, in order to, as the relevant reasons for relevant conditions state, to "*safeguard the retail function and character of the Brunswick Centre"* (e.g. Conditions 3,4,5) to "*safeguard the amenities of the adjoining premises and the area generally"* (e.g. Conditions 6, 7, 8, 9, 10,11, 18, 19, 20) *and* to "*safeguard the special architectural an historical interest of the building"* (the LB consent, Condition 1-4).

Detailed response

2.7 The consent does not say, or suggest on its face, that it is "flexible" in the manner alleged as related to Class E.

2.8 A development application is required to state a description of development on the prescribed form under the Development Management Procedure Order 2015 No 595, and the DMPO also requires an authority to give a description of development when setting out application for consultation (see Reg 7 and 15), and there is guidance that this description should only be amended to revised wording after consultation with developers (see paragraph 046 Reference ID: 14-046-20140306). These are attached in Appendix 1.

2.9 Camden would also include an informative on the decision notice stating the permission was for flexible uses that became locked in after 10years. This can be clearly seen in the near contemporaneous examples to this application, in this local authority, in Appendix 2, and general advice to that effect as published by lawyers can be seen at Appendix 3

2.10 The "ordinary reader" would know of this and expect it.

2.11 This development description does not mention flexible uses, and there is no such informative on the Decision Notice in the terms that would have been, and are, generally expected. It does not do so because it was not an application for a flexible planning permission under Class E.

2.12 There are multiple other points which support this. They include that:

(1) Camden has dealt with many flexible planning permissions under this provision and they all explicitly state in the development description that they are flexible or dual use and lists the alternative uses, copies of contemporary (to this consent) flexible use decisions are attached at appendix 2.
(2) Nowhere in the Officer's Report is there any mention of Class E, or 10 years;
(3) Nowhere in the planning application document submitted or in the subsequent committee report is the use of a "flexible" planning permission mentioned linked to Class E and 10 years. The cover letter dated 21st May 2001 from Levitt Bernstein (copy attached at appendix 4) which accompanied the planning application describing the development description is close to the description used.
(4) The Appellant has chosen to put forward no evidence of the leases despite those having been requested and no evidence of how the 2003 Permission is primarily for the forward extension of *existing* retail units where no change of use is likely to be involved (but where the leases have not been placed before the LPA), a new supermarket that is specifically conditioned (see condition 5 of 2003 Permission), the creation of new retail units (Class A1) within redundant access stairs where no alternative use is specified and the creation of the new 'eye catcher' structure where alternative uses are listed but which was not built. The primary purpose as can be seen in the Planning Statement at Appendix 2 of the Council's Statement of Case, see for example on shop fronts at section 3 ("*the general intention is to bring forward the shop fronts to just beyond the line of the existing main circular columns, thus getting rid of the original covered arcades which have provided gloomy*….".)
(5) This argument is not consistent with other conditions, for example all the A3 units all required approval of details of the method of ventilation and extraction systems (condition 8) and so were tied to the units, 1-3, 9, 11-13, 15-17, 19-21, 23 and 30-32 where permission (Ref: 2006/3876/P) was granted for this ventilation and extraction and flexible use in the manner alleged would not be possible.

(6) That is all because it is a consent (or rather two consents) on their own terms, on the basis of their own applications, and assessed by Camden in its planning judgment. Class E is essentially irrelevant. Permitted development provides for development which is *permitted* by virtue of the GPDO 1995 (as amended), not development which may be applied for and granted on its own terms, subject to its own conditions. That is what has happened here. The fact that under this consent the owner of the Brunswick Estate may make certain constrained choices about uses in particular areas of the Estate, or may have done so in the "Eyecatcher" had it ever been built, are all subject to the conditions of the consent

Condition 3

2.13 Thus, if the consent is not "flexible", the condition is not in that context. The appellants contend (see e.g. para. 10-13) that condition 3 has to be interpreted in the knowledge (of a reasonable reader with knowledge of planning law) that the permission was granted in the knowledge that the permission was granted expressly to allow changes of use, via permitted development rights, for ten years; and that condition 3 is not to prevent a change of use of any unit (excluding the supermarket and eye catcher) but is rather on their case designed to control the total amount of floorspace which is used for A2 or A3 purposes and after ten years the condition is no longer required because express planning permission would be required to change uses. A similar argument is developed in relation to the 2003 Use Classes Order and what would have been a permitted change of use at the time.

2.14 However, this is <u>not</u> the proper interpretation of the condition, whether or not the consent was "flexible".

2.15 Firstly, there is nothing on the face of the condition which states this. There is also nothing which suggests it is to cease to have effect in 10 years. It would be unusual to impose a condition with such an effect. In the absence of extremely clear words, this interpretation is untenable.

2.16 The purpose of Condition 3 having regard to its terms, its reason, and the officer's report (see below), plainly has nothing whatsoever to do with "flexible" consents, even if the consent was "flexible" (which it is not). It has everything to do with the very purpose for which it was imposed, i.e. to safeguard the retail function and character of the Brunswick centre but having a mix of uses to preserve the function and its character. There is nothing to suggest it was intended to expire in 10 years.

2.17 This is further set out in the Council's Statement, see e.g. the assessment at paragraph 5.28 and following, including its reason (5.30), its planning purpose (see 5.34 and following, including at 5.38 and the summary at 5.39).

2.18 Secondly, nowhere in the application for the 2003 permission is it stated or alluded to that this condition would cease to have effect after 10 years and at paras 6.7-6.8 of the Officer's Report it in fact strongly indicates the opposite, that the purpose of the condition was to provide ongoing control;

6.7 The development applies for Class A1/A2/A3 floorspace. It is important to ensure that the primary retail function of the Brunswick is protected and maintained to ensure that the neighbourhood shopping centre fulfils its primary

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role of offering shops and services within the locality. Class A2 and Class A3 uses are appropriate within the centre, and help to provide a mix of uses, however the level of these uses must be restricted to ensure the retail viability of the centre. Officers consider that no more than 40% of the total floorspace (excluding the identified supermarket) shall be permitted for A3 /A2 uses.

6.8 Conditions are proposed to this effect, and will also be explicit about the larger supermarket area, being exclusively for Class A1 retailing purposes and for no other use. Officers also recommend the imposition of a condition requiring details of the precise internal layouts of proposed retail units size to be submitted to and approved by the Council. This is important to ensure that the size of shops throughout the centre is controlled to ensure an acceptable mix of units given the designation of the Brunswick as a neighbourhood shopping centre. The control of the retail uses is necessary in accordance with policies SH2, SH13, and SH18

2.19 Thirdly, the scope of the Use Classes Order permitting a change from A3 or A2 units, to A1 units, is not material to the interpretation. Condition 3 provides that "up to a maximum" of the retail floorspace may be used within Use Class A3 or Use Class A2. It is the amount that is in A2 or A3 that is controlled to a very precise figure (3,386m2), because of the need to protect the retail function, i.e. at least 60% will be in A1 use. The fact that that more could be in A1 use does not mean that the condition would cease to have effect after 10 years.

2.20 Thus, the scope of the Use Classes Order (paragraph 15-16; paragraph 21(ii)) at the time is not relevant to this construction argument, but even if it were relevant, the Appellant does not grapple with the difficulty they face that at the material time, the Use Classes Order had no applicability to mixed use sites in any event – see the Council's Statement of Case at paragraph 6.61.

2.21 That is also reflected in the fact that the plans accompanying the application state A1/A2/A3 on approved ground floor plan (2105/PL142 Rev A), thus indicating the range of uses going on in those units which are, then, overall subject to Condition 3 ("*Up to a maximum of 40% of the retail floorspace equating to 3,386m (Excluding the supermarket and eye catcher) is permitted to be used within Classes A2 and A3").*

2.22 Fourth, thus, even if this was a flexible consent, which it is not, there is no justification for considering that the effect of the condition in its ongoing purposes was intended to be restricted to 10 years. The condition does not bear such an interpretation, nor does its reason, nor does planning policy.

2.23 Fifth, this Appellant's argument does not grapple with the fact that this consent is for a heritage asset. The associated Condition imposed on the Listed Building consent to control internal layouts, which the Officer's report states "*Officers also recommend the imposition of condition requiring details of the precise internal layouts of proposed retail units size to be submitted to and approved by the Council",* which condition was imposed on the Listed Building consent "*in order to safeguard the special architectural and historic interest of the building",* part of which is the mix of uses, which this consent also has appropriate controls across the whole of the Centre

subject to Condition 3 (and Condition 5, 8 and 11).

2.24 For these reasons, it is not a flexible consent having regard to Class E, and (even if it was) there is no suggestion on the face of the consent or in any supporting documentation that the condition was intended to be read as only applying for 10 years. The opposite is the case.

2.25 Finally, there is an air of unreality about this late argument. It is fundamentally irrelevant – even if the Appellant was correct (which they clearly are not, see above), the Class E "PD right" was always in any event a permitted development right subject not only to E.1(b), but also to E.1(c) "*Development is not permitted by Class E if… it would result in the breach of any condition…. Contained in that planning permission".* Class E.1 (b) providing that development has to be within 10 years does not mean that E.1(c) as a condition is of no practical effect after 10 years. The condition on the consent would continue to operate. For example, on this particular site, it would continue to mean that planning permission would be required for a change of use application which would otherwise be in breach of Condition 3, not an assessment of whether or not there was a material change considering the Centre as a whole. The same is true of other conditions.

Enforcement Action, Current and Lawful Use of the Units

2.26 Paras 24-26 of the appellant's further submissions then contend that the current use of some units as hot food takeaways does not affect the lawful use of these units because the lawful use is said to necessarily be the lawful use as of 1st September 2013 when the uses became "fixed", as it is said the uses currently taking place if they were unlawful could not yet have become lawful through the passage of time, and therefore it appears to be said that:

(1) As that use currently taking place was unlawful, they could "revert" to the uses which were taking place as of 1st September 2013 which would necessarily be lawful as they have to be A1, A2, A3, B1 or D1, and that enforcement action could be taken to return any units which are in breach to a point where they are not in breach, and therefore the proper lawful use of the Brunswick Centre has to be in line with Class E – other than for the Cinema, and Unit 2. This appears to be the point of footnote 5 and footnote 9.

(2) Therefore the (unspecified) amount of floorspace currently being use for "*hot food takeaway*" it is said "*cannot affect the analysis of the lawful use of the floorspace at the Centre nor the determination of this appeal*".

2.27 At paragraphs 35, the Appellant then asserts that "*all relevant uses now fall within Use Class E",* and then at paragraph 36 – 38, the Appellant then raise further points as to (a) no longer needing to rely on the transitional provisions of actually being in one of the specified use Classes as of 31 August 2020, because they assert that they can change to another operation at any time and therefore then take the benefit of Class E, and (b) then make further submissions in relation to Leon

Response

2.28 This argument is misconceived. Key reasons why include:

(1) This is a section 191 application for a certificate of the lawfulness of existing use or development, not an enforcement inquiry or a section 192 application

(2) It also only arises even in principle if the Appellant is correct to assert that the lawful use "*in the absence of any other planning permission was the use the unit was in as of 1st September 2013*", which they are not right to assert as a matter

of law, and the evidence by the Appellant is ambigious, unclear, and wholly lacking, including also evidence to the contrary.

(3) It also obviously only arises if the Appellant's argument as to the construction of condition 3, and as to "flexibility" is accepted. Fundamentally, that is misconceived. Whilst the application is for the whole of the centre so it is not immaterial that there some units which fall outside of Use Class E and which were sui generis, the key issue in this appeal is about the interpretation and application of Condition 3 to the Centre as a whole. Condition 3 is about maintaining the retail mix between retail units (in the language of the use classes, A1), compared to restaurant/bar type uses (A2 and A3 type uses). That balance is what Condition 3 is controlling and continues to control.

Section 191 (Point (1)

2.29 This is an application under s.191, which the Appellant's submissions do not address. This is not an enforcement inquiry, or a s.192 hearing, but a hearing into the application that has been made.

2.30 Under s.191(1), the application is made on the basis that "*an existing use of buildings or other land is lawful….".* Under s.191(4), the question is whether the local planning authority (and now the Inspector) is satisfied "*of the lawfulness at the time of the application of the use, operations or other matter described in the application…",* and under s.191(2) operations are lawful if "*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)…".*

2.31 It now appears that the Appellant accepts that their existing use (or some thereof, but this is an application for essentially the whole of the Brunswick Centre),is not within Class E and was because of the degree of its hot takeawayuse outwith Class A1 or A2 or Class A3 at the date of the application and immediately before, i.e. the Appellant now accepts the obvious, that there has undoubtedly been a significant rise in hot food takeaways, and the Council's view that prior to and on the date of the application (2nd September 2020) a number of units were in a separate 'Sui Generis' use.

2.32 Any such use is outside Class E.

2.33 It also ought to follow that the Appellant is now abandoning the argument made in its application "*the existing use of the premises for any purpose within Class E is lawful…"*, as it is not relying on the actual existing use, nor the actual existing use in fact taking place at the date of application, or immediately before the date of application (31 August 2021), but in fact it is purporting to rely (at least in part) on uses which it says were taking place in 2013 which it says it can revert too, and/or the ability to take enforcement action to return an actual existing use to the condition which the Appellant implies it should have been in in 2013.

2.34 This is a different application from the one that the Inspector may have thought they were determining. There is no plan or another analysis to explain which units the Appellant is saying should be assessed on the basis of the situation which they assert was the case in 2013 and to which they assert a right to return, and which should be assessed on the basis of the situation they assert today – they do not even state which units they accept fall outside Class E. In their hearing statement, the Appellant positively stated that "*the actual use of the premises is consistent with the authorised use and is therefore lawful"* (see paragraph 3.12) and that "*there is no ambiguity over*

which land use classification the tenants at the Site operate within…" (see paragraph 3.18).

2.35 Thus, in so far as the Appellant argues either that a different use of buildings or other land would be lawful if enforcement action were to be taken to return it that state, that is not consistent with s.191(2). In so far as the Appellant argues they could lawfully return it voluntarily to that state, this is not an application for whether a proposed use would be lawful. It is an application on the basis of the current existing use, which the Appellant now appears to accept in the case of some units has a significant, material level of takeaway use which takes it outside of Class E and may also be in breach of Condition 10. The LPA is not obliged to take enforcement action – see below – but on the Appellant's case is entitled to do so, which therefore takes it outside of s.191.

2.36 It is not proper for the Inspector to issue a certificate on the basis of s.191(1) and "*the existing use of the premises"* in order to certify that the existing use of the premises "*for any purpose within Class E is lawful as changes within the same Class is not development….",* if the use which is currently taking place is not lawfully Class E, but is a sui generis use to which change would be "development".

The lawful use "*in the absence of any other planning permission was the use the unit was in as of 1st September 2013*".

2.37 This argument is wrong, and further it cannot be asserted in this way on the evidence ("the use the unit was in"). The application is for the whole of the Centre.

2.38 Firstly, it is telling that the Appellant put forward and continues to put forward no substantive evidence of the use it asserts – simply a schedule of the use but no other supporting evidence.

2.39 Secondly, it is wrong because the Appellant wholly ignores the planning purpose of Condition 3. The planning purpose of Condition 3 is clearly the balance between retail and restaurant/bar-type uses, but even if a technical definition of the Use Classes was to be adopted, at the material time Use Class A3 included hot takeaway use and at the material time there was no Use Class A5. There has always been complexity and planning judgment as to the extent to which a particular level of takeaway use, on a particular site in a particular context, exceeds a very minor role, to become a more dominant role and sui generis, and then to become such that it would be considered dominantly within Use Class A5. That is why Condition 10 exists on the consent (to control that element of use), and when interpreting Condition 3 and its purpose, regard must be had to the fact that it is Condition 10 which controls the impacts of allowing takeaway use within what is otherwise being called "A3". The consent must be interpreted as a whole. Further Condition 10 does not map neatly to Use Class E (or indeed to the previous Use Class A2 and A3 as Use Class A5 was, after the date of the consent, separated out from Use Class A2 and Use Class A3).

2.40 The reason that matters is because thus, under the consent, as a matter of law, the nature of the operation that is allowed under the 2013 consent, i.e. which can permit hot takeaway use, is not within what is now Use Class E.

2.41 Secondly, the Appellant also does not begin to establish this on the facts. The planning history of the Brunswick Centre predates this consent by decades. In so far as there is an issue in relation to intensification of takeaway use and whether or not a particular unit is currently outside of Use Class E, or whether it is currently in breach

of condition 10, or not, and whether or not currently enforcement action could therefore be taken to return those units to the state they "should" be in 2013, in order to justify a certificate of lawfulness for the current existing use. The Appellant's analysis is over-simplistic, for a number of reasons:

(1) The Council had wished to know the history of the use of individual units to appraise whether or not Condition 3 had been complied with across the Brunswick Centre as a whole, and if not, to appraise what the consequences of that were. For example a breach on an individual unit of Condition 10 does not affect the efficacy of the proper interpretation of Condition 3, which is about controlling the proportion of retail vis-à-vis bar/restaurant use, across the majority of the centre.

(2) The Inspector has clearly and deliberately asked about extant use rights, and the Appellant has wholly failed, again, to give a clear and unambiguous answer. The Council has similarly asked on a number of occasions.

Some units have consent to operate with takeaway use, i.e. condition 10 has been relaxed. It is also possible that there are units which, since this consent was granted in 2003, have operated with a significant degree of takeaway use. That may have fluctuated. The degree has not been stated, despite requests. A landlord can be expected to have or be able to obtain detailed information – see paragraph 5.12 of the Council's Statement of Case. If so, such a use is or could be sui generis, and a significant degree of takeaway use falls outside of Class E.

The Appellant asserts its right to "revert", if there is unlawful use, to what it says is the lawful use which it asserts took place in 2013, and that there can be no other intervening lawful use, asserts the Appellant. However, the evidence does not show this, where this is a certificate sought for the whole of the Brunswick Centre. For example, under the schedule of leases (but not the actual leases, so the area under the lease being referred to is not clear, nor its terms, nor of course its actual use under those terms) produced by the Appellant at Appendix 10, Hare and Tortoise has been in situ since at least December 2005, but from its website, it states that it has been in the Brunswick shopping mall since 1996 as the first Hare and Tortoise[1]. Plainly it is possible for a 10 year period of use to have been established prior to 2021. Yo Sushi has been (on the evidence produced by the Appellant, it may predate this) in situ since at least September 2006 and is likely to have had a takeaway operation since that date, the point or points at which a takeaway use has expanded are not made clear, similarly Nandos has been in situ since at least March 2007, and similarly, Giraffe was in situ from September 2006 but was rebranded to "Slim Chickens" in September 2000 (the Appellant's schedule records this as a "rebranding", but in any event 2006 – 2016 would also be a 10 year period). In none of these units is the degree of takeaway use made clear over time. There are a number of units which even on the Appellant's own case could have had a significant degree of takeaway use, and who have a business model which would Indicate that this is probable, and where, despite repeated requests for information including now from the Inspector, the Appellant declines to give information which it is likely they possess and can be expected to possess.

Thus, the Appellant cannot properly say the lawful use "*in the absence of any*

[1] Japanese restaurant close to Russell Square, Bloomsbury (hareandtortoise.co.uk)

other planning permission, the lawful use was the use the unit was in as of 1st September 2013" and to which it can necessarily revert.

(3) The argument conflates planning judgment and expediency of enforcement action, with the Use Classes Order. It is possible that a use may have intensified for a period of time (for example because of covid), but that does not necessarily mean there has been a breach of condition – that is a question for the authority's planning judgment (which would include the relevant period of time over which to assess a breach). But, more importantly, even if there had been a breach of condition, the authority is not required to take enforcement action. Further, Condition 3 and Condition 10 have different planning purposes. There are a variety of reasons why an authority may choose not to take enforcement action, including the classic example that an authority considers it is not expedient to take action. Regardless of the reason why the authority has chosen not to take enforcement action, <u>if</u> it is entitled to take enforcement action, as the Appellant says it is, then under s.191(2) the use in breach of condition is only lawful if "*no enforcement action may then be taken in respect of them".*

Further, in any event, in this case, it does not actually deal with the issue as to the proper scope of the application for unrestricted Class E. Even if a particular extent of takeaway use was established as lawful for a particular area of the Brunswick Centre through breach of condition 10, given that the planning purpose of Condition 3 is clearly the mix of uses between retail/café & restaurant, and further also given that class A3 at the time included hot takeaway use, that does not determine whether or not it falls outwith Condition 3.

<u>Construction of condition and flexibility (Point (3)</u>

2.42 The certificate application for the whole of the Centre is only effective to mean that the whole of the Centre can be used as unrestricted Class E <u>if</u> there is not a condition or conditions which prevents that.

2.43 This argument seeks to circumvent the obvious planning purpose of Condition 3, as well as other conditions such as Condition 5 and 6 (controlling the use of the supermarket, as a supermarket), conditions controlling the use of A3 units and those which cannot be used for uses which fall within use class A3 (Conditions 8, 9, 10,11).

2.44 It is not considered that these points as to the takeaway use can be used to support the conclusion in paragraph 30 that Condition 3 "*was not imposed to prevent a change in the proportion for uses for all time*"; if it shows anything material to the construction of Condition 3, it shows the opposite, that there is indeed ongoing purpose to Condition 3 in controlling the mix of uses, which having regard to the planning purposes. No particular point is developed as to how these support the alleged interpretation of Condition 3. There is no attempt to address the conditions applicable the supermarket use, or those uses which fall within A3.

2.45 Secondly, it obviously also only arises if the Appellant's argument as to the consent being "flexible" is accepted; this is dealt with above. It is wrong.

Other arguments

All relevant uses now fall within Class E / Extent of takeaway use

2.46 This is not accepted, for the reasons as advanced above, and the proper construction

of the conditions. It is telling that the appellants have **still** not provided any evidence as to the extent of takeaway use at the time of the application, or historically as is required by s.191 (2) of the Act if such a case is to be put forward, and this has been requested on numerous occasions.

Leon

2.47 The argument that 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….",* is wrong and misrepresents the discussion at the Hearing. The description of development on the consent was "*change of use of ground floor unit from retail (Use Class A1) to mixed use retail, restaurant and takeaway (Use Class Sui Generis) (retrospective)"* The element of takeaway use was assessed as material in 2017, and it is not at all likely that element of the use decreased during covid, or subsequently, but rather almost certain to have significantly increased.

Can change uses with immediate effect, and then get the benefit of Use Class E

2.50 Leaving aside the issues of the proper interpretation of the consent and the fact that relevant conditions, in particular Condition 3, continues to apply and so this argument is wrong, it is in any event a matter of planning judgment what the "use" of an area or unit is.

2.51 If a particular business was to wholly cease its takeaway function for 24 hours, or a week, or a month, that will not be at all likely to impact the planning judgment of what the "use" is. If the use was to cease for a year, it is likely that would become more material, against which most of the businesses in occupation of these units have well known business operations which include a take-away function which would also require to be appraised.

2.52 There is also an air of complete unreality about the argument. It is not clear that the Appellant could in practice under its leases (which it has not provided) prevent e.g. Leon from operating a takeaway function, so the argument is also highly likely to be wholly academic. However, in the circumstances of this case, it would clearly require close appraisal.

2.53 Fortunately, that is not the issue before the Inspector, which is to determine the application as at the date of the application. This is a deeply unattractive argument and is, in fact, indicative of the poor state of the legal arguments being advanced by the Appellant. The Council repeats that it is open to the Appellant to apply to vary Condition 3, and/or Condition 10.