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ADVICE

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1. I am asked to advise in this matter on behalf of

permission was granted in 1988 for a retail park and is now subject to a CLOPUD application.

2. I am asked specifically to advise on the following matters;-

- (i) Whether the CLOPUD application comes within section 55(2) (a) of the 1990 Act and should thus be determined as required by Section 192
- (ii) If not whether a planning application should be sought for the work proposed
- (iii) Advice as to how any such planning application for internal works should be joined to the current application for external works.
- (iv) The extent to which the Council can claim that there is a material intensification of the use which adversely affects the vitality and viability of Town Centre and the evidence which will be required to support such a contention.

Background

3. In 1988 reserved matters were settled based on outline permission for 190,000 square feet retail warehouse park, garden centre, service areas and car parking. The only restriction as to use relates to the sale of food or drink (with the exception of the snack bar), clothing, toys, stationery and books (other than those relating to DIY activities) and not more than 5% of the floor space shall be used for the sale of electrical domestic goods and appliances (condition 12).

I note there is no condition restricting the size of the use within the consent area nor any restriction on subdivision of the units.

4. On 22<sup>nd</sup> December 2005 a CLOPUD application was made for the "subdivision of the existing unit to create four units and the installation of new mezzanine structures in each unit." This was accompanied by a planning application for "external alterations to unit C1". Those instructing me inform that without the external alterations the internal alterations would not allow the units to be used separately.

5. It appears that the Council permitted the subdivision of Unit D which is now D1, D2 and D3 after an initial refusal of the scheme for similar arguments to the ones below.

6. Previously (although I am not told when) those Instructing me had advised the Planning Officer that the two applications can be treated as one because "section 55 (2) (a) of the 1990 Act is the applicable section. This has not been altered by later additions by section 49 of the 2004 Act...Although the Secretary of State has the power to make an Order dealing with mezzanine floors no such Order seems to have been made.

Section 55 (2) states that the following operations "shall not be taken for the purposes of this Act to involve the development of land:- a) the carrying out for the maintenance, improvement or other alteration of any building of works which (i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building.."

Your concern appears to be that the planning application as submitted for external works is a necessary pre-requisite for the internal works to take place.

On that basis, if the works the subject of the certificate of lawfulness and the planning application for external works are taken together, then the works the subject of the certificate of lawfulness do not affect only the interior of the building and therefore do not come within section 55(2)(a).

There appear to be 2 questions we need to consider here. First can the internal works proposed be taken to be used (in accordance with the provision of Section 75) for the designed purpose. Secondly, if the answer to the first

question is no (and you have indicated it is), can the planning application and the certificate of lawfulness be linked as one development proposal with the effect that the former does not satisfy the test in Section 55 (2)(a). From what you have said in your e-mail, it seems clear both in practical terms and in time that the 2 applications are linked and that therefore the application for a certificate of lawfulness does not satisfy the Section 55 (2) (a) (i) requirement. I would suggest that this view is in accordance with the objects of the act and the applicants are trying to create a different building and intensification of use to the one originally permitted. The moral or result of that is that internal works to a building should be capable of being used effectively without any change to the external part of the building and in this case I suggest the applicants are clearly not using the exception made by the act properly."

7. I am of the opinion that the application for CLOPUD must be considered in isolation from the application from planning permission and as such should be granted. There is no precedent that would indicate that one looks beyond the application which is for internal works which by definition do not comprise development. Section 75 relates only to the interpretation of planning permission in the absence of any description of the purpose in the permission as granted. Therefore it cannot be right in applying it to a consideration of whether internal works satisfy the requirement of section 55. Essentially the 2 applications must be looked at as 2 phases – the first being an application for a CLOPUD for internal works which do not amount to development and then an application for operational development to the external parts of the unit.
8. In considering the application for planning permission the Council is perfectly entitled to look at the planning consequences of the application. While there may be no design issues in relation to the works proposed it is proper to consider whether the external works which enable the use of the 4 newly created units will have any planning implications including impacts on the local centre.
9. In addition it would be open to the Council to consider whether the use had changed materially by way of intensification. Those instructing me are correct

that as long as the use is not intensified to the extent that it is a different use, any increase in the use would not be material and therefore would not need consent. I note that the Planning Officer is of the opinion that the "subdivision of the building into relatively small retail units does result in a material intensification (although I am unclear as to how she reaches that conclusion) and would also result in smaller units that are not necessarily suitable for the bulky goods retailers that the park was designed for. As there does not appear to be a condition outlining the intention of the retail park or the purpose for which it was designed I am unconvinced this is relevant. As long as the units are not used for retail purposes that are prevented by condition then there is no limit to the use.

10. It must be noted that case law and commentary on the issue of subdivision of retail units would suggest that it is very unlikely that this would amount to intensification amounting to a material change of use unless there is a specific condition limiting retail floor space.

11. Therefore if the Council wish to refuse the planning permission due to concerns about preventing high street stores moving out to the park and therefore affecting the vitality and viability of Town Centre a strong case would have to be made on that basis. I have not been provided with any of the applicable retail policies that might apply but it would be necessary to demonstrate that there is no need for additional floor space in the retail centre and an assessment of the capacity of the local centre.

12. Para 3.2 PPS6 indicates that it contains policy considerations that may outweigh out of date Development Plan policy. Para 3.1 indicates the considerations that planning authorities should take into account when faced with proposals for development relating to town centre uses including extensions to existing facilities and applications for removal of conditions that would have the effect of creating additional floor space. Para 3.4 requires the applicant to demonstrate for example (i) the need for the development (ii) the development is of an appropriate scale (iii) there are no more central sites for the development (iv) there are no unacceptable impacts on existing centres and

(v) that the development is accessible. It would appear from my instructions that subparagraph (iv) outlines the main concerns of the Council. Paragraphs 3.20 – 3.23 outline the evidence that would be expected to be put forward by the applicant and possible the studies that the Council would use to rebut the proposal that the development would have no impact.

13. I would note however that subparagraph 3.20 indicates that these assessments are to be undertaken where *significant* development would *substantially* increase the attraction of the centre and could have an impact on other centres. Therefore unless the Council is able to demonstrate that the subdivision of the unit into 4 is significant and substantially increases the attraction of the centre. I believe it unlikely to be a sustainable argument that this will affect the vitality and viability of the Local centre to the extent that planning permission should be refused.

14. If you have any further queries please do not hesitate to contact me in Chambers.

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