

Our Ref: TB/65550.1

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Dear Sirs

Section 192, Town and Country Planning Act 1990 (as amended) (the "Act")

Unit 11 (formerly Unit 9c), Cyfarthfa Retail Park, Swansea Road, Merthyr Tydfil, CF48 1HY

We have been asked to opine on the lawfulness of the subdivision of Unit 11 (formerly Unit 9c) at Cyfarthfa Retail Park, Swansea Road, Merthyr Tydfil, CF48 1HY (the "**Premises**").

We refer to the letter dated 12 October 2021 sent by Burnett Planning & Development Limited to Merthyr Tydfil County Borough Council (the "**Application Letter**"), the contents of which our analysis is wholly aligned with.

We set out our opinion below in support of the case for the certificate of lawfulness, as set out in the Application Letter.

The Application

The certificate seeks to certify that the following operations would be lawful:

"Subdivision of Unit 11 by way of internal alterations to create two separate retail units without restriction on the minimum gross retail floorspace of any single user/unit" ("the proposed subdivision").

In short, we submit that the proposed subdivision is lawful because:

The proposed subdivision does not constitute development as defined in the Act; and

There is no restriction on subdivision in the operative planning permission (as amended) that relates to the Premises.

The Meaning of Development

Section 55(1) of the Act defines development as the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

Section 55(1A) of the Act defines "building operations" widely to include (a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder. "Building" is defined as including any structure or erection, and any part of a building, as so defined.

Section 55 of the Act excludes a number of operations and uses from the definition of development. In particular, section 55(2)(a) refers to "...the carrying out of 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...except where such operations have the effect of increasing the floor space of the building by more than 200 square metres in circumstances where the building is used for the retail sale of goods other than hot food."

Planning History of the Premises

We refer to the planning history overview of the Premises provided in the application letter.

As stated in the application letter, it is understood that planning permission reference P/04/0633 (the "**Operative Permission**") is the operative permission that controls the use of Unit 11 (formerly Unit 9c).

Condition 1 of the Operative Permission P/04/0633 states "This permission shall relate to the development as indicated on Drawing No's SP 1066(05) 200, 201, 202 Revision D, 203 Revision A, 204, 205, 206 Revision B, 207 Revision A, 208, 209, 210, 211, 212, 213, 214 and 215 and the conditions noted below."

Approved drawings SP 1066 (05) 202 Revision D and SP 1066 (05) 206 Revision B submitted with the Operative Permission identifies that the permitted gross retail floorspace of the Premises was 15,000sqft (1,393sqm).

Drawing SP 1066 (05) 202 Revision D also shows that a number of the retail units were at least 20,000sqft, for example Unit 1 (First Floor) – 20,000sqft and Unit 3 – 40,000sqft.

Condition 6 in the Operative Permission P/04/0633 states "Unless otherwise permitted by virtue of the current planning application, none of the retail units hereby approved shall be subdivided so that the gross retail floorspace of a single user/unit is less than 1,858sq.m (20,000sq.ft)".

Unit 11 (formerly Unit 9c)

At no point since its construction has Unit 11 been a minimum of 20,000sqft gross retail floorspace.

Unit 11 has a mezzanine floor measuring 3,584sqft (333sqm) that was used for non-sales purposes prior to the unit becoming vacant. There is no reference to this, or any, mezzanine floor in Unit 11 (formerly Unit 9c) in the Operative Permission or on any of the approved drawings listed in Condition 1 of that permission.

Including the mezzanine floor, the existing gross internal area of Unit 11 is 18,584sqft (1,726sqm).

There is nothing in Operative Permission that permits Unit 11 to have a mezzanine or requires that Unit to install and retain a mezzanine floor so that its total gross retail floorspace is at least 20,000sqft.

Legal Analysis

We submit that the proposed subdivision of Unit 11 by way of internal alterations to create two separate retail units without restriction on the minimum gross retail floorspace of any single user/unit is lawful for the reasons set out below.

Firstly, the subdivision of Unit 11 by way of internal alterations does not fall within the meaning of development under Section 55(2)(a) of the Act.

Secondly, Condition 6 in the Operative Permission imposes a restriction on subdivision, by way of a minimum unit size restriction of 20,000sqft gross retail floorspace, on those units that were identified on the approved plans as being 20,000sqft gross or larger only.

Thirdly, as stated above, Drawings SP 1066 (05) 202 Revision D and SP 1066 (05) 206 Revision B, listed under Condition 1 of the Operative Permission, show the Premises as having a floorspace of 15,000sqft. Therefore, it is clear that the Premises is exempt from the subdivision restriction in Condition 6 of the Operative Permission under the "Unless otherwise permitted by virtue of the current planning permission" wording.

The Supreme Court judgment in *London Borough of Lambeth v SSHCLG* [2019] UKSC, at paragraph 19 stated:

"In summary, whatever the legal character of the document in question, the starting-point – and usually the end point – is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

It is a matter of common sense, on the "natural and ordinary meaning" of the wording in Condition 6 of the Operative Permission, that the effect of the condition cannot be to restrict the subdivision of the Premises to a minimum unit size of 20,000sqft when that unit is "permitted by virtue of the current planning permission" to be smaller than the stated minimum unit size.

Condition 6 of the Operative Permission does not have the effect of restricting the subdivision of all the retail units, regardless of their size. If this has been intended, the Condition would have stated so.

Concluding Remarks

We submit that on the basis of the applicable law, as detailed above, the application contained in the application letter would be lawful, and therefore a certificate to that effect should be issued pursuant to section 192(2) of the Act.

Please do not hesitate to contact Tom Barton on the details below should you require any further information.

Yours faithfully

Mishcon de Reya

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