

Our Ref: 298CRP130921

12 October 2021



Merthyr Tydfil County Borough Council
Planning Department
Unit 5 Triangle Business Park
Pentrebach
Merthyr Tydfil
CF48 4TQ

Dear Sir/Madam

**S192, Town and Country Planning Act 1990 (as amended)
Unit 11 (formerly Unit 9c), Cyfarthfa Retail Park, Swansea Road, Merthyr Tydfil, CF48 1HY
Application for Certificate of Lawfulness**

This application is submitted on behalf of the owner of Cyfarthfa Retail Park, Corona Vulcan Merthyr Limited, under S192 of the Town and Country Planning Act 1990 (as amended) [the Act].

The application relates to Unit 11 (formerly Unit 9c) at Cyfarthfa Retail Park as identified on site location plan BPD1.

The proposed operations that the application seeks to certify would be lawful are:

“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 reasons why the proposed subdivision of Unit 11 would be lawful relate to –

- (1) the meaning of development as defined in the Town and Country Planning Act 1990 (as amended), and
- (2) the planning history of the site and the absence of any restriction on subdivision in the operative planning permission that relates to the use of the subject premises.

The Meaning of Development

Under Section 55(2)(a) of the Town and Country Planning Act 1990 (as amended) 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, are not operations that shall be taken to involve development of the land 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

Planning Permission P/02/0514

The first two phases of the Cyfarthfa Retail Park development were granted under Planning Permission P/02/0514, dated 10 June 2003, which permitted;

“Erection of retail park including A1 and A3 units, health and fitness (D2), covered builders yard and garden centre, associated car parking, servicing and access roads.”

A copy of Planning Permission P/02/0514 is attached as **Document 1**.

Under Planning Permission P/02/0514 the site where Unit 11 is now located was proposed to accommodate a 20,000sqft covered builders yard associated with the use of the adjoining 100,000sqft unit identified as Unit 9. This layout is shown on drawing SP 1066 (05) 202A attached at **Document 2**, which was listed as an approved drawing under Condition 1 of this permission.

Planning Permission P/03/0524

Planning Permission P/03/0524, dated 28 November 2003, superseded Planning Permission P/02/0514 and permitted the following;

“Amendment to condition 1 on planning permission P/02/0514 relating to the substitution of approved drawings no’s sp 1066(05), 202A, 203, 206 and 207 for Unit 9”

A copy of Planning Permission P/03/0524 is attached as **Document 3**.

The drawing SP1066 (05) 202 Revision B approved under Condition 1 in Planning permission P/03/0524 is attached at **Document 4**. This shows Unit 9(c) [now numbered Unit 11] in its current position with its floorspace being stated as 15,000sqft.

Planning Permission P/04/0633

Planning Permission P/04/0633, dated 29 April 2005, superseded Planning Permission P/03/0524 and granted permission for;

“Amendment to Condition 5 on planning permission P/03/0524 to allow the sale of non-food goods (bulky and non bulky) from Units 8, 9A, 9B and 9C and the installation of mezzanine floorspace in Units 8 and 9A.”

It is understood that Planning Permission P/04/0633 is the operative permission that controls the use of Unit 11 [formerly Unit 9c]. A copy of Planning Permission P/04/0633 is attached at **Document 5**.

The first page of the Decision Notice P/04/0633 states that;

“....the Local Planning authority hereby PERMIT the proposed development to be carried out in accordance with the plans submitted with the said Application...”

Condition 1 in Planning Permission P/04/0633 identifies the plans that the development had to be carried out in accordance with. The Condition 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.”

A copy of each of the drawings referred to in Condition 1 in Planning Permission P/04/0633 is attached at **Document 6**.

The only drawings that show the approved floorspace in Unit 9c (now Unit 11) are Drawing SP 1066 (05) 202 Revision D and SP 1066 (05) 206 Revision B. Both of these drawings show Unit 9c as being 15,000sqft (1,393sqm).

Condition 6 in Planning 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.)”

As shown on Drawing SP 1066 (05) 202 Revision D, a number of the retail units were at least 20,000sqft, i.e. Unit 1 (First Floor) - 20,000sqft; Unit 3 – 40,000sqft; Unit 7 – 20,000sqft; Unit 8 – 20,000sqft; Unit 9(d) – 65,000sqft.

The Existing Mezzanine in Unit 11 and Total 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 mezzanine floor, or indeed any mezzanine floor, in Unit 11 [Unit 9c] in the Decision Notice for Planning Permission P/04/063 or on any of the approved drawings listed in Condition 1 of that permission.

It is understood that the mezzanine was installed without requiring planning permission prior to the “*Amendments relating to certain internal operations*” coming into effect in June 2015 under The Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2015 which brought into the meaning of development internal operations which have the effect of increasing the floor space of a building by more than 200 square metres in circumstances where that the building is used for the retail sale of goods other than hot food.

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

There is nothing in Planning Permission P/04/063 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.

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

Reasoning as to the Lawfulness of the Proposed Operations

It is submitted 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 following reasons:

1. 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;
2. The effect of Condition 6 in Planning Permission P/04/0633 is to impose a restriction on subdivision, by way of a minimum unit size restriction of 20,000sqft gross retail floorspace, only on those units that were identified on the approved plans as being 20,000sqft gross or larger;
3. The approved drawings SP 1066 (05) 202 Revision D and SP 1066 (05) 206 Revision B, listed under Condition 1 of Planning Permission P/04/0633 clearly show Unit 9c (now Unit 11) as a 15,000sqft unit and, therefore, under the *“Unless otherwise permitted by virtue of the current planning permission”* wording in Condition 6 of Planning Permission P/04/0633 it is clear that Unit 11 is exempt from the subdivision/20,000sqft minimum unit size restriction;

As stated in the Supreme Court judgment in *London Borough of Lambeth v SSHCLG [2019] UKSC (Document 7)*;

“19. 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.”

Taking the *“natural and ordinary meaning”* of the words in Condition 6 in Planning Permission P/04/0633 it is a matter of common sense that the effect of this condition cannot plausibly be to restrict the subdivision of Unit 11 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.

If it had been intended that Condition 6 would impose a restriction on the subdivision of all of the retail units regardless of their size, including Unit 11, the Condition would simply have stated – *“none of the retail units hereby approved shall be subdivided”*. The Condition does not state this, and does not have this effect.

Legal Opinion

Attached at **Document 8** is an opinion from Mishcon de Reya LLP which supports the case for the certificate of lawfulness that is set out in this submission.

Conclusion

Section 192(2) of the Act states that if, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect.

The information in this letter and the supporting documents (Documents 1 – 8) demonstrate that - *“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”* - would be lawful.

Accordingly, a Certificate to that effect should be issued.

Documents

In addition to this letter, the application is supported by the following Documents as referred to above:

Document 1: Planning Permission decision notice P/02/0514;

Document 2: Drawing SP 1066 (05) 202 Revision A;

Document 3: Planning Permission decision notice P/03/0524;

Document 4: Drawing SP1066 (05) 202 Revision B;

Document 5: Planning Permission decision notice P/04/0633;

Document 6: Drawings 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;

Document 7: Supreme Court judgment in London Borough of Lambeth v SSHCLG [2019] UKSC;

Document 8: written opinion from Mishcon de Reya LLP

Please contact Colin Burnett at this office if you have any queries or require further information.

Yours sincerely

Burnett Planning & Development Limited

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