

SCHEDULE A3 TO THE AGENDA FOR THE
CENTRAL PLANNING COMMITTEE
3 FEBRUARY 2010

A3	WA/2009/1569 Tesco stores Ltd 21/12/2009	<u>Application for a Certificate of Lawfulness under Section 192 of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act") for a proposed use as (A1) Retail use at: - The Red Lion, Portsmouth Road, GU8 5JH</u>
Parish:		Witley
Ward:		Milford
Case Officer:		Mr C Stanley
8 Week Expiry Date		23/12/2009
Neighbour Notification Expiry Date		27/11/2009

RECOMMENDATION

That a Lawful Development Certificate should be issued for the change of use to Class A1 (Retail).

The application has been brought to committee at the request of the Local Ward Member.

Site Description

The site is located on the southern side of Portsmouth Road. The site comprises a two storey detached building with associated car parking and landscaped area to the rear. The site has most recently been occupied by The Red Lion.

Proposal

A Lawful Development Certificate is sought to establish that the proposed use of the building for A1 (Retail) use is lawful.

Relevant Planning History

WA/2009/1706	Application for consent to display illuminated and non-illuminated signage on the building and in the car park.	Pending Decision
WA/2009/1705	Application for Listed Building Consent for repairs to existing gate on rear wall.	Pending Decision
WA/2009/1704	Installation of new shop front together with alterations.	Pending Decision

WA/2009/1569	Application for a Certificate of Lawfulness under Section 192 of the Town and Country Planning Act 1990 for proposed Change of use from A4 (Drinking establishments) to A1 (Retail).	Pending Decision
WA/2002/2509	Erection of an entrance porch and a replacement fire escape; alterations to provide additional staff accommodation.	Full Permission 10/02/2003
WA/2001/1863	Application for Conservation Area Consent to demolish existing public house.	Withdrawn 11/12/2001
WA/2001/1862	Outline application for the erection of 8 dwellings with associated garages following demolition of existing public house.	Withdrawn 11/12/2001
WA/2001/1861	Application for Conservation Area Consent to demolish existing public house and alterations to garden wall.	Withdrawn 11/12/2001
WA/2001/1860	Outline application for the erection of 13 dwellings with associated garages following demolition of existing public house.	Withdrawn 11/12/2001
WA/2000/1752	Alterations to elevations, erection of a replacement fire escape staircase.	Full Permission 06/12/2000
WA/1994/1360	Display of illuminated signs (as amended by letter dated 02/11/94).	Consent Granted 21/11/1994
WA/1994/1200	Erection of extensions; erection of a pergola, landscaping and alterations to car park (as amended by plans received 14/10/94 and 07/11/94 and letter received 03/11/94).	Full Permission 11/11/1994
WA/1989/0406	Display of double sided illuminated sign.	Consent Granted 20/04/1989

Development Plan Policies and Proposals

- The Town and Country Planning (General Permitted Development) Order 1995 (as amended).

Representations

37 letters of objection received
1 letter of objection from Chiddingfold Parish Council
4 letters of support received

Grounds of objection relevant to a CLU application

- 1) Reference has been made in the Surrey Pub Guide to accommodation;
- 2) Red Lion was originally built as a hotel offering bed and breakfast;
- 3) The evidence provided is flawed and limited in nature;
- 4) Any accommodation by paying public. Or rental to staff suggests that the property has recently been used as Class C1;
- 5) It is likely that rented hotel accommodation as part of their normal business has taken place continuously at the Red Lion Hotel over a period of many years;
- 6) Mention of pub and restaurant in recent planning applications would not seem to disprove hotel accommodation usage but simply show that these terms now have more popular usage than the traditional Inn;
- 7) It is possible that accommodation aspect may have laid dormant recently. Planning application WA/2000/1750 made reference to modification of guest accommodation – but was withdrawn – suggesting it was no longer in owner's business plans;
- 8) If the full historic usage pattern cannot be specifically categorised within one of the four main use classes A-D then I query if this may have rendered it Sui Generis. Representations

Grounds of objection not relevant to a CLU application

<u>Comment</u>	<u>Occurrence</u>
Detrimental impact on village	(6)
Detrimental impact on existing shops	(22) (incl. Parish Council)
Noise	(2)
Traffic Congestion	(8)
Road safety	(11)
Excessive opening hours	(5)
Litter	(1)
Contrary to policy LT3	(1)
Contrary to policy CF2	(1)
Signage	(3)
Historical significance of building	(1)
Noise	(3)

Inadequate parking	(2)
Better used for affordable housing	(1)
Tesco would be good neighbour from their Guildford store	(1)
Tesco is invited to support community by selling store on for use as hotel or affordable housing	(1)

Grounds of support not relevant to a CLU application

- 1) Competition is the life-blood of the economy locally and nationally;
- 2) The petition is seriously flawed as the only place you can hand it in have a vested interest in keeping Tesco out;
- 3) The Co-operative store is not user friendly;
- 4) Local shops will not be affected due to the small size of Tesco;
- 5) Secretts is only open between 9-5.30pm and therefore not convenient;
- 6) Youth gather outside Co-op at present;
- 7) Proposal would benefit the village.

Issues raised in opposition or support, which are based on the planning merits of the proposed use, cannot be considered in the determination of the Certificate of Lawfulness for a proposed use. Examples of such issues raised include the impact of the proposed use on existing businesses, the impact of traffic, and the impact on the village of Milford. Determination of the application on the back of irrelevant material or arguments would be regarded as unreasonable, likely to place the Council at a risk of costs on appeal.

Material Considerations

The application for a Lawful Development Certificate seeks to establish that the proposed use of the building for A1 (Retail) use is lawful.

Use Class Order and General Permitted Development Order

A 'Use Class' is a grouping together of similar land uses. For example, shops are grouped as class A1, restaurants and cafés as A3, hotels as C1, and so on. Classes of use are set out in the Town and Country Planning (Use Classes) Order 1987 and its subsequent amendments.

Permitted changes from one Use Class to another are set out in the Town and Country Planning (General Permitted Development) Order 1995 as amended. A selective summary of use classes and permitted changes are provided in the table below.

Use Classes Order 2006	Description	General Permitted Development Order
A1	Shops, retail warehouses, hairdressers, undertakers, travel and ticket agencies, post offices, dry cleaners, Internet Cafes etc.	No permitted changes
A2	Financial and Professional Services Banks, Building societies, estate and employment agencies, Professional and Financial Services, betting offices	Permitted change to A1 where a ground floor display window exists.
A3	Restaurants, snack bars, cafes	Permitted change to A1 or A2
A4	Drinking Establishments, Pubs and bars	Permitted change to A1, A2, A3
A5	Hot Food Takeaways Hot Food Takeaway	Permitted change to A1, A2, A3
Sui Generis	Shops selling and/or displaying motor vehicles, retail warehouse clubs, launderettes, taxi or vehicle hire businesses, petrol filling stations and uses not falling within any other existing use class	No Permitted change

Use Class

The applicant has stated that the existing use of the building is A4 (Drinking Establishment), and therefore the proposed use of A1 (Retail) is lawful.

The description of the A4 class is given as Use as a public house, wine bar or other drinking establishment. The effect of the introduction of this class has been to deny cafes, restaurants, and takeaways the automatic right to change to a drinking establishment.

The A4 (Drinking Establishment) Use Class was created in April 2005 by an amendment to the Use Classes Order, which broke down the former A3 Class

into three parts. The alteration was introduced by because of widespread disquiet amongst local authorities that premises where alcohol could be consumed were being created in town centres without planning control, resulting in an increase in anti-social behaviour and disorder.

Matters to be considered

The planning merits of the use, operation or activity in the application are not relevant in the assessment of a Certificate of Lawful Use. The issue of a certificate depends entirely on factual evidence about the history and planning status of the building or other land and the interpretation of any relevant planning law or judicial authority.

The onus of proof in an LDC application is directly on the applicant to show to the Council on the balance of probabilities that a Certificate ought reasonably to be issued. Put simply, the applicant must show that it is more likely than not, that the facts asserted by him or her are correct.

If the Local Planning Authority have no evidence of their own, or from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate "on the balance of probability".

Where the Council has neither evidence of its own, nor receives evidence from others but is satisfied with the information submitted by the applicant it may grant a certificate based solely on "the balance of probability".

Evidence Submitted by the Applicant

- Photographs of interior and exterior of building (ground and first floors). The photos of the ground floor show a typical pub interior. The first floor shows rooms which were used for the purposes of ancillary staff accommodation;
- Planning history overview with emphasis placed on reference to public house use;
- License extension application with reference to objections from local residents mentioning pub usage;
- Reference is also made to a license application for live and recorded music on site (2005);
- Website listings for the Red Lion Public House;
- Insurance schedule for 2008/2009 listing occupation as Public House; and
- Existing layout plans of the building.

The evidence base is not extensive; this however is a result of the previous owners of the site leaving the premises and it sitting vacant for approximately 18 months. The planning history provided does not include any reference to

an alternative predominant land use on the site over a continuous period of 10 years.

The application was subject to neighbour consultation so that the evidence provided could be scrutinised by those with a local knowledge of the history of the site. Despite this consultation no documentary evidence has come to light during the course of the application process to contradict the claims made, or to cast doubt on any of the evidence submitted.

Officers have undertaken a review of the planning history, including details of all applications for advertisement consent. A review of all layout plans associated with these applications reveals that the building has been under A4 use (or previously as a public house), with varying levels of ancillary staff or guest accommodation.

A search by officers of the Council's Business Rates database reveals that the Red Lion has been shown in the non-domestic rating since 1990, as a Public House.

Consultation Responses

There are three grounds of objection raised through consultation responses that require a response. Namely, that the certificate should not be issued as:

- (i) the use of the building is actually a restaurant;
- (ii) there is an accommodation element on site;
- (iii) the use has been abandoned.

- (i) The use of the building is actually a restaurant;

There has been some suggestion that the premises have most recently been used as a restaurant, and the application fails as a result. It is accepted that the Public House took on a more "gastro" based usage, even calling itself a food emporium. This in itself does not mean that the use class changed from A4 (Drinking Establishment). Many public houses have shifted focus and enhanced the food offering due to the general decline in profits from beer sales, resulting from a decline in pub popularity, increases in beer taxes, and the deregulation of brewery owned pubs. The decline of the traditional pub in favour of the gastro-pub has been well documented in recent years.

In any case, for a restaurant to be considered the single primary use, it would have to be in circumstances where existing use rights for the public house had been extinguished. Even if the predominant use in recent years was food, an A3 use would not be established if it had not operated continuously as the predominant use for a period of 10 years. It is clearly possible to have a situation where the restaurant use increased in intensity but still in all the circumstances, was incidental to the primary use as a public house. The issue is academic as the change of use from A3 (Restaurant) to A1 (Retail) is also permitted and could therefore take place without the need for express planning permission.

Whether the existing lawful use is (a) primarily A4, (b) primarily A3, (c) a composite planning unit comprising two distinct and fixed uses of A4 and A3, (d) two distinct planning units with respectively an A4 and an A3 use; or (e) a dual use of a single planning unit wherein two uses, A4 and A3, fluctuate in their intensity from time to time, the Use Class Order permits a change therefrom to A1 use.

(ii) There is an accommodation element on site;

It is accepted that the Red Lion has provided some form of guest accommodation in the past, and that in more recent times, the upper floor has been used for providing staff accommodation. It is however accepted planning law that the use of part of a public house for inn accommodation or staff accommodation is a traditional function, and as such is considered ancillary. The use for accommodation purposes would only constitute a change of use of the building if the accommodation element became the primary use/function of the building. This is clearly not the case here. A number of long-term residents of neighbouring properties have responded to the consultation, and have not disputed or contradicted the evidence provided by the applicant.

(iii) The use has been abandoned.

Abandonment is a legal concept used by the courts to describe the circumstances in which rights to resume a use which has been lawfully carried on in the past may be lost because of the cessation of that use. The basic rules which have emerged are that abandonment may occur where an intention to cease a use is deemed to exist:

- a) by reason of leaving premises vacant for a considerable period or by allowing the building/s on which the use relies to deteriorate to the extent that re-use would involve what would be tantamount to rebuilding; or
- b) by the introduction of a different use (whether with or without planning permission) supplanting that which went before.

The building has been unoccupied since 2008. The windows have been boarded up for security purposes although internal fittings remained intact. It is considered that the building is sufficiently intact to reasonably support the contention that it is a drinking establishment and not merely the ruins of a drinking establishment. The building condition is such that a reasonable person is unlikely to assume that the use had, for all intents and purposes, been abandoned.

Although not comprehensive, the evidence provided is consistent with that discovered by officers during their own investigations. The evidence indicates that the building has been used as a public house (with ancillary uses) for ten or more years and is therefore considered lawful. These matters have been

demonstrated on the balance of probability, given the lack of any contradictory evidence. As such, any proposal to make use of the building for any activity within Class A1, including convenience shop, would in town planning terms, be lawful.

RECOMMENDATION: That a Lawful Development Certificate should be issued for the change of use to Class A1 (Retail).