

29 July 2021

Article 4 Direction to remove Class MA permitted development rights for change of use from Use Class E to residential use

Report by Barry John Lomax, Acting Head of Development Management

Relevant Portfolio Holder:

Cllr Rebekah Moll, Portfolio Holder for Planning Policy and Culture

Purpose:

To safeguard the local and the wider economy, the vitality of the borough's town centres and upon valued local services by introducing a non-immediate Article 4 Direction in the Borough's main town centres, local centres and industrial areas.

Recommendations:

- 1) That the Council serves a non-immediate Article 4 Direction to remove nationally permitted development rights for change of use from Use Class E to residential use, in the specified areas in the Borough, to come into effect on 1st August 2022.
- 2) That the Council consults on the non-immediate Article 4 Direction for a minimum period of six weeks.

Benefits to the Community:

To safeguard the local and the wider economy, the vitality of the borough's town centres and upon valued local services.

Key Points

- A. From 1st August 2021, new permitted development rights will remove the need to apply for planning permission for change of use of the Class E (commercial, business and service uses) which meet certain criteria, to residential use.
- B. The need to apply for planning permission will be replaced with a system of prior approval, for which the Council will only be able to consider a narrow suite of matters.
- C. Officers are concerned that the issues they can consider when determining a prior approval application are narrow, and will lead to the loss of a significant amount of Class E floorspace. This potential loss in Class E floorspace would have a negative impact upon the local and the wider economy, the vitality of our town centres and upon valued local services.
- D. The areas proposed to be covered by the Article 4 Direction are the designated town centres, local centres and industrial areas.
- E. In order to avoid the risk of financial compensation, a non-immediate Article 4 Direction is proposed that would come into effect from 1st August 2022. Buildings

currently in office use will still be protected under the Borough's existing Article 4 Direction until 31st July 2022, when all current Article 4 Direction that remove office-to-residential permitted development rights fall away. The proposed Article 4 Direction would ensure that there is no delay between the existing Direction falling away and the new Direction coming into effect.

- F. To enable the Article 4 Direction to be introduced before 1st August 2021, it requested to use Urgency Powers.
- G. A public consultation for a minimum period of six weeks would be carried out as soon as practicable after the Article 4 Direction is made.
- H. A recommendation on whether to confirm the Direction would be taken to Place Committee for approval.

Justification

1. On 1st September 2020, a statutory instrument came into force which, amongst other things, inserted a new Class E (commercial, business and service uses) into The Town and Country Planning (Use Classes) Order 1987, as amended ("the UCO"). On 21st April 2021, the Government enacted a statutory instrument creating a new Class MA of Part 3 of Schedule 2 of the GPDO. This removes the need for planning permission for changes of use of the Class E "commercial, business and service uses" which meet certain criteria to "dwelling houses" within Class C(3) of the UCO. These criteria are set out in Annex B.
2. Planning permission will be replaced with a system of prior approval. When determining an application for prior approval the Council will only be able to consider a narrow suite of matters. These are set out in Annex B.
3. Importantly, these matters do not normally allow a council to consider the impact on the local provision of the type of service being lost, or the contribution that the use being lost has upon the borough's economy or upon the vitality and viability of a town centre it may lie within. The only exception is for registered nurseries or health centres.
4. The Council is concerned that, unfettered, the new system of prior approval will result in:
 - a. the significant loss of the Borough's stock of office floorspace, where the floorspace of the existing office building is of 1,500 sq m or less;
 - b. development which will harm the vitality and viability of our town centres;
 - c. the widespread loss of smaller shops within our local centres and peripheral parts of some town centres;
 - d. a reduction in the diversity of uses in the Borough, so essential to its special character;
 - e. the loss of employment opportunities within the retail and business sector across the Borough; and
 - f. the destruction of important business clusters.
5. The Mayor of London has recently published a report that provides strategic evidence to support Class E commercial to residential Article 4 Directions by local planning authorities in Greater London. The London Plan identifies outer London

town centre **office** locations as cumulatively being of strategic importance to London. Kingston Town Centre, New Malden, Surbiton and Tolworth are all identified as strategically significant town centre office locations in London. Locally they provide an important source of employment and economic activity and contribute to the vibrancy and weekday spend of the town centres and high streets with which they are associated. The Mayor of London supports Article 4 Directions to remove Class E to residential permitted development (PD) rights to safeguard the strategic office functions associated with these locations.

6. The Mayor of London's report also highlights that, despite changes in consumer behaviour, technology and competition from out-of-centre development, London's **town centres** have shown their resilience by adapting and re-inventing themselves. They have diversified over time towards leisure uses and experiential, service retail uses. Vacancy rates in London's town centres and high streets are typically well below those experienced in other parts of the country. In 2019 the London average shop vacancy rate was 9 per cent compared to an average of 12 per cent for Britain as a whole (see Figure E.4). In some locations, the new PDR, in the absence of targeted Article 4 Directions, could undermine the adaptation of London's town centres and high streets as vibrant, successful locations for a range of business, culture, civic and community activities complemented by well-planned housing and mixed-use development. With the right support and with concerted national, London-level and local action, town centres and high streets are well placed to recover from the impacts of the pandemic, and it is essential that these actions are not undermined by permitted development.
7. London's **industrial capacity** can be impacted by Class E to residential PD rights both directly, through the loss of light industrial and creative production uses that fall within Class E, and indirectly, through the introduction of residential uses in industrial areas which can compromise the integrity or effectiveness of these locations in accommodating industrial-type activities and their ability to operate on a 24-hour basis.
8. The differential in value in residential use compared to commercial uses is such that PD rights will impact all areas of London, including vibrant commercial areas, and not just areas of low commercial value.
9. A non-immediate Article 4 direction is recommended. Once confirmed this will remove the freedoms offered under Class MA of the GPDO and mean that planning permission will continue to be required for changes of use of E class uses to residential. The non-immediate element avoids the Council being liable for compensation for any cost of loss of value to the relevant property as well as any other abortive expenditure such as costs arising from a refusal of planning permission for development that would otherwise be permitted under the GPDO.
10. Class MA2 of the GPDO states that an application for prior approval for development under Class MA may not be made before 1st August 2021. Class MA1 of the GPDO also states that development is not permitted by Class MA before 1 August 2022, if the proposed development is of a description falling within Class O of Part 3 of Schedule 2 to the GPDO (change of use from offices to dwellinghouses), and the development would not have been permitted under Class O immediately before 1st August 2021 by virtue of the operation of an Article 4

direction which is still in force. The Council already has an Article 4 Direction in place which removes permitted development rights allowing the change of use from offices to residential. The effect of these transitional arrangements means the existing Direction will remain effective until 1st August 2022. However, given that the Council cannot confirm this new non-immediate direction before August 2022, there will be a 12-month period when planning permission will not be required for the change of use of non-office Class E uses to residential.

11. It is only by the use of the Article 4 Direction, and through the requirement to seek planning permission, can the Council have regard to the relevant policies within the adopted Development Plan. Article 4 Directions can be a useful tool for ensuring that development capacity is optimised through site allocations, masterplans and town centre strategies, delivering better outcomes for housing delivery, housing quality and place-making. As such, the Article 4 direction meets the legal test in Article 4(1) of the GPDO in that the Council is “satisfied that it is expedient that development... should not be carried out unless permission is granted for it on an application...”.
12. Paragraph 53 of the National Planning Policy Framework (July 2021) states:
“The use of Article 4 directions to remove national permitted development rights should:
 - where they relate to change from non-residential use to residential use, be limited to situations where an Article 4 direction is necessary to avoid wholly unacceptable adverse impacts (this could include the loss of the essential core of a primary shopping area which would seriously undermine its vitality and viability, but would be very unlikely to extend to the whole of a town centre)
 - in other cases, be limited to situations where an Article 4 direction is necessary to protect local amenity or the well-being of the area (this could include the use of Article 4 directions to require planning permission for the demolition of local facilities)
 - in all cases, be based on robust evidence, and apply to the smallest geographical area possible.
13. The Article 4 Direction meets the tests as set out in the National Planning Policy Framework, as:
 - a. it is limited to situations where it is necessary to avoid wholly unacceptable adverse impact - In this case to protect the loss of shops and services in town centres, local centres, without which their vitality and viability could be permanently affected.
 - b. the areas to be covered are based on existing town centres, local centres and industrial areas that are designated in the adopted Development Plan due to their contribution to the local economy at either the wider strategic or local level.
14. The Council has considered the spatial extent of the Article 4 direction. Given the geographical locations of the Borough’s buildings that fall under Class E (including shops, restaurants, offices and workshops), the Council is seeking an Article 4 direction which covers the areas specified in Annex A, which covers all of the designated town centres, local centres, Strategic Industrial Locations (SILs) and

Locally Significant Industrial Sites. This reflects the areas covered by the existing Article 4 Direction for office-to-residential permitted development rights, but excludes the area around Norbiton (although the Coombe Road and Kingston Hill/Park Road local centres would be covered).

15. This new Article 4 Direction reflects the value that the Council places upon all of our town centres, local centres and industrial areas, and the role that they play in supporting the Borough's economy and in serving the day-to-day needs of the Borough's residents.

Timescales

16. It is considered necessary to introduce the Article 4 Direction prior to 1st August 2021 for the reasons set out in this report.
17. Officers will begin preparing a public consultation as soon as practicably possible after the introduction of the Article 4 Direction. The consultation lasts for a period of at least six weeks.
18. Confirmation of the Article 4 Direction cannot be made within 12 months of its introduction. A final decision will need to be made by Place Committee, which is likely to be in early 2022.
19. A local planning authority must, as soon as practicable after confirming an Article 4 Direction, inform the Secretary of State for Housing, Communities and Local Government. The Secretary of State does not have to approve Article 4 Directions, and will only intervene when there are clear reasons for doing so.

Resource Implications

20. The costs associated with the creation of an Article 4 Direction amount to officer time and the public consultation (including printing and posting letters) and will be covered by the existing budget for Strategic Planning.

Legal Implications

21. An Article 4 Direction removes nationally permitted development rights.
22. The Council is allowed to serve an Article 4 Direction with non-immediate effect in accordance with Article 4(1) of the Town and Country Planning (General Permitted Development) Order 2015 where they are satisfied that the type of development set out in the Schedule should not be carried out unless permission is granted for it on application, because it would be prejudicial to the proper planning of the area and constitute a threat to the amenities of that area.
23. Schedule 3 advises that a non-immediate Article 4 Direction takes effect at least 12 months after it is made. It can only be confirmed by the Council after the 12-month period has passed, having taken into account any representations received during the public consultation. The Council must notify the Secretary of State on the same day the notice is made.
24. Schedule 3 explains that the Council must consult on a non-immediate Article 4 Direction by (a) local advertisement, (b) site display at no fewer than two locations

within the area to which the direction relates for a period of no less than six weeks and (c) by serving the notice on the owner and occupier of every part of the land within the area to which the direction relates, unless this is impractical.

25. The Council has considered the human rights issues relevant to this matter, especially Article 1 of the First Protocol which is the right to enjoy property and possessions. It is considered that the action proposed in this report represents an appropriate balance between the rights of the landowner (to enjoy land subject to the reasonable and proportionate control by a public authority) and in the interests of those affected by the matter and the wider public interest.
26. Owners and occupiers of the land should note that the Article 4 Direction does not prevent the development to which it applies, but instead requires that planning permission is first obtained from the Council for that development.

Risk Assessment

27. The serving of a non-immediate Article 4 Direction avoids the risk of financial compensation.

Equalities Assessment

28. An EqIA was not completed because this report does not propose changes to existing service-related policies or the development of new service-related policies.

Background Papers

- GLA Report on strategic evidence to support London borough Article 4 Directions (commercial to residential), July 2021
- National Planning Policy Framework, July 2021

Annexes

Annex A - Areas to be covered by the Article 4 Direction

Annex B - Criteria for determining Class MA prior approval applications

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Annex A - Areas to be covered by the Article 4 Direction

1. Kingston Town Centre
2. Surbiton District Centre
3. New Malden District Centre
4. Tolworth District Centre
5. Barwell Business Park SIL
6. Chessington Industrial Area SIL
7. St Johns Industrial Area LSIS
8. Cambridge Road and Hampden Road LSIS
9. Silverglade Business Park LSIS
10. Red Lion Road LSIS
11. Fairfield Trade Park LSIS
12. Canbury Park LSIS
13. London Road LSIS
14. St George Industrial Estate LSIS
15. Tudor Drive Local Centre
16. Richmond Road Local Centre
17. Kings Road Local Centre
18. Kingston Vale Local Centre
19. Crescent Road Local Centre
20. Ewell Road S Local Centre
21. Kingston Hill and Park Road Local Centre
22. Coombe Road Local Centre
23. Cambridge Road Local Centre
24. The Triangle Local Centre
25. Kingston Road W Local Centre
26. Kingston Road E Local Centre
27. Burlington Road Local Centre
28. South Lane Local Centre
29. Chiltern Drive Local Centre
30. Malden Manor Local Centre
31. Plough Green Local Centre
32. Ewell Road N Local Centre
33. Berrylands Road Local Centre
34. Villiers Avenue Local Centre
35. Surbiton Road Local Centre
36. Alexandra Drive Local Centre
37. Ace of Spades Local Centre
38. Hook Parade and Elm Road Local Centre
39. Chessington North Parade Local Centre

Annex B - Criteria for determining Class MA prior approval applications

Class MA – commercial, business and service uses to dwellinghouses Permitted development

MA. Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class E (commercial, business and service) of Schedule 2 to the Use Classes Order to a use falling within Class C3 (dwellinghouses) of Schedule 1 to that Order.

Development not permitted

MA.1.—(1) Development is not permitted by Class MA—

(a) unless the building has been vacant for a continuous period of at least 3 months immediately prior to the date of the application for prior approval;

(b) unless the use of the building fell within one or more of the classes specified in sub-paragraph (2) for a continuous period of at least 2 years prior to the date of the application for prior approval;

(c) if the cumulative floor space of the existing building changing use under Class MA exceeds 1,500 square metres;

(d) if land covered by, or within the curtilage of, the building—

(i) is or forms part of a site of special scientific interest;

(ii) is or forms part of a listed building or land within its curtilage;

(iii) is or forms part of a scheduled monument or land within its curtilage;

(iv) is or forms part of a safety hazard area; or

(v) is or forms part of a military explosives storage area;

(e) if the building is within—

(i) an area of outstanding natural beauty;

(ii) an area specified by the Secretary of State for the purposes of section 41(3) of the Wildlife and Countryside Act 1981(3);

(iii) the Broads;

(iv) a National Park; or

(v) a World Heritage Site;

(f) if the site is occupied under an agricultural tenancy, unless the express consent of both the landlord and the tenant has been obtained; or

(g) before 1 August 2022, if—

(i) the proposed development is of a description falling within Class O of this Part as that Class had effect immediately before 1st August 2021; and

(ii) the development would not have been permitted under Class O immediately before 1st August 2021 by virtue of the operation of a direction under article 4(1) of this Order which has not since been cancelled in accordance with the provisions of Schedule 3.

(2) The classes mentioned in sub-paragraph (1)(b) are the following classes of the Use Classes Order—

(a) the following classes of the Schedule as it had effect before 1st September 2020—

(i) Class A1 (shops);

(ii) Class A2 (financial and professional services);

(iii) Class A3 (food and drink);

(iv) Class B1 (business);

(v) Class D1(a) (non-residential institutions – medical or health services);

(vi) Class D1(b) (non-residential institutions – crèche, day nursery or day centre);

- (vii) Class D2(e) (assembly and leisure – indoor and outdoor sports), other than use as an indoor swimming pool or skating rink;
- (b) on or after 1st September 2020, Class E (commercial, business and service) of Schedule 2.

Conditions

MA.2.—(1) Development under Class MA is permitted subject to the following conditions.

(2) Before beginning development under Class MA, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to—

- (a) transport impacts of the development, particularly to ensure safe site access;
- (b) contamination risks in relation to the building;
- (c) flooding risks in relation to the building;
- (d) impacts of noise from commercial premises on the intended occupiers of the development;
- (e) where—
 - (i) the building is located in a conservation area, and
 - (ii) the development involves a change of use of the whole or part of the ground floor, the impact of that change of use on the character or sustainability of the conservation area;
- (f) the provision of adequate natural light in all habitable rooms of the dwellinghouses;
- (g) the impact on intended occupiers of the development of the introduction of residential use in an area the authority considers to be important for general or heavy industry, waste management, storage and distribution, or a mix of such uses; and
- (h) where the development involves the loss of services provided by—
 - (i) a registered nursery, or
 - (ii) a health centre maintained under section 2 or 3 of the National Health Service Act 2006(4), the impact on the local provision of the type of services lost.

(3) An application for prior approval for development under Class MA may not be made before 1 August 2021.

(4) The provisions of paragraph W (prior approval) of this Part apply in relation to an application under this paragraph as if in the introductory words in sub-paragraph (5), for “and highways impacts of the development” there were substituted “impacts of the development, particularly to ensure safe site access”.

(5) Development must be completed within a period of 3 years starting with the prior approval date.

(6) Any building permitted to be used as a dwellinghouse by virtue of Class MA is to remain in use as a dwellinghouse within the meaning of Class C3 of Schedule 1 to the Use Classes Order and for no other purpose, except to the extent that the other purpose is ancillary to the use as a dwellinghouse.”.