

DB/230084/L0003



29th April 2024

Neath Port Talbot County Borough Council
Planning Department
The Quays
Brunel Way
Baglan Energy Park
Neath
SA11 2GG

Dear Sir/Madam

**On behalf of United UK Real Estate Investment Industrial Holdings Ltd:
Section 96A – Non-material amendment to remove Condition 2 and 5 as set out under
planning permission P2023/0816 at Unit 3, Kenfig Industrial Estate, SA13 2PE**

On behalf of United UK Real Estate Investment Industrial Holdings Ltd (“the applicant”), please find enclosed an application submitted under S96A for the removal of Condition 2 and 5 as set out under planning permission P2023/0816. The application is submitted via the planning portal (Reference: PP-13021844) and comprises of the following:

- Application forms duly completed and signed; and
- Site location plan 230084/P0001; and

The requisite fee of £115.00 will be settled directly by the applicant.

Site location and background

The application unit forms part of the wider South Wales Distribution Centre located on Kenfig Industrial Estate. The Industrial Estate extends to approximately 50 hectares and is well located in close proximity to the M4 motorway.

South Wales Distribution Centre was created when BorgWarner, an American automotive business began a phased closure of their plant. From available online planning records, it appears that the site benefitted from a mixed Class B2/B8 planning permission. Following the phased closure and subsequent withdrawal from the site it has since been sub-divided to create smaller units to house a variety of employment uses.

Unit 3 is located in the northern corner of the site and extends to 9,008 sq m (GIA) and benefits from an external yard area. Access to the Unit is taken from a shared road that connects to the spine road of the wider employment area to the south.

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In September 2023, Rochefreight UK took occupancy of the unit on the understanding that the unit benefitted from Class B8 consent. Following an appraisal of the unit, it was concluded that it did not benefit from Class B8 use. As such, in order to regularise the position, Mango was instructed to submit a Section 73A application. On 23rd February 2024, planning permission was granted for "Section 73A: For retrospective change of use to Class B8 (Storage or distribution).

The permission was granted subject to conditions, including the following two:

Condition 2 states:

"Before beginning any development at the site, you must do the following: -

a) Notify the Local Planning Authority in writing that you intend to commence development by submitting a Formal Notice under Article 24B of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPWO) in the form set out in Schedule 5A (a newly inserted Schedule) of the DMPWO (or in a form substantially to the like effect); and

b) Display a Site Notice (as required by Section 71ZB of the 1990 Act) in the form set out in Schedule 5B (a newly inserted Schedule) of the DMPWO (or in a form substantially to the like effect), such Notice to be firmly affixed and displayed in a prominent place, be legible and easily visible, and be printed on durable material. Such Notice must thereafter be displayed at all times when development is being carried out"

Condition 5 states:

"Within three months from the date of this permission, full details of the method to enable the provision of gigabit capable broadband infrastructure from the site boundary to the building shall be submitted to and agreed in writing by the local planning authority. The approved scheme shall be fully implemented on site within two months from the date of its approval and shall be retained as such thereafter".

Section 96A

Section 96A of the Town and Country Planning Act 1990 provides a mechanism to effect non-material changes to a consented development, including variation/removal of conditions.

Under subsection (1) of Section 96A, an LPA may make a change to any planning permission if they are satisfied that the change is not material. Further, under subsection (3) the power conferred by (1) includes the power to remove or alter existing conditions.

As such, this application is submitted under Section 96A for the removal of Condition 2 and 5 for the following reasons.

Condition 2

It is understood that this condition was imposed as an oversight by the LPA. Insofar as the original application was submitted under Section 73A ie. it was retrospective, Part 1 of the condition could not be complied with. Furthermore, insofar as there are no physical works being undertaken by nature of the application being for change of use, the requirement to erect a

notice during the course of the development is obsolete. As such, it respectfully requested that Condition 2 be removed.

Condition 3

Condition 3 requires the applicant to submit details of gigabit infrastructure for approval within 3 months of the date of the permission and installed within 2 months of the approval.

Officers have indicated that all applications including change of use must have this condition included as they have received verbal advice from PEDW to do so. Moreover, officers suggested that scale of the change of use on this occasion also influenced their decision to include the condition.

PEDW has issued no formal guidance to support the actions of the LPA in this instance.

The imposition of conditions on a planning permission is governed in Wales by Circular WGC 016/2014 "The Use of Planning Conditions for Development Management".

At Paragraph 1.2 it states:

"The power to impose conditions when granting planning permission is very wide. If used properly, conditions can enhance the quality of development and enable many development proposals to proceed where it would otherwise have been necessary to refuse planning permission. The objectives of planning, however, are best served when that power is exercised in such a way that conditions are clearly seen to be fair, understandable, reasonable and practicable. This circular sets out guidance on how this can be achieved".

Paragraph 1.3 states:

"Chapter 3.0 details the six tests that must be applied when drafting a planning condition. The chapter stresses that conditions should only be imposed where they are both necessary and reasonable, as well as enforceable, precise and relevant both to planning and to the development to be permitted. Attention is particularly drawn to paragraphs 3.2 to 3.9 which advise that in considering whether a condition is necessary authorities should ask themselves whether planning permission would have to be refused if the requirements of that condition were not imposed..."

Paragraph 1.4 states:

"The operation of the planning system should instil public confidence and the sensitive use of conditions can assist in achieving this. The use of conditions that are unreasonable or unenforceable can damage that confidence and the use of too many conditions can be confusing..."

As the Council will be aware, the Courts have set out criteria for the validity of planning conditions. We argue that the imposition of Condition 5 does not satisfy the relevant criteria.

Unnecessary

Firstly, the Condition is unnecessary. The Council would not have refused planning permission had the Condition not been imposed. As the Council will be aware, they approved an

application on an adjoining unit (2B) for the same proposal only a matter of weeks before this decision was issued. That permission was issued without such a Condition (Ref: P2023/0823).

Indeed, this is supported further with a review of recent consents issued by the Council for other change of use applications. The below list were all approved without the imposition of a similar Condition.

P2023/0425 - change of use of restaurant to Class B1 – 2nd August 2023

P2023/0510 - change of use to B8 storage – 13th September 2023

P2023/0729 – change of use to class B8 for the siting of storage containers – 3rd January 2024

P2023/0890 – change of use to A3 – 26th January 2024

P2024/0023 – retention of cofu of garage to car valeting – 9th February 2024

P2024/0041 – change of use to Class A2 – 16th February 2024

Moreover, having undertaken a review of change of use applications submitted to other Council's across South Wales over the last 18 months, there is no evidence that any other Council is imposing a similar condition.

As such, it is argued that the Condition is unnecessary.

Unreasonable

Secondly, the Condition is unreasonable. With regards to Broadband, PPW 12 states at 5.2.21:

"New development proposals should include the provision of 'gigabit capable' broadband infrastructure from the outset".

This is replicated in Future Wales 2040 under Policy 13.

The supporting text states:

"Typically this will apply to developments where people are present, for example new housing, business and commercial premises, and public buildings. Local Development Plans should include policies to help deliver this".

It continues:

*"'Gigabit capability' will for the most part be fibre, but could also include fixed wireless access. For the former this will mean that the developer will need to install underground ducting to allow the communications provider to install fibre to connect easily with residents and businesses, and for fixed wireless infrastructure the communications provider may need to erect a mast and/or install small antennae. **This helps negate the need to retro-fit developments in the near future to accommodate fibre or any new technologies that arise**". (our emphasis)*

The very fact that it is intended to negate the need to retro-fit would suggest surely that it does not apply to existing buildings. Indeed, to require retro fitting would be entirely contrary to PPW, which states that new development proposals should provide gigabit broadband from the "outset".

Moreover, the consultations in respect of gigabit infrastructure were related to new homes, and upgrading of Part R of the Building Regulations.

As you are aware, the application was submitted under Section 73A and sought retrospective change of use of an existing building to Class B8. No new physical development is proposed as part of the application.

If this were a new Class B8 unit being constructed, I would endorse fully the need for such a Condition. However, this is not new build development and, as such, we argue that the requirement is not triggered in this instance. Indeed, as the supporting text to Policy 13 highlights, the requirement to introduce infrastructure for “new” developments is to negate the need to retro-fit developments in the near future. PPW refers to “from the outset”. The reading of PPW and Policy 13 is that it can only apply logically to “new” build development and not to existing.

To support this, I discussed the matter with other senior officers across South Wales. The response was the same. None are being instructed to impose such a Condition on change of use applications because of the potential issues arising and that it is only being applied to “new” build proposals. Indeed, when Welsh Government consulted on gigabit infrastructure, it was on the basis of “new” build housing only. Which is entirely logical.

Additionally, I asked the applicant to speak with the broadband provider in the area to establish if gigabit broadband was available or indeed was there an intention to provide it. The response was no to both.

On the basis of the above, we argue that the imposition of the Condition is unreasonable in that it does not comply with the tenor of Welsh Government policy. There is no argument that it should apply to “new” build proposals but not for change of use, particularly retrospective in nature. Moreover, insofar as there is no intention of the broadband provider to bring gigabit provision to the area, it is unreasonable to expect an applicant to make infrastructure provision available for something that is not going to come forward.

Should the Council be minded to retain the Condition then it should be made clear that it will have practical implications for so doing, which will be both costly and timely.

As such, we request respectively that Condition 5 be removed.

Assessment

There is no statutory definition of a ‘non-material amendment’. This is because the materiality of a change depends on a number of factors such as the context of the overall scheme, the amendments being sought to the original planning permission, the specific circumstances of the site and surrounding areas, which will vary from one application to another.

The responsibility for determining whether a proposed change is non-material lies with the local planning authority.

When assessing whether an amendment is non-material, the following guidelines have been set out by the Welsh Government within “Planning Guidance: Approving non-material amendments to an existing planning permission” July 2014. At paragraph 2.6 of the guidance, the following is set out:

“a(i) Is the scale of the proposed change great enough to cause an impact different to that caused by the original approved; and

The proposed removal of the conditions does not alter the scale of the development.

a(ii) Would the proposed change result in a detrimental impact either visually or in terms of local amenity.

The proposed removal of the conditions will not impact upon visual or local amenity.

b) Would the interests of any third party or body be disadvantaged in planning terms; or

The proposed removal of the conditions would not disadvantage third party or body interests.

c) would the proposed changes conflict with national or development plan policies.”

The proposed removal of conditions will not conflict with national or development plan policies.

Conclusions

When assessed against the four criteria as set out within Government guidance, the proposed removal of Conditions 2 and 5 do not cause an impact different to that caused by the original approved; do not result in a detrimental impact either visually or in terms of local amenity; do not impact upon the interests of any third party and do not conflict with national or development plan policies.

As such, the proposed removal of conditions is considered to be non-material.

I trust that the enclosed is complete and will allow the prompt registration of this application. Should you have any queries, or require any additional information, please do not hesitate to contact me.

Yours faithfully

Darren Brown
Associate

Encs.