

**REPORT TO DEVELOPMENT MANAGEMENT COMMITTEE**  
**5 July 2023**

**REFERENCE:** HW/FUL/23/00015

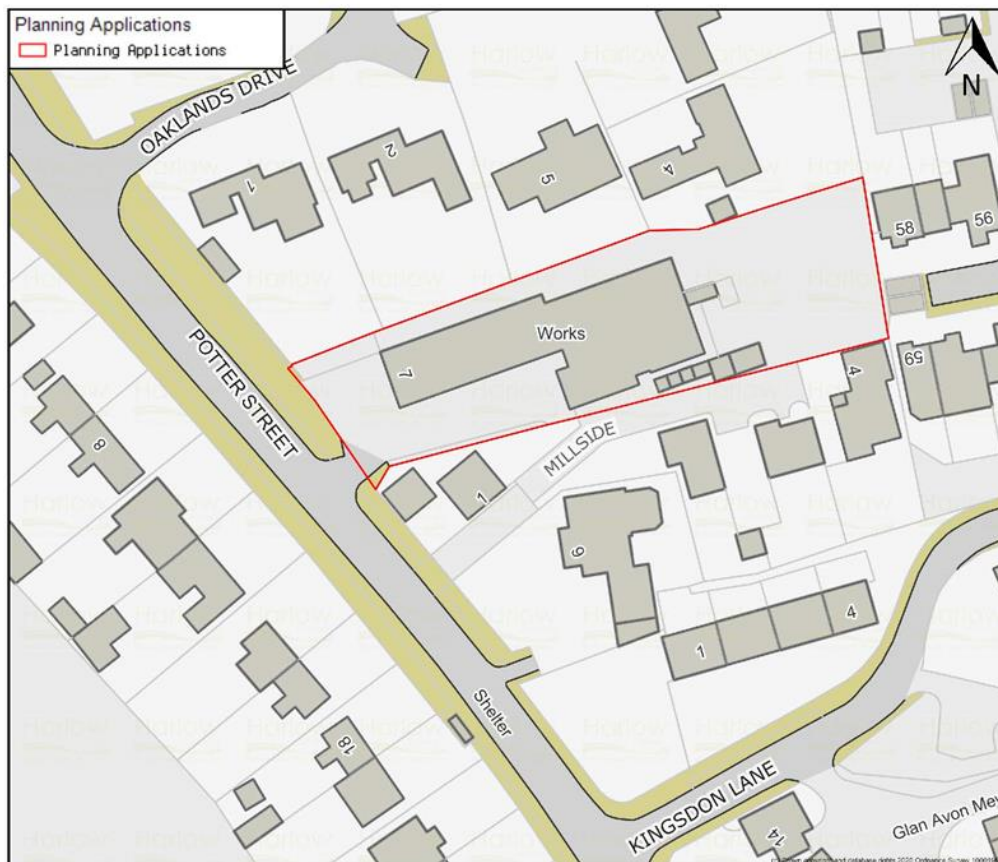
**OFFICER:** Mick Gavin

**APPLICANT:** M B Yildiz

**LOCATION:** 7 Potter Street  
Harlow  
Essex  
CM17 9AD

**PROPOSAL:** External works (part implemented) consisting of partial demolition and realignment of south elevation with insertion of 2 new windows and new door, new sliding entrance doors and new window to west (front) elevation, internal blocking up of some windows, these works to facilitate change of use within Use Class E to a supermarket and office spaces. New side access and rear car parking area created.

## LOCATION PLAN



## **REASON BROUGHT TO COMMITTEE:**

This application was considered by the Committee at its meeting of 12 April 2023.

The previous report to the Committee is reproduced in full at Appendix 1 for reference.

This is an update report.

The Committee resolved to defer consideration of the application to allow officers to take legal advice.

Legal advice has been received and the application must now be reconsidered by Committee.

## **Background**

The recommendation to Committee was that the application be refused for the following reasons:

- 1. No sequential test has been submitted to demonstrate that the use cannot be located within the Town centre, a Neighbourhood Centre or Prentice Place Hatch or other Hatch. Given the size of the proposed shop and its relative proximity of the Prentice Place Hatch it is considered likely that the retail outlet would result in harm to the vitality and viability of that Hatch. No impact assessment was submitted to demonstrate this would not occur. The proposal would therefore conflict with policies RS1, PR5 and IN1 of the HDLP.*
- 2. The proposal would result in significant harm to the amenities of neighbouring residents in terms of noise, disturbance, light pollution and loss of privacy arising from intensification of vehicle and pedestrian traffic at the site and the introduction of light pollution arising from signage, window openings, and vehicle headlights. These impacts would be exacerbated by night-time operation of the retail unit given the area's low night-time ambient noise levels and absence of night-time lighting other than street lamps. The proposal thereby conflicts with policies PL1 and PL10 of the Harlow Local Development Plan 2020.*
- 3. The proposal would be detrimental to highway safety by virtue of inadequate on-site manoeuvring space which would fail to efficiently and safely accommodate parking and servicing resulting in congestion and on street parking to the detriment of the free and safe flow of traffic, and absence of arrangements to segregate vehicle and pedestrian traffic. The proposal thereby conflicts with policies IN2 and IN3 of the Harlow Local Development Plan 2020.*

Officer's sought legal advice in response to the legal opinion submitted by a legal opinion submitted by the applicant. The essential argument in the applicant legal opinion is that:

(1) the change of use of the site from light industrial to a supermarket and offices is a change within Class E of the Town and Country Planning (Use Classes) Order 1987 ("Class E", "UCO 1987"), thus it does not amount to development requiring planning permission;

(2) the application is limited to the physical works proposed to the building and the creation of the car park; and

(3) therefore the Council must confine its consideration to those physical works and the creation of the car park, without considering the use of the site as offices and a supermarket. It is contended that the Council's approach is 'unlawful' and 'unreasonable'.

### Legal Advice

The legal advice received by officers sets out various case law, where similar issues have arisen in the past and come before the courts. It is clear from this that the works which have been undertaken at 7 Potter Street do not constitute what is termed a 'new chapter'. This is where development at a site is so extensive that the site's existing use rights are extinguished and a nil use applies to a site ie. a new planning history begins from that point.

The legal advice is clear that notwithstanding the physical changes to the building and site, the existing Class E use rights remain. The use of the buildings for activities that fall within Use Class E, including retail and offices, does not constitute development and does not require planning permission.

In the light of this, two approaches to the assessment have been explored and these are explained below. One approach is to take a narrow view of the application, taking the applicant's view that only the physical alterations need permission. The other is to take a wider view, that the proposed use is part of the proposed development.

### The narrow view of the application

The Council could adopt the narrow view contended for by the applicant and assess the application by considering the acceptability of only the operational development, namely the alterations to the building on the site and the creation of the car park. On this basis, the Council would not consider the acceptability of the use of the site for offices and a supermarket.

If this approach was adopted, the Council could only refuse the application for reasons related to the operational development, namely the physical works. The three reasons for refusal proposed (above) would not be compatible with this approach in their current form because they are all dependent on consideration of the use of the site, i.e. the proposed office and supermarket use. More specifically:

The first proposed reason for refusal is exclusively concerned with the acceptability in principle of the proposed supermarket use. This reason could not be amended to comply with the narrow view of the Application.

The second proposed reason for refusal is concerned with the impact on neighbouring amenity 'arising from intensification of vehicle and pedestrian traffic at the site'. The intensification referred to here is based on the proposed supermarket use. However, it would be possible for this reason for refusal to be amended to comply with the narrow view of the application, by focussing on the proximity of the new access way and parking areas to the neighbouring properties and the impact that the use of those spaces by cars and pedestrians will have on the neighbouring properties. This is based on the use of those areas, but is not dependent on the consideration of the acceptability of the proposed use.

The third reason for refusal is concerned with highway safety arising from the 'parking and servicing', resulting in congestion. This again is premised on the proposed use of the site, for example the likely trip generation, but this could be amended so that it referred to the

adequacy of the servicing and car parking space within the Site (e.g. space for safe manoeuvres) without being dependent on the proposed use.

## Conclusion

If the Council wishes to take a narrow view to the application, on the same terms as the applicant. It would be possible for the Council to refuse to grant planning permission on that approach, but the proposed reasons for refusal would require amendment as set out above.

## The wider view of the Application

The alternative approach would be for the Council to assess the application on the basis that the proposed use is part of the proposed development, i.e. on the basis that the grant of planning permission would include a grant of permission for the proposed use as offices and a supermarket, such that it was then necessary and appropriate to consider the acceptability of that use.

The first argument is that the package of works, taken as a whole, both internal and external, includes the proposed use.

The second argument relies on section 75 of Town and Country Planning Act 1990 (TCPA) which materially provides:

‘(2) Where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used.

(3) If no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed.’

This applies in this case as the physical works facilitate the purposes, in this case retail and office, for which the building is to be used.

## **Conclusion**

There is an arguable basis for taking a wider view to the application, on the basis that a grant of planning permission will include a grant of planning permission for the proposed use. This could be advanced: (1) based on the interpretation of the Application; and/or (2) by operation of s. 75(2) TCPA 1990.

In the light of this advice it is concluded that this wider view should be adopted, as the use of the building cannot be divorced from the operational works. They are part of one application and should be considered as such.

On this basis, it would be possible for the Council to refuse planning permission for the proposed reasons for refusal.

## Planning Assessment (Updated)

In the light of the above considerations it is clear that the existing Class E use rights are retained at the site, and the use of the buildings for retail and offices purposes does not constitute a change of use and does not, therefore, in itself need planning permission.

In taking the wider view set out above, however, it can be argued that because the physical works facilitate the use, the grant of permission would include the grant of permission for the proposed use. On that basis it can be argued that it would be possible for the Council to refuse planning permission for the proposed three reasons for refusal as recommended in the report to the June Committee,

#### Environmental Health update

Since the April Committee Environmental Health officers have assessed impacts from light and noise pollution. It has been found that no Statutory Nuisance is occurring.

#### **RECOMMENDATION**

**That Committee resolve to REFUSE PLANNING PERMISSION for the following reasons:**

1. No sequential test has been submitted to demonstrate that the use cannot be located within the Town centre, a Neighbourhood Centre or Prentice Place Hatch or other Hatch. Given the size of the proposed shop and its relative proximity of the Prentice Place Hatch it is considered likely that the retail outlet would result in harm to the vitality and viability of that Hatch. No impact assessment was submitted to demonstrate this would not occur. The proposal would therefore conflict with policies RS1, PR5 and IN1 of the HDLP.
2. The proposal would result in significant harm to the amenities of neighbouring residents in terms of noise, disturbance, light pollution and loss of privacy arising from intensification of vehicle and pedestrian traffic at the site and the introduction of light pollution arising from signage, window openings, and vehicle headlights. These impacts would be exacerbated by night-time operation of the retail unit given the area's low night-time ambient noise levels and absence of night-time lighting other than street lamps. The proposal thereby conflicts with policies PL1 and PL10 of the Harlow Local Development Plan 2020.
3. The proposal would be detrimental to highway safety by virtue of inadequate on-site manoeuvring space which would fail to efficiently and safely accommodate parking and servicing resulting in congestion and on street parking to the detriment of the free and safe flow of traffic, and absence of arrangements to segregate vehicle and pedestrian traffic. The proposal thereby conflicts with policies IN2 and IN3 of the Harlow Local Development Plan 2020.