

LOCAL PLAN SUB-COMMITTEE – 18 AUGUST 2022

PART I – NOT DELEGATED

POLICY AND RESOURCES COMMITTEE- 18 AUGUST 2022

PART I - DELEGATED

5. CONSIDERATION OF ARTICLE 4 DIRECTIONS TO REMOVE PERMITTED DEVELOPMENT RIGHTS (DCES)

1 Summary

1.1 This report sets out the implications of the new Permitted Development Rights from Class E (commercial, business and services) to Class C3 (residential) that came into effect from 1 August 2021. It sets out options and recommendations for bringing forward Article 4 Directions for selective parts of the Three Rivers District to remove this PDR, withdrawing permitted development rights under Class MA.

2 Details

2.1 Significant changes to the Use Classes Order came into force on 1 September 2020. Many town centre and employment uses now fall under the new Class E (commercial, business and service use). This means there is now far greater flexibility for changes of use without the need to obtain planning permission, as shown below:

Table 1 Changes to Use Classes

Use	Use Class	
	Up to 31.08.20	From 01.09.20
Shop – unless now F.2 (see below)	A1	E
Shop not more than 280sqm mostly selling essential goods, including food and at least 1km from another similar shop	A1	F.2
Financial and professional services	A2	E
Café or restaurant	A3	E
Pub or drinking establishment	A4	Sui generis
Hot food takeaway	A5	Sui generis
Offices	B1(a)	E
Research and development	B1(b)	E
Light industry	B1(c)	E
General industry	B2	B2
Storage and distribution	B8	B8

Hotels, boarding and guest houses	C1	C1
Clinics, health centres, crèches, day nurseries, day centre	D1	E
Museums, public libraries	D1	F.1
Cinemas, concert halls, bingo halls and dance halls	D2	Sui generis
Gymnasiums, indoor recreation not involving motorised vehicles or firearms	D2	E

- 2.2 In March 2021 the Government published legislation¹ in England to introduce a new and much broader permitted development right (PDR) - new class MA. The new Class MA enabled changes of use from Class E to residential without the need for planning permission from 1 August 2021. Prior approval from the local planning authority is still required on various planning matters.
- 2.3 There were some limitations included in these new PDRs. The PDR does not apply if more than 1,500 sqm of cumulative floorspace is to be converted. This is a significant restriction for office to residential conversions. There are also limitations relating to location of development, longevity of existing use and vacancy.
- 2.4 The premises must have been vacant for at least three months prior to the date of the prior approval application. Closures as a result of the Covid-19 pandemic will not count towards this vacancy requirement. It would be of significant concern if these units were deliberately left unlet to benefit from the PDRs from 1 August 2022.
- 2.5 Developers will have several other hurdles to overcome to benefit from new class MA in terms of the impact of noise from commercial premises on intended occupiers, conditions in relation to the loss of social infrastructure uses, the provision of adequate natural light in habitable rooms and must meet the minimum national space standards for housing conversions. These will be assessed through an application for "Prior Approval". This allows the Local Planning Authority to consider the proposals and their likely impacts in regard to certain factors (i.e. transport and highways, flood risk, and how these can be mitigated). In addition, in conservation areas the Council can take account of the impact that the change of use will have on the character or sustainability of the conservation area if the change of use involves the ground floor.
- 2.6 Use Class E includes offices, the research and development of products or processes, and any industrial process (which can be carried out in any residential area without causing detriment to the amenity of the area). These are the uses that relate to the District's employment areas.
- 2.7 Under Article 4 of the General Permitted Development Order (GPDO) the local planning authority (or the Secretary of State) can withdraw specified Permitted Development Rights (PDRs). Article 4 Directions can restrict the scope of PDRs in relation to a particular area and in relation to a particular PDR. Where an Article 4 Direction is in place, a planning application will be required where otherwise the development would fall within PDRs. Article 4 Directions provide an essential and

¹ 1 Statutory Instrument 2021 No.428. The Town and Country Planning (General Permitted Development etc.) (England) (Amendment) Order 2021

necessary tool to allow councils to consider proposals where PDR could be particularly detrimental.

- 2.8 In 2016, the Council made three non-immediate Article 4(1) Directions to remove permitted development rights for changes of use from office and light industrial to residential in the District's three allocated employment areas:
- Croxley Green Business Park – Article 4 Direction to remove permitted development rights for change of use from offices to residential
 - Maple Cross/Maple Lodge Employment Area – Article 4 Direction to remove permitted development rights for change of use from offices to residential
 - Tolpits Lane Employment Area – subject to Article 4 Direction to remove permitted development rights for change of use from offices **and** light industrial to residential
- 2.9 Under the transitional arrangements, where there were existing Article 4 Directions relating to office to residential PDRs (Class O), these remained effective until 31 July 2022. From the 1 August 2022 these Article 4 Directions ceased to exist. As such, from the 1 August Three Rivers' employment areas are no longer protected from PDRs.
- 2.10 Since these Article 4 Directions were introduced, it is considered that there is a continuing need to protect employment areas from the change of use from offices and/or light industrial to residential through permitted development, although further evidence work is required to fully determine whether this is the case. Class MA PDRs will essentially reduce the scope of office to residential (due to there being more prior approval criteria to address) while increasing the scope for change of use from retail to residential as well as introducing new PDRs for various other town centre uses, to change to residential.
- 2.11 As shown in Table 1 above Use Class E includes a wider range of uses than just those relating to employment. It includes commercial uses such as shops and cafes amongst others. These have been subject to PDRs since the 1 August 2021 as there was no Article 4 Direction in place for their protection. In this past year there have been two successful applications for prior approval. Both located in Rickmansworth.
- 2.12 Although the application of PDRs to the District's commercial premises hasn't resulted in a 'free for all' leading to damaging results to our commercial centres it may be prudent to consider protecting the primary shopping frontages in the District with an Article 4 Direction to avoid a gradual chipping away of our high streets.
- 2.13 In order to reinstate the requirement for planning permission for conversions from offices and light industry to residential within the District's allocated employment areas new Article 4 Directions will need to be made.
- 2.14 The test for the use of Article 4 Directions has been amended by the revised NPPF. Previously it was stated that the use of Article 4 directions should be limited to situations where it 'is necessary to protect local amenity or the wellbeing of the area'. The revised NPPF has imposed a much more stringent test where the development relates to a change from non-residential to residential (paragraph 53). In this scenario the use of Article 4 directions should be limited to situations where it 'is necessary to avoid wholly unacceptable adverse impacts'. Additionally, in all cases, Article 4

Directions should be 'based on robust evidence and apply to the smallest geographical area possible'.

- 2.15 These amendments to the NPPF limit the ability for local planning authorities to use Article 4 directions unless they have real justification and evidence for it; certainly the extent of land included in the directions will now be under more scrutiny. It should be noted that any application for making an Article 4 Direction could be delayed or even rejected by the Secretary of State.
- 2.16 Neighbouring authorities in SW Herts have had the process delayed by requests for further justification from the Secretary of State and several London Boroughs have had their Article 4 Directions rejected. These authorities had applied for Article 4 Directions in defined geographical areas however the Secretary of State rejected these saying they failed to take a sufficiently targeted approach and should look at a smaller geographical area.

Table 2 Summary of key dates

1 September 2020	Changes to the Use Classes Order came into force creating new Use Class E (commercial, business and services)
1 March 2021	The Government published legislation to introduce a new, broader Permitted Development Right - Class MA
1 August 2021	New Permitted Development Rights from Class E (commercial, business and services) to Class C3 (residential) came into effect
1 August 2022	Existing Article 4 Directions cease to exist

Evidence, timescales and resources

- 2.17 A significant amount of evidence is required to justify the preparation of Article 4 Directions. The evidence will also guide us on which areas really need Article 4 Directions and their precise boundaries. As such, it should be noted by Members that the making of new Article for Directions will need to take any new evidence into consideration. The required evidence is more onerous now than when the previous Article 4 Directions were made in 2016 so the previous justifications may no longer be valid.
- 2.18 The process of gathering the necessary evidence will take time and resources and the need for taking a targeted approach considering the value of individual units will only add to this. It is estimated that it would take an officer approximately three weeks to prepare the Article 4 notices and accompanying evidence if their sole focus is on this work. This would have knock on effects on other work within the Planning Policy Team, especially work on the Local Plan.
- 2.19 The procedure for making an Article 4 Direction involves a 21-day consultation period following the publication of the Article 4 Direction notice. When the notice is publicised it is also sent to the Secretary of State for consideration. As already stated the Secretary of State may seek further evidence and justification delaying the making of the Article 4 Direction.
- 2.20 The overall time for preparing an Article 4 Direction is expected to be two to three months. In 2016 the process took nearly 4 months. It should be noted that during this

period the employment areas will not be covered by Article 4 Directions and will be susceptible to PDR conversions.

Non-immediate Vs immediate Article 4 Directions

- 2.21 There are two types of Article 4 Directions that can be prepared. The 'standard' non-immediate Article 4 Direction and the immediate Article 4 Direction. The non-immediate option has a 12-month period between the Article 4 Direction being made and it coming into force. This leaves the area covered by the non-immediate Article 4 Direction susceptible to prior approval applications under PDRs for those 12 months. There is therefore the risk associated with this option of offices and light industrial conversions to residential taking place under PDRs during the 12 months before the non-immediate Article 4 Direction comes into force.
- 2.22 The immediate Article 4 Direction on the other hand comes into force immediately after the direction is made. This is followed by consultation and is confirmed after 6 months. When making an immediate Article 4 Direction a local authority would need to demonstrate that development in the area covered by the immediate Article 4 would be prejudicial to the proper planning of the area or constitute a threat to the amenities of the area as set out in schedule 3 'Procedures for Article 4 Directions' of the GPDO.
- 2.23 In making an immediate Article 4 Direction the Council can be liable under section 108 of the Town and Country Planning Act 1990 (as amended) to pay compensation to those whose permitted development rights have been withdrawn but only if, within 12 months of the effective date of the Article 4 Direction, the Council
- 1) Refuses planning permission for development which would otherwise have been permitted development, or
 - 2) Grants planning permission subject to more limiting conditions than the GPDO.
- 2.24 The most significant cause of loss/damage is likely to be the difference between the capital value the property would have had if permission had been granted and the capital value of the property without planning permission. Within Three Rivers, residential values tend to be significantly higher than employment values. Liability to pay compensation is limited to a 12-month period beginning with the date on which the Article 4 Direction comes into operation.
- 2.25 The grounds on which compensation may be claimed are limited to abortive expenditure or other loss or damage directly attributable to the withdrawal of permitted development rights. The onus is therefore on the claimant to prove a financial loss resulting from the refusal to grant permission or from the grant subject to conditions formerly granted by the permitted development.
- 2.26 It is impossible to accurately predict the cost of these compensation claims. Officers estimate that it would likely be no less than £100,000 but more likely be upwards of £500,000, possibly into the millions of pounds.
- 2.27 The Council's insurers have confirmed that these compensation claims would not be covered by insurance as the Council would have chosen to make an immediate Article 4 Direction rather than the 'standard' non-immediate Article 4 Direction.
- 2.28 Advice from Finance is that the financial risk of making an immediate Article 4 is too great and should be avoided.

3 Options and Reasons for Recommendations

- 3.1 The following outlines options for bringing forwards Article 4 Directions and assesses their appropriateness. Further detailed work is needed to assess the existing situation – particularly to understand any recent changes of use and vacancy rates considering the flexibility of Class E and circumstances arising from the pandemic to inform policies in the emerging Three Rivers Local Plan. The South West Herts Economic Study and Retail and Leisure needs assessment will provide supporting evidence in this regard. The drawing of boundaries and the ability to have some control over change of use in those areas is important for supporting economic recovery following the pandemic and in facilitating sustainable communities.

Option 1 – Take no action

- 3.2 The 2016 Article 4 Directions for the District’s employment areas have ceased to exist. Taking no action will mean that the employment areas will remain susceptible to conversions from office and light industrial to residential indefinitely. Other commercial properties in the District’s town centres will also remain susceptible to conversions to residential as they already have been over the last twelve months.
- 3.3 It is considered that the continued harm to the proper planning of our employment areas due to no Article 4 Directions being in place is not acceptable. There is a risk of poor quality housing being developed that makes no contribution to infrastructure or affordable housing. Some of the effects will be dealt with as part of the conditions of prior approval, but these are very limited in scope.

Option 2 – Prepare non-immediate Article 4 Directions covering the District’s three allocated employment areas

- 3.4 The allocated employment areas of Croxley Business Park, Maple Cross/Maple Lodge and Tolpits lane would be the initial focus of evidence gathering. It can be demonstrated that these are small geographical areas compared to the District as a whole, however further work will be required to consider these areas at a more granular level. As such there may be adjustments to the boundaries covered by the non-immediate Article 4 Directions when compared to those prepared in 2016.
- 3.5 It is also possible the evidence work may result in the Council coming forward with one or two of the employment areas rather than all three. We need to be confident that the applications for Article 4 Directions would be successful and pass scrutiny from the Secretary of State. Evidence gathering needs to be done before Officers are able to consider the merits of the individual areas.
- 3.6 This option carries the risk of conversions to residential taking place during the 12 months before the Article 4 Direction comes into force. During this period as above there is a risk of poor quality housing being developed that makes no contribution to infrastructure or affordable housing. Some of the effects will be dealt with as part of the conditions of prior approval, but these are very limited in scope.

Option 3 – Prepare immediate Article 4 Directions covering the District’s three allocated employment areas

- 3.7 As with Option 2 above further evidence work is required to determine whether the need for Article 4 Directions on these areas is justified.
- 3.8 Immediate Article 4 Directions would require applications for conversions from offices and light industry to residential within the Districts allocated employment to seek

planning permission immediately after the Article 4 Direction is made. It should be noted that there will be a period of time where the evidence is being prepared and consultation is taking place that the employment areas won't be covered by Article 4 Directions.

- 3.9 This option carries the risk of compensation claims being made against the Council. These could be anywhere from circa £100,000 to millions of pounds. Advice from Finance is such that the financial risk is too great and should be avoided.

Option 4 – Prepare non-immediate Article 4 Directions covering the District's primary shopping frontages in conjunction with or following on from any Article 4 Directions prepared for the District's employment areas.

- 3.10 Considering that PDRs for changes of commercial uses to residential have already been in place for 12 months and only two prior approvals have been permitted in that time the risk from these conversions is not considered to be high. There is however concern that this could lead to the gradual degradation of our high streets over a longer-term period.

- 3.11 As the risk of conversion to residential is considered lower only non-immediate Article 4 Directions are considered appropriate for the District's primary shopping frontages.

- 3.12 Officers consider the District's employment areas as higher priority in terms of the need for Article 4 Directions to be in place. When taking into consideration timescales and resourcing it would be preferable to undertake this work once any Article 4 Directions for the District's employment areas have been prepared.

4 Policy/Budget Reference and Implications

- 4.1 The recommendations in this report are within the Council's agreed policy and budgets.

5 Equal Opportunities, Staffing, Environmental, Community Safety, Public Health, Customer Services Centre, Communications & Website, Health & Safety Implications

- 5.1 None specific.

6 Financial Implications

- 6.1 Should Members choose Option 3 to make immediate Article 4 Directions there is the risk of compensation Claims against the Council. These claims could have significant financial implications for the Council as these could range from circa £100,000 to millions of pounds.

- 6.2 These claims would not be covered by the Council's insurance so in this scenario the Council would need to consider how it would cover these compensation claims.

- 6.3 Any compensation claim would be a direct call on the Council's General Fund Reserve. The 2021/22 Outturn Report showed planned reserves at 31 March 2023 to be £4.4M compared to a recommended minimum balance of £2M. However, this is before the impact of the contract variation agreed with SLM and the impacts of a pay award above 2% and general inflation is taken into account. Members will need to balance the risk of compensation claims against the impact on reserves.

7 Legal Implications

- 7.1 The Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No 2) Order 2021 ('GPDO 2021') came into effect on 1st August 2021. The GPDO 2021 amends the Town and Country Planning (General Permitted Development Order) 2015 ('GPDO 2015') bringing it into line with the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 which substantially amends the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order") by introducing new use Classes E (commercial, business and service), F.1 (learning and non-residential institutions) and F.2 (local community), which subsumed some existing use classes. Many of the classes of permission in Schedule 2 to the GPDO 2015 are defined by reference to classes of uses specified in the Use Classes Order. The new 'Class MA' permitted development right in the GPDO 2015 allows changes of use from a use falling within Class E to Class C3 (residential). This means that provided the limited requirements and conditions of Class MA are satisfied, it will be possible to make a change of use from a Class E use to a Class C3 use without the need to apply to the local planning authority for planning permission. This permitted development right has become available from 1 August 2021. Article 4 directions restricting changes of use from Office uses to residential will cease effect on 1 August 2022.
- 7.2 The procedures which must be followed in making, modifying or cancelling any Article 4 Direction are set out in Schedule 3 of the GPDO.
- 7.3 **An Immediate Direction** can only be used in the specific circumstances set out in paragraph 2(1), Schedule 3 GPDO 2015. Immediate Directions could only be used to withdraw these proposed development rights if the local planning authority consider they would be prejudicial to the proper planning of their area or constitute a threat to the amenities of their area (paragraph 2(1)(a)). The effect of an immediate Direction is that the permitted development rights are withdrawn with immediate effect but must be confirmed by the local planning authority following local consultation within six months. In order to implement an immediate Direction, the local planning authority must have already begun the consultation processes towards making a non-immediate Article 4 Direction.
- 7.4 **The effect of a non-immediate Direction** is that permitted development rights are only withdrawn upon confirmation of the Direction by the local planning authority following local consultation for at least 21 days and after having given at least 12 months' prior notice of them coming into effect. (but no longer than 2 years after the end of the local consultation period).
- 7.5 The difference between immediate and non-immediate Directions is the potential compensation liability attached to them. Section 108 of the Town and Country Planning Act makes provision for compensation to be payable where an application for planning permission (that would formally have been permitted development) is refused or is granted subject to conditions different from those in the GPDO. However, so long as 12 months' notice is given before the Article 4 direction takes effect, no compensation will be payable.
- 7.6 The Council must have regard to:
- The Public sector equalities duty** to eliminate unlawful conduct under the Equality Act 2010. The duty is set out at Section 149 of the 2010 Act. It requires the Council, when exercising its functions, to have 'due regard' to the need to eliminate discrimination (both direct and indirect discrimination), harassment and victimization and other conduct prohibited under the Act, and to advance equality of opportunity

and foster good relations between those who share a 'protected characteristic' and those who do not share that protected characteristic.

The **human rights issues** relevant to this matter, especially Article 1 of the First Protocol which is the right to enjoy property and possessions.

8 Risk and Health & Safety Implications

8.1 The Council has agreed its risk management strategy which can be found on the website at <http://www.threerivers.gov.uk>. In addition, the risks of the proposals in the report have also been assessed against the Council's duties under Health and Safety legislation relating to employees, visitors and persons affected by our operations. The risk management implications of this report are detailed below.

8.2 The subject of this report is covered by the Planning Policy service plan. Any risks resulting from this report will be included in the risk register and, if necessary, managed within this/these plan(s).

Nature of Risk	Consequence	Suggested Control Measures	Response <i>(tolerate, treat, terminate, transfer)</i>	Risk Rating <i>(combination of likelihood and impact)</i>
Not taking any action	Conversions from use class E to residential degrades our employment areas and high streets	Article 4 Directions can be put in place requiring planning permission for these conversions and bringing the development back within the Council's control	Terminate	6 (medium)
Prepare non-immediate Article 4 Directions	12 month period where conversions from use class E to residential degrades our employment areas and high streets	None	Tolerate	4 (low)
Prepare immediate Article 4 Directions	Compensation claims against the Council with significant	Prepare non-immediate Article 4 Directions	Terminate	12 (very high)

	financial implications			
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8.3 The above risks are scored using the matrix below. The Council has determined its aversion to risk and is prepared to tolerate risks where the combination of impact and likelihood scores 6 or less.

Very Likely ----- Likelihood ----- ▼ Remote	Low	High	Very High	Very High
	4	8	12	16
	Low	Medium	High	Very High
	3	6	9	12
	Low	Low	Medium	High
2	4	6	8	
Low	Low	Low	Low	
1	2	3	4	
Impact ----- Low -----> Unacceptable				

Impact Score

4 (Catastrophic)

3 (Critical)

2 (Significant)

1 (Marginal)

Likelihood Score

4 (Very Likely (≥80%))

3 (Likely (21-79%))

2 (Unlikely (6-20%))

1 (Remote (≤5%))

8.4 In the officers’ opinion none of the new risks above, were they to come about, would seriously prejudice the achievement of the Strategic Plan and are therefore operational risks. The effectiveness of the management of operational risks is reviewed by the Audit Committee annually.

9 Recommendations

9.1 That:

- 1) Members Approve the preparation of non-immediate Article 4 Directions to withdraw permitted development rights for Use Class E (commercial, business and service use) to Use Class C3 (residential) on each of the three District's Employment Site Allocations at:
 - Croxley Business Park-site ref: E(a),
 - Tolpits Lane-site ref: E(b),
 - Maple Cross/Maple Lodge-site ref: E(d).
- 2) Members Approve the preparation, following on from the completion of the employment area Article 4 Directions, of non-immediate Article 4 Directions to withdraw permitted development rights for Use Class E (commercial, business and service use) to Use Class C3 (residential) in the District's primary shopping frontages as set out in the draft Regulation 18 version of the emerging Local Plan.
- 3) Members note that the evidence work involved in preparing the non-immediate Article 4 Directions may influence whether the Article 4 Directions are made or result in changes to the boundaries of the Article 4 Directions.
- 4) Members note the possibility that the Secretary of State may refuse all or part of an Article 4 Direction at these locations.
- 5) That delegated authority is given to the Director of Community & Environmental Services in consultation with the Leader and Lead Member for Infrastructure and Planning Policy to prepare the Article 4 Directions as outlined in recommendations 1 and 2.

Report prepared by: Marko Kalik – Head of Planning Policy and Conservation

Background Papers

National Planning Policy Framework (NPPF, 2021)

National Planning Practice Guidance (NPPG, 2022)

The Town and Country Planning (General Permitted Development) (Amendment) (England) 2015

The Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No 2) Order 2021

The Site Allocations Local Development Document (2014)

South West Herts Economic Study (2019)

South West Herts Retail & Leisure Study (2018)