

Stop the Press

Judicial Review proceedings have been launched by the campaign group Rights: Community: Action to stop the Use Class changes coming into force. This challenge has been made on the basis that the changes to the 1987 Order have been made “without proper consultation and without Parliamentary debate”. The case will be listed in the High Court as a rolled up hearing for 1.5 days within the period between Thursday 8 October and Thursday 15 October 2020. At the time of writing, it is unclear what the implications are for the utilisation of the new Use Classes moving forward but we will provide an update once the court proceedings have been resolved.

On 1 September 2020, significant changes to the Town and Country Planning (Use Classes) Order 1987 (the 1987 Order) came into effect. These changes were made through the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 (the 2020 Regulations).

The 2020 Regulations make wholesale changes to the 1987 Order, abolishing Use Classes A1 (shops), A2 (financial and professional services), A3 (restaurants and cafes), A4 (drinking establishments), A5 (hot food takeaways), B1 (business), D1 (non-residential institutions) and D2 (assembly and leisure) and creating new, broader Use Classes in the form of Use Classes E (commercial, business and service), F.1 (learning and non-residential institutions) and F.2 (local community), which cover some of the previous uses with the rest becoming Sui Generis (meaning “in a class of its own”).

The new Class E covers commercial, business and service uses. This includes uses for purposes such as retail; restaurant; office; financial or professional service; indoor sport; medical; nursery; administrative; and some minor industry.

The new Class F.1 covers learning and non-residential institutions. This includes uses such as non-residential educational uses, as well as use as a museum, art gallery, library, public hall, religious institution or law court.

The new Class F.2 covers local community uses. This includes the use of land as a shop of no more than 280 square metres, mostly selling essential goods, including food, and at least 1 kilometre from another similar shop; as a community hall; for outdoor sport; as a swimming pool; or as a skating rink.

A number of uses that previously fell into one of the remaining uses within Class A or Class D have been reclassified as Sui Generis. New Sui Generis uses include public houses; wine bars; drinking establishments with or without expanded food provision; hot food takeaways; live music venues; cinemas; concert halls; bingo halls; and dance halls.

A full description of the changes can be found in the table within the Appendix to this article.

1. How Will These Changes Affect the Use of Development That Already Has Planning Permission?

The impact of these changes upon the use of a development that already has the benefit of planning permission depends on the Use Class that such development previously fell into. There are two circumstances that can arise:

- **Where the use of a site would previously have been categorised as A1; A2; A3; or B1.**

Article 7 of the 2020 Regulations states that development in these Use Classes should automatically be treated as falling within Class E from 1 September 2020. Changes to another use, or mix of uses, within the same Use Class will not require planning permission. This means that the flexibility arising from a wider Use Class can be utilised immediately.

- **Where the use of a site would previously have been categorised in any other Class that has now been abolished.**

Outside of Article 7, there is no automatic process to act as a guide for how those uses impacted by the changes should be treated moving forwards. Furthermore, as there is no such clarity and the legislation is so new, there will be an element of uncertainty on the part of Local Planning Authorities in the application of the new rules.

Clearly if a Use Class is abolished, there is no class for it to fall into but it is unclear how such an issue is to be resolved.

We would expect updated government guidance on this ambiguity.

2. How Will These Changes Affect Development That Is Currently Within the Planning Process?

The implication of the 2020 Regulations for development currently within the planning system is straightforward and similar to that for development that has already been granted planning permission.

Any planning application submitted prior to 1 September 2020 that refers to a Use Class will be determined in line with that named Use Class. This means that if the named Use Class falls into classes A1, A2, A3 or B1, once permission is granted, the use will automatically be treated as falling within Class E. If a use falls within a class that is not A1, A2, A3 or B1 any ambiguity should be clarified by the Local Planning Authority as part of the decision process and updated government guidance is expected on this point.

3. How Will These Changes Affect Future Development?

The position moving forward should be much clearer. Where a Use Class is named within any planning applications submitted after 1 September 2020, this should refer to Class E, F or the relevant Sui Generis use. It will be important to ensure that any planning application submitted moving forward takes account of these uses and is accurate in how it applies these classes.

4. Are There Any Limitations on the Scope of the New Use Classes?

The implications of the 2020 Regulations are complicated in cases where there is a restriction on development in the form of a planning condition. There could be a situation where planning permission was granted for a specific use, which now changes class due to the 2020 Regulations, yet there is a condition that specifically restricts the use of development to the old named use.

The courts have been clear in their willingness to interpret planning conditions in line with their ordinary meaning. This means that where a condition specifically restricts development to a certain use or from becoming a certain use, this will continue to act as a restriction. In other words, the new Use Classes do not amount to an excuse to use land in a way that a Local Planning Authority had expressly prohibited, even if the restriction refers to a Use Class that has been abolished.

The implication of this is that the new Use Classes may provide limited flexibility in certain circumstances. This issue can be resolved where a section 73 application is made in order to obtain a new grant of planning permission not in accordance with the condition that limits the use. It will be important to seek specific advice should a section 73 application be proposed.

5. Impact on the GPDO

The General Permitted Development Order 2015 provides rights for Permitted Development. This Order has not been amended to reflect the updated Use Classes. The transitional provisions mean that where Permitted Development Rights are to be used, the use of a development should be assessed under the old Use Classes, and this will continue to be the case until 31 July 2021. The government has suggested that a new Permitted Development Order will be made in due course but it is not clear what this will contain, although clearly this is anticipated before 31 July 2021.

This transitional approach gives rise to a number of considerations:

- The uncertainty over what any revised rights could contain means that if any change of use relying on Permitted Development is envisaged in the near future, consideration should be had to when such a right should be used. It is not clear whether any updated Permitted Development Rights will allow development in the forms currently in use.
- If an old use should be treated as sui generis under the new system, it may be worth considering whether there would be any advantage in using Permitted Development Rights under the current rules to change the use of a building to something that would allow more flexibility. If such action is not considered, it may be that no Permitted Development Right will exist to move from such Sui Generis use in the future.

6. What Implications Will the Changes Have on My Lease?

As well as the simple planning position, the 2020 Regulations will have significant implications for land rights, especially for leases where it is important for a landlord to balance control with flexibility in order to attract tenants. There are a number of different circumstances that arise and the approach to each will be different.

• Existing Leases

If the use permitted by a lease does not refer to a specific Use Class or it refers to a specific use within a class of the 1987 Order existing at the date the lease was entered into, then there will be no change in the extent of the use permitted by that lease. In these circumstances, the 2020 Regulations do not cause a change in approach.

If the use in the lease refers to the 1987 Order as amended or replaced, then the 2020 Regulations will potentially extend the scope of a use. In most cases, as the majority of leases will have a provision for landlord approval, there is some security for landlords provided. However, the drafting of any lease may mean that landlords find themselves having limited powers to refuse consent to change a use. It will be important for the limits of use provisions within a lease to be carefully assessed. In any case, this is an important consideration to bear in mind when it comes to rent review.

- **New Leases**

It will be important to give careful consideration to the drafting of new leases to take the new Use Classes into account. In particular, it will be necessary to consider whether a use should be confined to the actual intended use only, or use within a particular class. If the permitted use is too narrow, this could suppress rent, whereas if it is too wide, a tenant could have too much freedom. Either way, the powers available to a landlord to approve or refuse a change of use will need to be carefully drafted to ensure their utility.

- **Agreement for Lease Exchanged But Not Completed**

Where there is an agreement for lease that has exchanged but has not yet completed, the situation is a little more complex. A court is likely to interpret any agreement for lease in accordance with what was intended at the time that the agreement was negotiated.

Concluding Thoughts

The intention behind the 2020 Regulations is to reflect the diversity of uses on high streets and in town centres, providing greater flexibility for businesses to adapt to changing market conditions. However, the effect would appear to be broader than this and may, in turn, lead to a greater degree of flexibility in areas that run contrary to local planning policy.

There remain a number of uncertainties that surround these changes. Will Local Planning Authorities, for example, look to impose far more restrictive conditions to limit changes of use? How will Permitted Development Rights change? What will be the impact on Community Infrastructure Levy where charges are, for example, linked to the old Use Classes?

Time will tell on this and we, of course, will be available to assist in this process.

Ultimately, there is a lot going on in the world of planning at the moment. The change to the Use Classes Order is just one of many updates being made that will have wide ranging implications. Consultation on the government White Paper “Planning for the future” closes at 11:45 p.m. on 29 October 2020 and those proposals introduce significant changes to the planning system. It remains to be seen how the new Use Classes will relate to this.

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Appendix

Use Class Table

Use	Use Class Until 31 August 2020	Use Class From 1 September 2020
Shops	A1	E
Shops no larger than 280 square metres (selling essential goods and located at least 1 kilometre from a similar shop)	A1	F.2
Financial and professional services (not including medical services)	A2	E
Restaurants and cafés	A3	E
Pubs or other drinking establishments	A4	Sui generis
Hot food takeaways	A5	Sui generis
Business (offices other than use within Class A2, research and development, and light industrial processes)	B1	E
General industrial	B2	B2
Storage and distribution	B8	B8
Hotels	C1	C1
Residential institutions	C2	C2
Dwellinghouses	C3	C3
Houses in multiple occupation	C4	C4
Non-residential institutions (medical or health services, crèches and day nurseries)	D1	E
Non-residential institutions (schools, art galleries, museums, public libraries, public halls, exhibition halls, places of worship and law courts)	D1	F.1
Assembly and leisure (indoor sport, recreation or fitness and gyms)	D2	E
Indoor or outdoor swimming pools, skating rinks and outdoor sports not involving motorised vehicles or firearms	D2	F.2
Cinemas, concert halls, bingo halls, dance halls and other live music venues	D2	Sui generis