

UPDATE REPORT

BY THE DIRECTOR OF ENVIRONMENT AND NEIGHBOURHOOD SERVICES
READING BOROUGH COUNCIL
PLANNING APPLICATIONS COMMITTEE: 5th December 2018

ITEM NO. 11

Ward: Whitley

App No.: 180698

App Type: FULL

Address: 448a Basingstoke Road

Proposal: Change of Use of 448a Basingstoke Road to a mixed B1 (a) (1735sqm including 72sqm of new mezzanine) /A3 (128sqm) /D1 (724sqm) use, with glazing to replace roller door (amended)

Applicant: Reading Family Church

Date valid: 26th April 2018

Minor Application: 8 week target decision date: 21st June 2018

Agreed Extension of time date: 21st December 2018

Planning Guarantee: 26 week date: 25th October 2018

RECOMMENDATION

As on main report.

1. ADDITIONAL/ UPDATED INFORMATION

- 1.1 The description was incorrect on the main report and has been amended.
- 1.2 The applicant has submitted a QC opinion (attached at Appendix 1), prepared for Ultima Properties Ltd, the freehold owner of the site, with regard to the HSEs further advice following the committee in September 2018 and the resultant change in the officer recommendation.
- 1.3 As is documented in the main report, officers considered that the further information provided by the HSE was a material consideration and raised significant safety concerns over the proposed use adjacent to the COMAH site (Proctor and Gamble) such that they considered the recommendation should be changed to refusal.
- 1.4 Councillors are advised that on 26th November 2018 (following the completion of the main report) the HSE formally requested the Ministry of Housing, Communities and Local Government SoS consider call-in of this application should the decision be a resolution to grant permission. Therefore, if that were the resolution then the SoS would need to be provided with a period to consider whether to call in the application under S77 of the 1990 Town and Country Planning Act. As there is no formal time period under this section of the Act, officers are suggesting an initial 21 day period. However, councillors should be aware that there are powers for the SoS to issue a stop notice to the LPA to prevent a decision on the planning application from being issued if the SoS has not reached a decision and requires further time to consider the matter.

APPENDIX 1: QC ADVICE FOR ULTIMA PROPERTIES Ltd

448a and 448 BASINGSTOKE ROAD, READING

CHANGE OF USE OF B1 OFFICE BUILDING TO MIXED USE INCLUDING PREMISES FOR READING FAMILY CHURCH

ADVICE

Introduction

1. I am asked to advise Ultima Properties Ltd, the freehold owner of 448 and 448a Basingstoke Road, Reading (“the Properties”), in respect of an application (ref. no. 180698/FUL) for planning permission made by Reading Family Church for the change of use of 448a Basingstoke Road to a mixed B1(a) use (1,735 sq m including 72 sq m of new mezzanine), A3 use (128 sq m) and D1 use (1,724 sq m), with glazing to replace a roller door (“the Planning Application”).
2. The Planning Application was made to Reading Borough Council (“the Council”).
3. The Planning Application was the originally the subject of objection by the neighbouring site operator, Procter and Gamble, who operate the Gillette UK Ltd Site. It then became the subject of objection by the Health and Safety Executive (“HSE”). Those objections were based on the fact that the proposed development at 448a Basingstoke Road would be located within the HSE’s allocated inner zone of the three zones that HSE identify in terms of proximity to existing liquified petroleum gas (“LPG”) held in large bulk tanks on the Gillette Site and areas for aerosol storage in trailers and that site being subject to the Control of Major Accident Hazards Regulations 2015 (“COMAH Regulations 2015”).
4. Procter and Gamble and Gillette UK Ltd subsequently withdrew their objection in light of further information, and proposals to control the proposed use at 448a Basingstoke Road. HSE did not withdraw its objection.
5. The Planning Application was reported to the Council’s Planning Applications Committee on 5 September 2018.

6. The Council's Director of Environment and Neighbourhood Services reported the continued objection from the HSE in full.
7. Notwithstanding that objection, the Director recommended that the Committee give the Director delegated powers to grant planning permission, subject to the imposition of conditions and the securing of an agreement under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act") and advance notice to the HSE to consider whether to request the Secretary of State for Communities and Local Government ("the Secretary of State") to call-in the application for his own determination.
8. The Council's Committee accepted that recommendation. It granted the necessary power to the Director to grant planning permission subject to those requirements.
9. The Council subsequently gave the requisite notice to the HSE of its intention to grant planning permission, by email dated 7 September 2018. The HSE therefore had 21 days in which to submit any request to the Secretary for State for the application to be called-in. The HSE did not submit any such request. Instead the HSE wrote to the Council by letter dated 27 September 2018 requesting that the Planning Application be referred back to the Council's Planning Applications Committee for reconsideration. This was said to be on the basis that the HSE was "unconvinced that ... planning committee members fully understood the seriousness of HSE's advice given the nature of the proposed development and the risks from a major accident at the neighbouring Gillette UK Ltd Site."
10. It appears that the Planning Application is now to be reported back to the Planning Applications Committee on 5 December 2018. The Director has written a further report. As things stand, the Director is now recommending that planning permission be refused, in light of the HSE continued objection. There is also reference to the absence of a section 106 obligation in respect of parking matters; it is my understanding, however, that the latter reason is capable of resolution by the provision of an appropriate section 106 agreement, as previously anticipated. I am therefore asked to advise on the outstanding HSE objection.
11. For the reasons set out in more detail below, it is my view that:

- (1) There is no basis for HSE's claim that the members of the Planning Applications Committee did not fully understand the seriousness of HSE's previous advice. To the contrary, the Director's previous report set out the HSE's position. The objection was the subject of debate at the meeting. The issue was well-publicised. The Planning Applications Committee members would have been well aware of HSE's position when deciding the Planning Application. Nothing material has changed.
- (2) Moreover, the Planning Applications Committee was entitled to reach the decision it did. It is the Council, as local planning authority, that is required to make a decision on the merits of any planning application in its area, in light of any advice they receive. The HSE's advice is just that – advice; the HSE has no power to dictate the outcome of a planning application. It was for the Committee members to reach their own determination, in light of the development plan and all other material considerations. That is exactly what the Committee did. If the HSE disagreed with that view, it was open to the HSE to request the Secretary of State to call-in the application; but the HSE chose not to do so. There is no proper basis for bringing the matter back in front of the Committee again on the basis of some alleged lack of understanding on the members part.
- (3) In any event, there was nothing surprising, or unreasonable, in the Planning Applications Committee decision. On the evidence - which has not materially changed - the members were entitled to approve the proposed planning application in light of the existing use. In providing their advice, the HSE self-avowedly do not take account of the existing permitted use of a site, with the consequential inherent risks that already exist and are tolerated by the HSE by such use. The HSE only looks at the nature of risk as if the site were unoccupied and a new use being proposed. However, that is clearly not the situation here. 448a Basingstoke Road is an existing premises. It has an existing permitted use. That use enables employees to be present on site, throughout the working day, in greater numbers on average than would regularly be on site under the new proposed use. There is self-evidently a residual risk involved in the premises being located in proximity to the LPG tanks. That risk is already

tolerated by the HSE for the existing use. The HSE is concerned about the proposed change of use in terms of the potential for different and more vulnerable users to be on site. However, the HSE has not quantified, or assessed, the true nature of any additional risk said to arise from that change. The imposition of proposed conditions could only have served to have reduced the risk of an incident actually occurring. The HSE has not identified, or quantified, any material increase in the overall risk from the current use of the site, to the proposed change of use with such conditions imposed. On the face of the submitted evidence, whilst there will be periods when greater numbers of people are on site, and they will be different in composition, overall it could be that the residual risk has in fact decreased on any statistical assessment. If, for example, the buildings have fewer people in them on average across the week than under the existing situation, and the risk of an incident has been reduced, the net change may be either neutral or beneficial. That is not to underestimate the seriousness of the situation if an accident were to occur, nor to acknowledge that the consequences might be more severe if the property were occupied by more people at the time that the incident occurred. It is simply to recognise that risk needs to be assessed in the round. Where the existing risk is already deemed to be tolerable, and tolerated for the existing use, the local planning authority is entitled to reach its own judgment that the residual risk with the proposed use is not unacceptably increased, or in fact is potentially reduced by the proposed conditions and use profile proposed.

- (4) The Committee is still required to make its own decision. On the evidence, it is entitled to resolve to grant planning permission for the proposed development, just as it did before, in the absence of evidence from the HSE that the residual risk has materially increased with the proposed use. It would then be up to the HSE to decide whether or not to request a call-in application. The HSE is not obliged to make any such request. Even if it is made, the Secretary of State is not obliged to accept any such request. In any event, precedent indicates that even where such requests have previously been made and accepted, the Secretary of State may well still allow the grant of planning permission in any event. One such well-known example was the case of redevelopment of the Oval Cricket Ground in London, where the Secretary of

State granted planning permission for the development to proceed, notwithstanding the HSE's objection concerning the proximity of the development to much larger gas holders in the vicinity.

Factual Background

12. The property at 448 Basingstoke Road, Reading was developed as a factory building in the 1950s. The property at 448a Basingstoke Road was developed as B1 building in the 1980s. Both provide good quality 2 storey buildings, with accompanying private car-parking, for the existing uses.
13. The Council will be well aware of the past history of use of these buildings. Indeed, the HSE's own photographs - showing the location of the relevant gas tanks - show the existing buildings in busy use, with the car-park of the two buildings virtually full.
14. The property at 448 Basingstoke Road is occupied by tenants and Ultima Business Solutions. It is in existing B1/B8 use. It is not the subject of any current planning application. It currently accommodates approximately 120 staff on site.
15. The property at 448A Basingstoke Road was previously occupied by Ultima Business Solutions who had around 170 staff on site. That actual employment use has been continual until very recently, when Ultima Business Solutions relocated to nearby larger premises in April 2017. The site was then offered for sale by local property agents.
16. There remains an extant use for B1 purposes which means that the building can continue to house employers and employees in large numbers throughout the day (as it has done in the past). There is no restriction on the occupancy of the building. The past employment use had 170 permanent employees, plus visitors to the site. The Council recognise that it had the potential capacity for more. It seems to me that this must be the relevant benchmark against which to consider the nature of any risk associated with the proposed use.
17. In addition, I understand both employment and residential permissions and uses exist in the immediate vicinity within the relevant COMAH zones without previous objection.

18. The operator of the Gillette Site will, of course, be required to continue operating that site safely and in accordance with the COMAG legislation.
19. I am instructed that the current freehold owners occupied 448a Basingstoke Road for more than 20 years, without ever being advised that the property was in a risk zone. That is helpful context in understanding that whatever the nature of the existing risk, it is not of such a nature that the HSE, the adjoining owner, or the local planning authority, has ever thought it necessary to inform the owners and occupiers of 448a Basingstoke Road about.
20. I am also instructed that the building has kitchen facilities, and Ultima had an outdoor smoking zone for use by its employees on the boundary with the neighbouring site, which the owners of the Gillette factory knew about and on which they have never commented.
21. It is clear that the current Planning Application offers the potential for some of the residual risks that existing in the use of 448a Basingstoke Road to be reduced in practice, by the imposition of appropriate conditions which may address these sort of activities. The Planning Application therefore offers potential opportunities for the risk of any hazardous incident occurred to be reduced, even though the existing risks are clearly considered to be tolerable.
22. As a result of the offer of sale of the building at 448a Basingstoke Road, Reading Family Church (RFC) expressed interest in the site and terms have been agreed with the owner for RFC's occupation.
23. RFC has consequently submitted the Planning Application for its proposed change of use of the building for a mixed use, including a range of community facing activities (community café, teaching/training areas for job-seekers and similar, Food Bank collection point, mother and toddler groups etc), together with a hall for Church meetings and RFC administration offices.
24. The Council has accepted the principle of the proposed change of use away from employment purposes. I am instructed that the proposal enjoys widespread public support. This includes specific support from the local Member of Parliament. It is not

difficult to understand why. It is normally difficult under the planning system to retain existing community uses of this kind in most areas. Therefore, the prospect of delivering a new use of this kind is likely to be popular, and to represent a significant benefit in terms of the general planning of the area.

25. The proposal was originally the subject of an objection on behalf of Procter and Gamble, as the operator of the adjoining Gillette Factory site. This identified the need for consultation with the HSE on the basis that it was a COMAH rated facility. The Council duly consulted the HSE.
26. Procter and Gamble subsequently withdrew its objection after further information was provided about the Planning Application and procedures for addressing risk. Procter and Gamble did so on the basis that the local planning authority impose appropriate conditions addressing some of these risks, such as conditions restricting outdoor fires, use of fireworks, and similar activities. Details of evacuation procedures were provided. On this basis alone, it can be seen that the Planning Application in fact offers the potential to secure greater controls over the use of 448a Basingstoke Road than currently exist. It therefore offers the opportunity to implement measures which would introduce controls that should reduce the risk of any incident actually occurring. This does not appear to be recognised by the HSE in its representations.
27. These sort of controls may not, themselves, involve mitigation to reduce the consequences if an incident were to occur (such as an explosion of the type posited by the HSE). However, it is clear that HSE tolerate the existing situation in terms of the risk it poses. In addition, it is difficult to see why such additional measures could not be sought in any event if there were any need to reduce the risk arising from the consequences of an event.. For example, the provision of a fire and/or blast wall structure in between the LPG tanks and the adjacent site at 448a Basingstoke Road does not appear to have been considered. If HSE are in fact concerned about such events, it is not clear why such measures have not been sought and obtained given the existing permitted use of the site at 448a Basingstoke Road and the presence of many people (considerably in excess of 100 persons) on a regular basis.
28. It has been pointed out that the HSE in fact permitted a change to the COMAH consent in 2009 by allowing additional aerosol storage on the site. It is difficult to

reconcile this with the current attitude towards the proposed use, particularly given the opportunities that actually exist on the Planning Application to introduce controls over the use of 448a Basingstoke Road in conjunction with the proposed use.

29. HSE object to the proposed use on the basis of its approach to COMAH. They advised that their method of assessment does not take into account existing uses.
30. As noted above, a report on the Planning Application was prepared and provided to the Planning Applications Committee on 5 September 2018, recommending that the Director be given delegated powers to approve the planning application, subject to conditions, a section 106 agreement and referral to the HSE. The report to the Committee fairly reported the HSE's continued objection and it was the subject of discussion at the Committee meeting itself. . That recommendation was accepted.
31. The Council duly notified the HSE, giving it the ability to request the Secretary of State to call in the application pursuant to the Town and Country Planning (Development Management Procedure) (England) Order 2015 and consistent with paragraph 072 of the Planning Practice Guidance. HSE is a statutory consultee pursuant to Article 18 of the 2016 Order because of the COMAH Regulations.
32. The HSE did not make such a request. Instead, by letter dated 27 September 2018 it wrote to the Council stating it was "unconvinced that your planning committee members fully understood the seriousness of HSE's advice." The letter referred once again to the relevant hazardous substances consent for the Gillette Site and the relevant three zones that HSE uses for consultation purposes. It referred to its land use planning advice in this respect and the fact that the proposed development lay within the inner zone, and the HSE regarded the proposed development as involving some development within sensitivity level 1 ("SL1") of its policy. HSE stated it would not advise against the granting of planning permission for SL1 development for low density employment use (eg less than 100 persons at work in a building of two stories or less in height). However, the HSE also considered it to involve development in SL2 – indoor use by the public, and SL3 – use by vulnerable and sensitive groups, in light of the intended use to be made of the building by RFC (including worship and various support groups, with attendance by vulnerable persons

and children). HSE therefore requested that the matter be referred back to committee.

33. This is now being done by the Director, with a new recommendation to refuse permission.

Analysis

34. First, in my view, there is no real basis for HSE's claim that the members of the Planning Applications Committee did not fully understand the seriousness of HSE's previous advice. To the contrary, the Director's previous report set out the HSE's position. The objection was the subject of debate at the meeting. The issue was well-publicised. The Planning Applications Committee members would have been well aware of HSE's position when deciding the Planning Application. Nothing material has changed.

35. Secondly, although the Director has altered his recommendation, I do not know why that has been done. The Planning Applications Committee was entitled to reach the decision it did previously and it would be entitled to reach the same decision again, notwithstanding the HSE's position.

36. It is the Council, as local planning authority, that is required to make a decision on the merits of any planning application in its area, in light of any advice they receive. The HSE's advice is just that – advice; the HSE has no power to dictate the outcome of a planning application.

37. The HSE concede this in both the First and Second Reports of the Advisory Committee on Major Hazards. These identify respectively in Chapter 5 and Chapter 4 (as the HSE latest letter records):

“... the siting of developments should remain a matter for planning authorities to determine, since the safety implications, however important, could not be divorced from other planning considerations”

“... local authorities are well placed to take proper account of the full range of local factors, including safety issues, which are relevant to a planning decision.”

38. However, this principle is underpinned by an even stronger consideration which is applicable here. That is the fact that the HSE's advice is necessarily confined to the necessarily assessment of the proposed use as if there were no existing use permitted on the site. HSE's advice does not factor in the fact that there is an existing permitted use on the site which has continued, and can continue, giving rise to an existing residual risk which is already tolerated. HSE's advice does not recognise this basic point.
39. In such circumstances, it was and remains for the Committee members to reach their own determination, in light of the development plan and all other material considerations, as to what to do. That is exactly what the Committee did previously. It is what the Committee is entitled to do again. If the HSE disagreed with that view, it was open to the HSE to request the Secretary of State to call-in the application; but the HSE chose not to do so. There is no proper basis for bringing the matter back in front of the Committee again on the basis of some alleged lack of understanding on the members part.
40. Thirdly, I do not consider there to be anything surprising, or unreasonable, in the Planning Applications Committee decision. On the evidence - which has not materially changed - the members were entitled to approve the proposed planning application **in light of the existing use**. In providing their advice, the HSE self-avowedly do not take account of the existing permitted use of a site, with the consequential inherent risks that already exist and are tolerated by the HSE by such use. The HSE only looks at the nature of risk as if the site were unoccupied and new use being proposed. However, that is clearly not the situation here. 448a Basingstoke Road is an existing premises. It has an existing permitted use. That use enables employees to be present on site, throughout the working day, in greater numbers on average than would regularly be on site under the new proposed use.
41. There is self-evidently a residual risk involved in the premises being located in proximity to the LPG tanks. However, that risk is already tolerated by the HSE for the existing use. That use is an unrestricted office use, pursuant to which 170 employees and visitors have been on the site previously, and the same number or greater could

continue to be in the future. Any reasonable assessment of the proposed use should necessarily consider whether there is in any fact any increase in overall risk associated with the proposed use, and whether any such increase in risk is in fact material. That is not something that the HSE has done.

42. The HSE is concerned about the proposed change of use in terms of the potential for different and more vulnerable users to be on site, but on the application of their planning policy approach which ignores what is already permitted.
43. Consequently, the HSE has not quantified or assessed the true nature of any **additional** risk said to arise from that change.
44. In fact, as I have illustrated above, it seems to me that the imposition of proposed conditions associated with the proposed use (such as restrictions on the currently unrestricted use of outdoor space) can only serve to reduced the risk of an incident actually occurring.
45. The HSE has not identified, or quantified, any material **increase** in the overall risk from the current use of the site, to the proposed change of use with such conditions imposed.
46. On the face of the submitted evidence, whilst there will be periods when greater numbers of people are on site (for example when the church use is occurring), and users will be different in composition (including children), overall it may well be that the residual risk of an incident, and the effects of an incident, has in fact decreased on any statistical assessment.
47. If, for example, the buildings have fewer people in them on average across the week than under the existing situation (where the buildings would be likely to be occupied by 170 employees plus visitors for substantial proportions of the day), and the risk of an incident has been reduced, the net change in risk may, statistically, be either neutral or beneficial. Risk is usually capable of statistical assessment by application of relevant mathematical formula.
48. That is not to underestimate the seriousness of the situation if an accident were in fact to occur. No one disputes that. Nor is to fail to acknowledge that the consequences might be more severe if the property happened to be occupied by more people at the

time that the incident occurred, or more vulnerable people. It is simply to recognise that risk needs to be assessed in the round. Overall the net chance of a risk eventuating, coupled with the potential consequences depending upon the numbers more likely to be on site (based on an averaging process) may in fact have reduced.

49. Where the existing risk is already deemed to be tolerable and tolerated for the existing use, it seems to me that the local planning authority is entitled to reach its own judgment; and it is entitled to reach a judgment that the residual risk with the proposed use is not unacceptably increased, or in fact is potentially reduced by the proposed conditions and use profile proposed.
50. In this respect, conditions on the proposed use which reduce the potential for an incident to occur (eg restrictions on outdoor space use), or which mitigate the potential consequences if an incident were to occur (eg evacuation plans, or potentially conditions imposed on fire/blast breaks), are all potentially relevant in justifying such a judgment.
51. Accordingly, I consider that the Committee is still required to make its own decision. On the evidence, it seems to me it remains entitled to resolve to grant planning permission for the proposed development, just as it did before, in the absence of evidence from the HSE that the residual risk has materially increased with the proposed use.
52. In these circumstances, it would then be up to the HSE to decide whether or not to request a call-in application. The HSE is not obliged to make any such request. Even if it is made, the Secretary of State is not obliged to accept any such request. In any event, precedent indicates that even where such requests have previously been made and accepted, the Secretary of State may well still allow the grant of planning permission in any event.
53. One such well-known example was the case of redevelopment of the Oval Cricket Ground in London, where the Secretary of State granted planning permission for the development to proceed, notwithstanding the HSE's objection concerning the proximity of the development to much larger gas holders in the vicinity. The development was the redevelopment of part of the pavilion end of the cricket ground,

with the replacement of the Surrey Tavern and Lock, Laker and Peter May stands and other minor buildings with a new plaza, a six-storey stand incorporating 1,830 additional spectator seats, and other facilities including a hotel. The new development was proposed next to what HSE regarded as a major hazards site, namely the Kennington gasholder station, which is placed in the top-tier of COMAH sites.

54. HSE strongly opposed the development on the basis that it would involve a significant increase in the numbers of people would be placed in both the inner and middle of HSE's three zones around the gasholders.
55. The relevant local planning authority, Lambeth Council, decided to grant planning permission against HSE's strong advice. HSE obtained a call-in of the application and a planning inquiry was subsequently held. However, notwithstanding HSE's continued objection and evidence, the Inspector recommended the grant of planning permission and the Secretary of State accepted that recommendation and granted the necessary permission. In so doing, both the Inspector and Secretary of State analysed the particular features of the planning application and the risks consequently involved, and they balanced the benefits of the development to the sport of cricket and the economic benefits for the area against the residual risk. HSE accepted, as it states it has always done, that this is a proper judgment to be made by the relevant decision-maker. That was even in circumstances where the COMAH site was in the top-tier of risk, and many more additional people were being placed into the inner zone of concern by the development proposed there, than here.
56. In my view, the same general approach is applicable here as a matter of basic principle. The fact that HSE has objected to the proposed development does not prevent the Council from reaching its own decision to grant planning permission. In so doing, the Council is entitled to look specifically at the application in the context of what is already permitted on site, and to assess any residual risk in that context in a way in which the HSE has clearly not done. The Council is also entitled to take into account the benefits of the proposed development and the social and economic benefits it would provide when considering any residual risk. In so doing, the HSE would properly recognise that these are legitimate judgments for the decision maker to take into account. The approach also demonstrates that the HSE's opinions on such issues are not determinative. The HSE may or may not request a call-in if the Council were to decide

to grant permission. Even if such a request were made, the Secretary of State may decide not to call-in the application. And even if the Secretary of State were to call-in the application, the Secretary of State may well decide to uphold the Council's decision to grant permission.

57. The Council should therefore exercise its own judgment, without considering itself bound to act in accordance with the HSE's stated objection. HSE's stated concern will be fully protected by its ability to request a call-in of the Secretary of State (although it may well choose not to make such a request if satisfied that the Council has decided to grant permission in the knowledge of HSE's objection). The Council should not be reluctant to have the courage of its own previous convictions in this respect, particularly given that the HSE's position does not take into account the existing position and the tolerated risk, nor does the HSE seek to quantify the nature of any material increase in risk. No prejudice is caused to the HSE by the Council resolving to grant planning permission because the HSE can still request a call-in if it sees fit to do so.

58. The Council is therefore entitled to grant permission based on the strong planning merits of what is proposed, and in light of its previous views and judgment on the acceptability of residual risk. If the Council were to do this, I would expect the HSE to think again before requesting any call-in. However, even if it were to make such a request, before acceding to it, I would expect the Secretary of State to adopt the same pragmatic approach that the Council ought to consider as to the question of increased risk based on the existing permitted use, rather than the artificial approach adopted by the HSE of not taking into account that permitted use in its decision-making.

JAMES STRACHAN QC
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4 December 2018