

ESTATES AND AGENCY HOLDINGS PLC

FLITCROFT HOUSE, 114 - 116 CHARING CROSS ROAD, LONDON WC2H 0JR

BACKGROUND TO APPLICATION

MEMORANDUM

1 Original application

1.1 A full planning application was submitted to Camden Council by The Design Solution on behalf of Estates and Agency Holdings with a covering letter dated 6 October 2008. The application was given reference number 2008/4772/P.

1.2 The agenda of the Development Control Committee for 5 February was accessed by the applicant on Camden Council's website on 20 January 2009. The application was on the agenda with a recommendation of approval (with a notation "Granted"). The applicant, on later accessing the website, noticed that the agenda entry had been deleted without notice or explanation. On enquiry, the case officer informed the applicant's agent (Design Solution) on 28 January that the application had been withdrawn from the agenda and would be refused. Design Solution were also told that another planning officer would now be dealing with the application. Design Solution requested a meeting with him but to no avail, but a further period was given for the submission of additional material. The planning application was then determined under delegated powers and was refused.

1.3 The decision letter dated 31 March 2009 refused planning permission for the following reason:

"The proposed development, by reason of the reduction of the number of retail units on the Charing Cross frontage to below the threshold of two thirds (66%), would be detrimental to the character, function, vitality and viability of the area contrary to Policy R7 (protection of shopping frontages) of the London Borough of Camden Replacement Unitary Development Plan 2006."

2 Appeal

2.1 Prior to the date of the decision notice, however, an appeal had been lodged on 27 March 2009 on the basis that the Council had failed to determine the application within the statutory period. The appeal was given reference APP/X5210/A/09/2101133 by the Planning Inspectorate.

2.2 At paragraph 5.3 of the Council's Statement of Case submitted to the Planning Inspectorate, the Council stated that at the public inquiry it would *"expand upon and amplify policies of the UDP 2006 upon which it based its decision [our emphasis] and the London Plan to demonstrate that the appeal application is unacceptable."*

2.3 Paragraph 5.2 of the Council's Statement explained that *"as per the reason for refusal [our emphasis], of those policies listed in paragraph 4 above, the policies which the Council considered not to be satisfied by the proposal were Policy R7".*

2.4 As stated above, the reason for refusal in the refusal letter dated 31 March 2009 was that *"The proposed development, by reason of the reduction of the*

number of retail units on the Charing Cross Frontage to below the threshold of two thirds (66%) [our emphasis], *would be detrimental to the character, function, vitality and viability of the area* **contrary to Policy R7** [again, our emphasis] (*Protection of shopping frontages*) of the London Borough of Camden Replacement Unitary Development Plan 2006".

- 2.5 We note that the 66% threshold test does not derive from Policy R7 of the UDP, but from paragraph 15.23 of the Revised Planning Guidance for Central London: Food, Drink and Entertainment, Specialist and Retail Uses. This distinction is important.

- 2.6 The Council's Delegated Report contains a section entitled "Appropriateness of a new A3 use" in which the Council considers the application of policy to the issue of reducing the number of retail units on the Charing Cross Frontage. We quote the entire extent of this consideration in the Delegated Report:

"The application site is located in a Central London Frontage, within the Central London area. Policy R7 (Protection of shopping frontages and local shops) has a broad presumption against the loss shopping floorspace in Central London. The revised Planning Guidance for Central London (food, drink and entertainment) 2007 states that while the retail function of [t]his street is not as significant in terms of size and number of uses as the Tottenham Court Road/New Oxford Street area, the uses do support other concentrations of specialist book and music shops. It is considered that some additional non-retail uses may be accommodated, only on the basis that the overall level of retail does not fall below two thirds (66%) of uses on the frontage or cause harm to amenity and not result in a reduction of retail uses to less than two thirds.

This proposed frontage runs from St Giles Circus in the north to Cambridge Circus. there are currently 66.6% of the units in retail use (16 out of 24) (see table below). Policy R7 specifies that planning permission will not be granted for the net loss of retail floorspace where it will damage the character and function of a central London Frontage.

The proposed development would result in the number of retail units on the Charing Cross Frontage falling below thirds (66%) to 62.5% contrary to policy. The Council seeks to protect areas and clusters of specialist activity that uniquely contribute to the character of the Central London Area. It is considered that the proposed reduction in the number of retail uses would alter the character of the frontage and therefore [the] application is unacceptable"

- 2.7 It is clear from the above quotation, that whilst passing reference is made to the "broad presumption" in Policy R7, the reality is as stated at paragraph 3.16 of the Appellant's Statement of Case i.e. that the 66% test was being used by the Council as a proxy for the wider judgment on the vitality and viability of Charing Cross Road required by the Development Plan. By seeking to substitute, for the broader approach in Policy R7, a uniform and arithmetical exercise based on 66% of units in the frontage, the RPG has gone further than is justifiable for supplementary guidance, which is meant to support and exemplify Development Plan Policy but not undermine that process.

- 2.8 Accordingly, the Applicant notes that the Council states at paragraph 5.3 of the Council's Statement that it had based its refusal on the Development Plan, without clarifying that it did not do so on the basis of the broader approach required under Policy R7, but, in practice, solely on the basis of the 66% test in the RPG. Since this is the only basis advanced by the Council for alleged breach of Policy R7, the

Council must impliedly accept that if the 66% approach is either incorrect or not determinative it has no other basis for opposing this resubmitted application.

- 2.9 The Council's Statement listed policies at paragraph 4.6 under the heading "Other Material Policy Considerations" which the Council has taken into account in determining the application. Policies in relation to noise, vibration, siting and design are referred to, presumably for the sake of providing a complete background to the matter.

- 2.10 For the avoidance of doubt, we quote below from the Delegated Report to clarify that the Council considers the proposal's design and plans, as well as its lack of impact on residential amenity, to be in keeping with policy.

- 2.11 The Delegated Report states under the section entitled "Design" that:

"It is considered that the shopfront would preserve and enhance the character of the building and the character and appearance of the wider conservation area is considered acceptable."

"The proposed alterations to the elevations at ground floor level are considered to preserve the character and appearance of the conservation area."

"The proposed (air conditioning) units would preserve the character of the building and the character and appearance of the wider conservation area."

- 2.12 The Delegated Report states under the section entitled "Residential Amenity" that:

"It is considered that the proposed plant would not harm the amenity of any surrounding residents or occupiers and would therefore be acceptable."

"The (waste) proposal is in accordance with the Camden Planning Guidance."

"The proposed change of use ... will only result in a marginal increase in trip generation. the site is in close proximity to a variety of bus routes and near to Tottenham Court Tube."

- 2.13 In other words, the only issue in question in relation to the resubmitted application is the appropriateness of a new A3 use along the Charing Cross Frontage in terms of its replacement of an A1 unit, not because this is an inappropriate location per se for A3. It is clearly an appropriate location for A3 in principle.

3 The Council's review of the position

- 3.1 In light of the above, we were grateful to receive Louise McLaughlan's letter of 19 June 2009, which stated as follows:

"The Council considers itself to have a responsibility to continually review planning applications and appeals. In this case, there has been a material change of circumstances since the application was refused."

The Council's case has hinged on the failure of the proposed scheme to maintain the 66% threshold of retail units on the Charing Cross Road frontage. Since the refusal, the scheme now needs to be viewed in the context of the changing retail landscape within the relevant area brought about by the Crossrail project (and in particular its effect on the % calculations), in addition to the effects of an economic climate which has continued to worsen."

In these circumstances, the Council consider that whilst the refusal of the scheme was reasonable and well-founded, the proposal can now be viewed favourably. As you will appreciate, this is the view taken at officer level, and it cannot bind the Development Control Committee. However, in the event that your client re-submitted the application, it would be supported by officers, who would seek to have the matter determined as expeditiously as possible.

For these reasons, the Council no longer seek to defend its decision to refuse the application, listed as you know for Public Inquiry on the 28th July 2009."

- 3.2 The Planning Inspectorate were copied in to this letter.

4 **Response to alleged material change in circumstances**

- 4.1 We do not accept that information in relation to the Crossrail project affecting retail units on Charing Cross Road has only come to light since permission was refused.

- 4.2 The Healthcheck Assessments section of the Camden Retail Study prepared by Roger Tym & Partners on November 2004, which was commissioned by the Council, states as follows:

"2.4 Local agents consider that the proposed redevelopment of Tottenham Court Road Station and the prospect of Crossrail, and the uncertainty surrounding the implementation of these projects, means that developers and investors are adopting a wait and see approach to redevelopment proposals at the northern end of Charing Cross Road. As a consequence a number of units are occupied by retailers on temporary short-term lets, for example 121-133 Charing Cross Road, part of which was formerly occupied by Waterstone's bookstore. This situation does not help the centre build a qualitative reputation and could jeopardise its short to medium term future and submitted as part of the planning application."

- 4.3 Moreover, the Supplementary Statement prepared by Savills in February 2009, and submitted in support of the application, states as follows:

"4.12 The major impact, temporarily from construction and permanently, of the new Tottenham Court station and the demolition of 138-148 Charing Cross Road was not considered in the RPG. It is not known why the Crossrail proposals were not considered by Camden Council since the Bill received its first reading in February 2005 and by the time the RPG was consulted upon the main and several addendum environmental statements had been published which describe in some detail the proposed works. It is understood that Camden was aware of the Bill and was a petitioner in Parliament. The policy for Charing Cross Road needs to be reconsidered as a result of both of these."

- 4.4 The Opinion of David Elvin QC dated 2 March 2009, also submitted in support of the application, states as follows in respect of the 66% retail frontage test in the Revised Planning Guidance for Central London Food, Drink and Entertainment, Specialist and Retail Uses 2007:

"18 As the recent Savills' Submission makes clear, the Crossrail works (which are scheduled to continue in this location to about 2014) are already having an effect in the boarding up of properties and the northern end of the Road and will be followed by the closing of the Road to through traffic and significant demolitions and excavations. See the extent of the amended proposals in the Crossrail Additional Provisions No.3 (AP3) Environmental Statement Chapter 5 (November 2006): the photograph from p.55 of the AP3 ES is reproduced in the Savills' Report.

19 *The RPG does not discuss the implication of Crossrail nor is there any mention of it. Given the likely impacts of this in terms of the medium terms construction impacts and the longer term changes to the public highways and the improvement of passenger transport, this seems difficult to understand. It suggests that the base text and work pre-dated the Crossrail proposals, although the Bill was introduced in February 2005 and had its Second Reading before the summer recess in 2005. Indeed, Camden was a petitioner against aspects of the Bill.*

20 *The works under the Crossrail Act 2008 will physically isolate the northern end of the Road for their duration and will replace the Centre Point fountains with a new plaza entrance to the new tube and Crossrail stations. There will be no frontage development as is the case at present."*

- 4.5 In respect of the "significant drop in the economic market" referred to in Louise McLaughlan's email, there can be no reasonable suggestion that the impact of what is generally termed the "Credit Crunch" has only emerged since the Council took its decision on 31 March 2009, little over two months ago.

Berwin Leighton Paisner LLP

22 June 2009