
OPINION

Introduction

1. I am instructed on behalf of Laffly LLP (“Laffly”), the owner of 150 Holborn, London, EC1N 2NS (“the Property”), and asked to advise as to whether the removal of roof plant from the Property would implement an extent planning permission (ref: 2011/4198/P), without triggering s. 106 obligations attached to the permission.

Background

2. The Property is a vacant eight-storey building. The lawful use of the Property comprises of 9,830 sqm of Class B1 use; 2,775 sqm of Class A1, A2 and A3 use; and 193 sqm of C3 use.
3. The Property benefits from an extant planning permission, dated 25th January 2012 (ref: 2011/4198/P) for the following development (“the Permission”):

“Refurbishment and alterations to the property, including extension to 5th and 6th floor and additional floor at 7th level for Class B1 offices on Holborn and Grays Inn Road elevations, extension at 3rd, 4th and 5th floor level for Class B1 offices and Class C3 residential on Brooke Street elevation, creation of 5 new residential units with 1 x existing unit (Class C3) and new residential entrance core off Brooke Street and associated elevation alterations, replacement plant and enclosures at roof levels, recladding to exterior elevations, alterations to main entrance including associates partial change of use from shops (Class A1) to offices (Class B1) at ground floor, partial change of use from offices (Class B1) to

financial and professional services (Class A2) at 1st floor level, creation of enclosed service yard to rear with amenity space above, green/brown roofs and cycle parking."

4. The Permission contains only one pre-commencement condition, namely condition 4. As set out in my instructions, this condition appears to have been added in error (as it is identical to condition 3, which is not a pre-commencement condition). An application has been made under s. 96A of the Town and Country Planning Act 1990 ("the 1990 Act") to remove condition 4.
5. Assuming that this is successful, there will be no pre-commencement conditions that need to be discharged before the Permission can be lawfully implemented.
6. The Permission was accompanied by a section 106 agreement, also dated 25th January 2012 ("the Agreement").
7. The financial obligations in the Agreement are triggered by implementation, as defined under the Agreement. "Implementation Date" is a defined term, and is defined as follows:

"the date of implementation of the Development by the carrying out of a material operation as defined in Section 56 of the Act PROVIDED THAT for the purposes of determining whether or not a material operation has been carried out there shall be disregarded such operations or works of or connected with or ancillary to archaeological investigation, ground investigations and site survey works, site or soil investigations, works of decontamination, Soft Strip Works, and the erection of fences and hoardings and references to the terms "Implementation", "Implement" and "Implemented" shall be construed accordingly."

8. The definition of "Soft Strip Works" is as follows:

"works to remove non-structural building elements, including, inter alia, removal of doors, flooring, fixtures, roof plant, internal walls fittings, services, temporary structures (including room partitions) and hazardous materials and including the

erection of scaffolding or other temporary structures and any temporary works associated with soft strip or surveys prior to demolition works being commenced."

Legal Framework

9. In accordance with section 91 of the 1990 Act, condition 1 of the Permission requires the development to begin not later than 3 years from the date of the Permission (i.e. before 24th January 2015).
10. Section 56(1) of the 1990 Act defines when development is said to begin for the purposes of section 91. So far as is relevant, it provides as follows:

...

(2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

(3) The provisions referred to in subsection (2) are sections 61L(5) and (7), 85(2), 86(6), 87(4)] 2, 89, 91, 92, 94 and 108(3E)(c)(i)

(4) In subsection (2) "material operation" means—

(a) any work of construction in the course of the erection of a building;

(aa) any work of demolition of a building;

(b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;

(c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);

(d) any operation in the course of laying out or constructing a road or part of a road;

(e) any change in the use of any land which constitutes material development.

...

11. As such, development is taken to have begun on the earliest date on which any "material operation" which is comprised in the development begins to be carried out.

12. The following principles are well-established:

(1) The list of material operations in ss. (4) is not definitive: *Field v First Secretary of State* [2004] EWHC 147 (Admin);

(2) The works involved in the material operation do not need to fall within

the definition of “development” for the purposes of section 55 of the 1990 Act: *Malvern Hills District Council v. Secretary of State for the Environment* (1983) 46 P&CR 58 at pg 69;

(3) The material operation carried out must be more than de minimus:

Thayer v Secretary of State for the Environment [1991] 3 PLR 104;

(4) The operation need not effect a permanent change: *Aerlink Leisure Ltd*

(In Liquidation) v First Secretary of State [2005] 2 P. & C.R. 15;

(5) The works must be related to the planning permission involved: *South*

Oxfordshire District Council v Secretary of State for the Environment

(1981) 42 P. & C.R. 211. In this respect, they must amount to an

“unequivocal act pursuant to the planning permission” (see *Staffordshire*

County Council v Riley [2002] P.L.C.R. 5)

Would the removal of roof plant implement the Permission, but not implement the financial obligations in the Agreement?

13. The first question to consider is whether the removal of the roof plant would amount to a material operation for the purposes of section 56, such that it would implement the Permission.

14. In my opinion, the removal of plant is a material operation, for the following reasons:

(1) The operations in ss. (4) of section 56 are not exhaustive. The particular examples given (i.e. laying a road, pipe or foundations) are only set out as they are likely to occur in the majority of developments (see *Field* at paras. 38 and 41). However, they do not assist in a case like this concerning the refurbishment of an existing building.

- (2) Given that the list is not definitive, a material operation in the course of adding new plant can be a material operation for the purposes of section 56 if the addition of new plant is *"comprised in the development"*.
- (3) In *Malvern Hills*, the Court of Appeal considered the meaning of section 56(4)(d), namely *"any operation in the course of laying out or constructing a road or part of a road"*. It was held the meaning of the word operation in this context was *"any working activity on the land in the course of laying out a road, whether or not that activity has resulted in a change in the character of the land or in anything that might be called development."* (at pg 69).
- (4) Applying that definition here, the question is whether the removal of the existing plant is a *"working activity on the land"* which is carried out in the course of replacing the plant. It self evidently is. The plant cannot be replaced until the existing redundant plant is removed.
- (5) Further, the removal of the plant cannot be seen as a discrete operation separate from the development permitted by the Permission.
- (6) The Permission permits *"replacement plant and enclosures at roof levels"*. There is no reason for the developer to remove the existing plant to the building unless and until it is to be replaced by the new plant permitted by the Permission. In this regard, the removal of the plant can be seen as an *"unequivocal act pursuant to the planning permission"* (see *Staffordshire County Council v Riley* [2002] P.L.C.R. 5)
- (7) This interpretation is supported by the fact that section 56 is intended to be a low threshold for developer to cross. As it was put in *Malvern Hills*: *"The specified operations are not necessarily very extensive. Very little*

need be done to satisfy the section. That which is done, however, must genuinely be done for the purpose of carrying out the development. Section 43 is a benevolent section that aims at avoiding hardship to a developer who is genuinely undertaking the development.” (at pg 70).

15. Given the above, in my opinion the removal of the roof plant is a material operation comprised in the development for the purposes of section 56 of the 1990 Act and would implement the Permission.

16. Next, it must be considered if the removal of the roof plant would implement the obligations in the Agreement.

17. In my opinion, it is clear that it would not. The financial obligations in the Agreement are triggered on the “Implementation Date” as defined in the Agreement. This excludes “Soft Strip Works”, as defined. These works include “*works to remove non-structural building elements including...roof plant*”. It is therefore clear that the removal of the roof plant falls within the definition of “Soft Strip Works” and does not implement the obligations in the Agreement.

Conclusion

18. The removal of the roof plant would not trigger the financial obligations in the Agreement, but would implement the Permission.

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