



Response to the Position Statement of London Borough of Camden ("Council")

Greater London House, Hampstead Road, London, NW1 7QX ("GLH")

1. INTRODUCTION

- 1.1 We act on behalf of Lazari Investments Limited (the "**Applicant**") who have submitted an application for a Certificate of Lawfulness for a Proposed Use or Development pursuant to Section 192 of the Town and Country Planning Act 1990 ("**Act**"), (the "**Application**").
- 1.2 The proposed works at GLH consist of the infilling of the central open air atrium up to the floor level of the third floor, to provide additional office floorspace.
- 1.3 We have been provided with a position statement on behalf of the Council in relation to the proposed works at GLH and the proposed decision to refuse the Application. This note is a response to that position statement.

2. CLARIFICATIONS

- 2.1 The position statement of the Council refers to an earlier note produced by this firm, which was submitted in support of the Application. We consider it helpful to clarify certain contents of that note which the Council has commented on.
- 2.2 The note states at paragraph 2.3 "*As the infill works will not be visible above the roof line of the existing building they will not materially affect the external appearance of the building*". The Council takes issue with this, stating that in their view what is necessary to be considered is "*whether the works would result in a material change to the exterior of the building when viewed from normal vantage points in the ordinary course of events*".
- 2.3 To clarify the position previously advanced, the assertion made is that because the works are not visible above the roof line, they are not visible to the public from usual vantage points. Consequently they do not materially affect the external appearance of GLH. The degree of visibility of the alteration is determinative of whether the appearance is materially affected. In this respect we agree with the position stated by the Council.
- 2.4 The correct legal scope when considering an application for a lawful development certificate is provided by the Planning Practice Guidance which states "*A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process*"¹. The Council must decide the Application on this basis.

3. THE NATURE OF THE WORKS

- 3.1 It is agreed that *Burroughs Day v Bristol City Council* ("**Burroughs Day**") is a judgment which dealt with a very particular set of facts. However, it is considered the general principles laid down in that judgment remain good law and cover "infinite circumstances" beyond the particular facts of that case, as is the common law basis of legal precedent in the England & Wales. Accordingly those principles should be applied to the facts and circumstances of the present situation.
- 3.2 The position statement in considering the nature of the proposed works states that "*the works are substantial and undoubtedly have a material effect on the external form of the building. As such, they have the potential to materially affect its appearance*". This is not an accurate summary of the law.
- 3.3 *Burroughs Day* clearly establishes the principle that "*What must be affected is the 'external appearance' not 'the exterior'. The use of the word 'appearance' means that it is not sufficient for the external surface of a building to be affected by the proposed alteration*".

¹ Planning Practice Guidance Paragraph: 009 Reference ID: 17c-009-20140306



- 3.4 "Appearance" is a broader category than external form and captures the impression of the building from usual vantage points, rather than mere changes to form or occasional or passing views.
4. **THE DEGREE OF VISIBILITY**
- 4.1 The position statement sets out *"the fact that the works themselves in this case are so substantial (unlike in Burroughs Day) means that any degree of visibility of those works will make it likely they will have a material effect on the external appearance of the building"*.
- 4.2 As noted above the scale of works and the impact on the exterior form is not the correct test. Further the position as set out misunderstands the degree of visibility test. The degree of visibility test can be explained as follows:
- 4.2.1 It is not the alteration to the building which is being considered; rather it is the extent to which any change to the external appearance of the building is visible to someone looking at the building from outside. The material impact is to be judged by reference to the viewer, not the building; and
- 4.2.2 The test is not a consideration of the extent to which the alterations to the building can be seen on their own, it also considers the number of vantage points from which the alterations can be seen and the location of such vantage points.
- 4.3 It is incorrect to state that any degree of visibility of those alterations will likely be material, as this will depend on the extent of the change experienced by the viewer, and a balanced consideration of what is visible, where it is visible from, and cumulatively how many vantage points are affected.
- 4.4 The position statement considers the visibility of the building from within the open air atrium itself and sets out why these views are to be taken as an external vantage point. To do so, the position statement provides an alternate test to that provided by Burroughs Day;
- "It is noted that if the judge had been faced with the current set of facts he may have re-worded the test to as "the alteration must be one which affects the way in which the exterior of the building is or can be seen by an observer looking at the outside of the building"*.
- 4.5 This is pure speculation and can have no legal weight in the Council's decision whatsoever.
- 4.6 The re-worded test is based upon the Council's understanding that the purpose of section 55 of the Act *"is concerned with discernible change of use or of the physical form"*.
- 4.7 This is not the purpose of section 55 of the Act however. Section 55 of the Act is concerned with the public rather than the private effects of operational development. Where operational development will have a nil or a de minimis impact on the public, section 55 provides that planning permission is not required.
- 4.8 It is for this reason that section 55(2) is included as an exception to the definition of development provided by section 55. Internal works which cannot be seen and works which do not materially affect the external appearance of a building cannot have a material effect on the public. The planning system operates to protect the public interest, not private interests.
- 4.9 Considering the 'discernible change' rationale put forward by the Council, if section 55 is concerned with 'discernible change', internal alterations would not have been removed from the definition of development. An individual who walks into a private building (with consent) and views a materially different internal appearance will of course notice a 'discernible change'. However, in this circumstance there is no impact to the public at large, and because of this it is not necessary to assess the planning merits. The same rationale applies to non-material changes to the external appearance of buildings; this is why planning permission is only required for an alteration that materially affects the external appearance of a building.
- 4.10 Section 55 is concerned with the effect on the public. For this reason those views of the open air atrium are not relevant when considering if the external appearance of the building



has been materially affected. It is the effect on the views experienced by the public from outside of the building, not from areas to which they only have access with the consent of the private owner, which are relevant to the Council's decision.

- 4.11 In this regard the judgment of John Todd v Derbyshire Dales District Council considers further whether alterations to the exterior of a building were capable of materially affecting its external appearance. In this case it was decided that the building "*is in a remote location and is not readily visible to the passing public. The external changes would not affect the way in which the exterior of the building is seen by an observer outside*". The same rationale applies in respect of GLH.
- 4.12 The internal/external vantage points of the open air atrium of GLH are not accessible to the public. Those individuals who do have access into the open air atrium, and also into the building itself where the open air atrium can be viewed, are employees of tenant companies or attend for other general business purposes. In this respect the view which they experience of the open air atrium is much the same as the view they experience of the internal spaces of the building.
- 4.13 In this regard the test laid out in Burroughs Day is clear: "*the alteration must be one which affects the way in which the exterior of the building is or can be seen by an observer outside of the building*". This test is principally concerned with the potential adverse impact on the public.
- 4.14 It is an incorrect approach to use the facts of Burroughs Day in comparison to the Application as a basis to materially alter the test which was laid out in Burroughs Day. The amended test, as has been shown, is based upon a fundamental misunderstanding of the purpose of section 55 of the Act and the reason for the test being formulated.
- 4.15 With the above in mind the vantage points both from within and of the open air atrium are not to be considered when assessing whether the proposed works materially affect the external appearance of the building.
- 4.16 The only other vantage points of the proposed works are from the top floor of one tall building which potentially has very slight visibility of the works, and office premises across the street to the rear of GLH on Mornington Crescent which may notice a slight difference when looking into the building down a servicing ramp, but only when the roller shutters are open. These vantage points, either separately or cumulatively, do not constitute the necessary degree of visibility to establish that the external appearance of the building has been materially affected.

5. **OTHER CONSIDERATIONS**

- 5.1 The Islington appeal decision is noted. This involves very specific factual circumstances with a very specific potentially significant harm caused by the installation of an office window circa 2 metres from a residential bedroom window.
- 5.2 It is not clear on what basis any significant harm is considered to be likely as a result of the proposed works at GLH. Any harm would only be in relation to those vantage points to be considered, which do not appear likely to suffer from any other harm as a result of the works.
- 5.3 In any event, the decision of a planning inspector is not a legal precedent which overrides a decision of the High Court. The precedent legal test is provided by Burroughs Day and has since been applied by the Courts of England and Wales without criticism or modification. This continues to be the test that is required to be applied by the Council in the determination of the Application.

6. **CONCLUSION**

- 6.1 We disagree with the assessment and the proposed decision of the Council. The external appearance of the building will not be materially affected by the proposed works. It is noted that the works are located externally, however it has been clearly established that views from inside the open air atrium from within the building are not views enjoyed by the public. Further the potential views of the proposed works from outside the building are limited and



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from unusual vantage points and so are not sufficient to establish that the external appearance of the building will be materially affected.

- 6.2 We request in light of this note that the Council reconsiders the basis of the proposed decision for the Application. We also politely request a response to this note setting out where you continue to disagree and your reasoning for doing do. We note that these points may also be discussed at the upcoming meeting.

Herbert Smith Freehills

7 June 2016