
A D V I C E

1. INTRODUCTION

1.1. I am asked to advise Lazari Investments Limited (“Lazari”) as to whether or not proposed alterations at their premises Greater London House (“GLH”) would benefit from the deeming provision contained in s.55(2)(a) Town and Country Planning Act 1990 (“TCPA”). A question has also arisen as to the lawfulness of a proposed s.106 obligation in the event that one of the possible alterations is pursued.

1.2. GLH comprises some nine floors of office accommodation arranged around a central atrium which is, currently, open to the sky. At the front of the property there are four above ground storeys, whilst at the rear there are six. The atrium is in use for ancillary servicing and bicycle parking at ground floor level.

1.3. The Proposed Works comprise partial infilling of the atrium up to the top of the second storey so as to provide an additional 3,539m² of office floorspace.

1.4. Since the Proposed Works would constitute operational development, attention has focussed on s.55(2)(a) TCPA, which provides as follows:

"The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land –

(a) the carrying out for the maintenance, improvement or other alteration of any building of works which –
(i) affect only the interior of the building; or
(ii) do not materially affect the external appearance of the building."

1.5. Limb (i) has been regarded as not being available on the basis that the atrium space, although enclosed on all sides, is outside the building itself.

1.6. The relevant facts in relation to limb (ii) are that there are no viewpoints outside the building itself where the proposed works would be visible. Visibility inside the premises is limited to a slight view from a roller shutter door, when open, at the rear of GLH, together with views within the atrium itself and from internal upper storey windows, looking down onto it.

1.7. An application was submitted to the Local Planning Authority (London Borough of Camden) for a Certificate of Lawful Proposed Use or Development ("CLOPUD") on the basis of s.55(2)(a)(ii). Camden officers disagree with the approach taken by those instructing me and clearly do not intend to grant a Certificate.

1.8. There is a policy issue which lies behind the disagreement. Policy DP2 of the Camden Development Policies provides:

"Policy DP2: Making full use of Camden's capacity for housing The Council will seek to maximise the supply of additional homes in the borough, especially homes for people unable to access market housing, by:

- a) expecting the maximum appropriate contribution to supply of housing on sites that are underused or vacant, taking into account any other uses that are needed on the site;*
- b) resisting alternative development of sites considered particularly suitable for housing; and*
- c) resisting alternative development of sites or parts of sites considered particularly suitable for affordable housing, homes for older people or homes for vulnerable people. The Council will seek to minimise the loss of housing in the borough by:*
- d) protecting residential uses from development that would involve a net loss of residential floorspace, including any residential floorspace provided:*
 - within hostels or other housing with shared facilities; or*
 - as ancillary element of another use, wherever the development involves changing the main use or separating the housing floorspace from the main use.*
- e) protecting permanent housing from conversion to short-stay accommodation intended for occupation for periods of less than 90 days;*
- f) resisting developments that would involve the net loss of two or more homes, unless they:*
 - create large homes in a part of the borough with a relatively low proportion of large dwellings,*
 - enable sub-standard units to be enlarged to meet residential space standards, or*
 - enable existing affordable homes to be adapted to provide the affordable dwelling sizes that are most needed.*

As an exception to the general protection of residential floorspace, where no alternative site is available, the Council will favourably consider development that necessitates a limited loss of residential floorspace in order to provide small-scale healthcare practices meeting local needs.”

1.9. Lazari have therefore also considered an alternative option, which is to explore placing a roof over the full extent of the atrium, via either a CLOPUD or a planning application. Officers have indicated that any planning permission would need to be accompanied by a s.106 obligation restricting the provision of additional floorspace under the roof which would, of course, defeat the object of the exercise for Lazari.

1.10. I have been referred to the case of Burroughs Day v Bristol City Council [1996] 1 PLR 78. There, the issue was whether the provision of a lift shaft housing involving roof alterations and replacement of windows to the front elevation of the building required planning permission as well as listed building consent. The Court held that they were not development: it was not sufficient that the works should merely affect the external appearance of the building, rather, they must “*materially*” so affect it. It was held that the change must be visible from a number of normal vantage points on the ground or from a neighbouring building outside the building: visibility from the air or from a single building would not be sufficient; moreover, materiality was to be judged in relation to the building as a whole, not just a part of it taken in isolation; materiality will depend in part on the degree of visibility and the assessment must take into account the nature of the building in question, such as whether it is listed.

1.11. My opinion is sought on the following questions:

1. Whether the Proposed Works constitute development for the purpose of section 55 of the Act;
2. Whether vantage points from within the atrium and from the building are to be taken into account when assessing if the external appearance of a building is materially affected;
3. Whether the material differences in the factual circumstances of Burroughs Day in comparison the Proposed Works provides any basis to depart from the test provided therein;
4. Whether the proposed alternative option of the roof only constitutes development for the purposes of section 55 of the Act;
5. Whether the roof only option provides a higher chance of success of obtaining a CLOPUD in comparison to the application for a CLOPUD in respect of the Proposed Works;
6. The validity of the proposed section 106 restriction on internal works proposed by LBC in respect of an application for the roof only; and
7. The merits and chance of success on appeal in respect of the CLOPUD application.

2. QUESTIONS 1 and 2

Whether the Proposed Works constitute development for the purpose of section 55 of the Act

Whether vantage points from within the atrium and from the building are to be taken into account when assessing if the external appearance of a building is materially affected

2.1. I do not consider that either of the proposed projects of works constitute development because each of them falls within the deeming provision of s.55(2)(a)(i).

2.2. The Court in Burroughs Day set out principles capable of application to other cases and there is no reason to treat it as a decision which is confined to its own facts. Clearly the statutory test of material effect is one of fact and degree, to be judged by an inspector on site, in the event of an appeal. It must be borne in mind that I have not visited the site. However, I have been provided with useful photographs and plans. Considering these in the light of the Burroughs Day principles, I have particular regard to the following features:

(1) GLH was originally constructed in the 1920s as a tobacco factory. It was extended in the 1960s and converted to office use in 1998. It is an imposing building which is recorded in the Conservation Area Appraisal as “*overshadowing nearby listed terraces*”. The atrium in question however, is not visible from the outside because it is totally enclosed by the substantial blocks of development around it.

(2) The outstanding CLOPUD application proposal would not be visible at all from the public realm or other properties outside the building; internal views within GLH are not relevant to the “*external appearance of the building*”, which is the statutory test. More difficult, given the concession that the atrium is external space¹ not “*the interior of the building*”, is the question of views within the atrium space. I would argue, firstly, that the “*external appearance*” is not affected, because the viewer is, before and after, enclosed by the inside walls of the building. Secondly, changes in such enclosed views would not “*materially*” affect the external appearance, provided that they cannot be seen from the public realm or neighbouring buildings. Materiality must relate to planning control which (unlike listed building control) is concerned with externalities – appearance in public views and certain (i.e., material)² effects upon neighbours. This approach is consistent with the “*degree of visibility*” and “*whole building*” criteria in Burroughs Day.

3. QUESTION 3

Whether the material differences in the factual circumstances of Burroughs Day in comparison the Proposed Works provides any basis to depart from the test provided therein

¹ Which is consistent with Deputy Judge’s finding about the valley gutters in Burroughs Day (p.10).

² Including overlooking and privacy as in the Islington appeal decision.

3.1. As I have said, Burroughs Day establishes principles of general application. Its precise facts do not detract from its relevance or from the correctness of the tests. It is, however, only first instance authority and does not purport to be an exhaustive examination of all potential circumstances. The principal matter of contention relates to the relevance of internal views, which is an issue of principle rather than fact. The legislation has not changed since the case was decided; it is still directed towards considering “*the external appearance of the building*”. This is consistent with the purposes of planning, as opposed to listed building, control, as I have said in answer to Questions 1 and 2.

4. QUESTION 4

Whether the proposed alternative option of the roof only constitutes development for the purposes of section 55 of the Act

4.1. The alternative option of inserting a roof to cover the entire atrium is similar in its essentials to the second floor enclosure option. Applying the Burroughs Day principles, regard should be had to the extent and nature of off-site views. If they are confined to upper storey views from one building, then it is likely that the change would be found not to be material. If more extensive views are obtainable off-site, then that would support the opposite contention. The fact that the test of materiality relates to the whole building and not just part of it is germane and helpful. I see no reason to depart from that principle just because the facts here are different from those in Burroughs Day. The approach clearly reflects and does full justice to the statutory words.

5. QUESTION 5

Whether the roof only option provides a higher chance of success of obtaining a CLOPUD in comparison to the application for a CLOPUD in respect of the Proposed Works

- 5.1. Whether or not the alternative is a stronger option would depend on its relative degree of visibility off-site. Since it comprises plain glass inserted below the roofline, it seems to me to assist with regard to the Council's points on views within the atrium. If it can be established, it would clearly give freedom to rely on the internal works limb of the subsection in future.

6. QUESTION SIX

The validity of the proposed section 106 restriction on internal works proposed by LBC in respect of an application for the roof only; The validity of the proposed section 106 restriction on internal works proposed by LBC in respect of an application for the roof only

- 6.1. S.106 TCPA is broad enough to authorise an obligation in the terms sought by Camden. S.106(1)(a) provides for an obligation to be entered into "*restricting the development or use of the land in any specified way*" and the suggested restriction would fall within the scope of that provision.
- 6.2. It is relevant, however, to consider whether planning permission (if required) for the Alternative Option (roofing over) could or should be withheld on the basis of a refusal to enter into such an obligation. Regulation 122(2) of the

Community Infrastructure Levy Regulations 2010 provides, in relation to qualifying development³ as follows:

" A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

- (a) necessary to make the development acceptable in planning terms;*
- (b) directly related to the development; and*
- (c) fairly and reasonably related in scale and kind to the development."*

6.3. The London Borough of Camden has policies in its development plan which seek the provision of housing on or off site where other forms of development are permitted on sites which are suitable for housing. This is probably the underlying reason why officers are being uncooperative. The policies (DP1 and DP2) leave it open, in principle, to avoid providing housing on site, having regard to certain criteria. Gerald Eve have, rightly, advised that a robust case would need to be demonstrated to justify not providing on or off site housing. Doubtless the Council would argue that allowing the proposed roof without the s.106 obligation would be *"unacceptable in planning terms"* and *"directly related to the development"* because of Policies DP1 and 2 and their underlying rationale which is that housing is treated by the Plan as the priority landuse. Against that, it could be argued that the only development in question is a roof, but I think that the policy context would enable Camden to argue that a s.106 obligation would be justified to prevent circumvention of the

³ Within the meaning of Regulation 6

policy. Lazari would then need to demonstrate why housing would be inappropriate on site and/or why no off-site contribution in kind or cash would be feasible.

7. QUESTION 7

The merits and chance of success on appeal in respect of the CLOPUD application

7.1. I consider that the arguments for a CLOPUD are good, either in the case of the undetermined application or the alternative option. Obviously, it would be essential for me to see the site and understand the full extent of offsite views in each option before finally committing myself in terms of a percentage chance. Provided that the argument really does come down to effects upon people within the atrium, however, I have clearly indicated that I do not regard these views as materially affecting the external appearance of the building as a whole. Therefore an appeal should be successful.

8. CONCLUSION

8.1. I shall be happy to advise further if necessary. It would be advantageous to see the site and to discuss matters further with those instructing me and Gerald Eve.

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