

Introduction

We have been asked by our client, 177 Shaftesbury Avenue Limited, to provide this legal opinion which sets out the legal tests which need to be satisfied in order for a planning permission to be lawfully implemented. This opinion is to be used in support of a consent of revocation application under Section 181 of the Town and Country Planning Act 1990 ('the Application') which has already been submitted to the Council (application reference 2016/2321/REV) and is awaiting a decision.

Facts

So far as are relevant to the issues in dispute, the facts are as follows:

LEGAL OPINION

relating to 167-177 Shaftesbury Avenue,
London



Flint Buildings
1 Bedding Lane
Norwich
NR3 1RG

Ref: PJW/

Introduction

- 1 We have been asked by our client, 177 Shaftesbury Avenue Limited, to provide this legal opinion which sets out the legal tests which need to be satisfied in order for a planning permission to be lawfully implemented. The opinion is to be used in support of a certificate of lawfulness application under Section 191 of the Town and Country Planning Act 1990 ("the Application") which has already been submitted to the Council (application reference 2016/3331/NEW) and is awaiting registration.

Facts

- 2 So far as are relevant, the facts as we understand them can be briefly summarised as follows:
 - 2.1 The Application has been submitted on behalf of Mayfield Real Estate Group by Bilfinger GVA.
 - 2.2 The Application relates to one floor of 167-177 Shaftesbury Avenue, London, WC2H 8JR ("the Property").
 - 2.3 Our client is the lessee of the Property together with one other floor.
 - 2.4 Planning permission was granted on 16th February 2015 for the redevelopment of the Property under reference 2012/2774/P ("the Permission"). The redevelopment comprises: "Change of use of first floor level from offices (Class B1a) to six self-contained residential units (C3) comprising 2 x 2 bedroom and 4 x 1 bedroom flats plus associated internal and external alterations to include a new ground level louvred, bin store door". The Permission is subject to conditions and a Section 106 Agreement.
 - 2.5 Condition 5 of the Permission was discharged on 13th April 2016. This is a pre-commencement condition relating to the Construction Management Plan (ref: 2015/3022/P).
 - 2.6 Full Energy Efficiency and Sustainability Plans have been submitted to, and approved by, the Council as required by the Section 106 Agreement and all relevant Section 106 Agreement and CIL monies have been paid by them.
 - 2.7 Works were commenced at the Property on 23rd May 2016 comprising internal strip out of the first floor level of the Property and demolition of

internal walls ("the Works"). A letter of intent and photographs evidence the carrying out of the Works. These matters are further set out in a statutory declaration given by Joseph Mansour who is one of the directors of our client.

- 3 The Application seeks to secure a Certificate of Lawfulness confirming that development has been lawfully initiated.

The Legal Position

- 4 The legal position is straightforward.

- 5 Section 56(1) of the Town and Country Planning Act 1990 provides: "...development of land shall be taken to be initiated- (a) if the development consists of the carrying out of operations, at the time when those operations are begun".

- 6 Sub-section (2) then provides: "... 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".

- 7 Sub-section (4) then sets out that the following constitutes a "material operation" for the purposes of sub-section (2): "(aa) any work of demolition of a building;".

- 8 A body of case law has dealt with the interpretation of these key statutory provisions and we summarise briefly below:

8.1 A "material operation" comprised in the development must be carried out. The issue is not the quantum of operations undertaken but whether they relate to the planning permission involved (*Thayer v Secretary of State for the Environment* [1992] J.P.L. 264).

8.2 The operations must be carried out before the time limit in which development must be commenced has expired.

8.3 The question of whether certain material operations were "comprised in the development" would not necessarily be answered simply by comparing them with the approved plans. Differences between the approved plans and operations relied on need not be fatal to the capability of the operations to be effective in commencing the development (*Commercial Land Ltd/Imperial*

Resources SA v Secretary of State for Transport, Local Government and the Regions [2003] J.P.L. 358 (Admin)).

- 8.4 The test under Section 56 is objective and the intention of the person carrying out the operations is irrelevant (R (Ashfield) v National Assembly for Wales [2003] EWHC (Admin)).
 - 8.5 The “material operation” does not itself need a planning permission. The Secretary of State’s view is that development may still be commenced even if the works could be carried out under permitted development rights.
 - 8.6 All pre-commencement conditions need to have been discharged. Not strictly relevant to this case but the Courts have determined in a long line of cases culminating in R (on the application of Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin) that this principle should only apply to a condition which expressly prohibits any development taking place before a particular requirement has been met. In short there is a sequential test with the first key question being whether the condition is a pre-condition to lawful development? If so, has it been complied with?
- 9 If development has been lawfully initiated, development can be undertaken and completed pursuant to that permission at any point thereafter. The purpose of the Application is to establish under Section 191 of the Town and Country Planning Act 1990 that the Works undertaken have lawfully initiated development pursuant to the Permission and it would then follow that no enforcement action can be taken against them or further development undertaken pursuant to the Permission.
- 10 Under Section 191 of the Town and Country Planning Act 1990: “(1) If any person wishes to ascertain whether – (b) any operations which have been carried out in, on, over or under land are lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.”
- 11 Pursuant to sub-section (4), “If... the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the.... operations... described in the application....., they shall issue a certificate to that effect...”.

12 Finally, the burden of proof is on the applicant and the standard of proof is the balance of probabilities. As to the latter, the NPPG makes it clear:

“..if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant’s version of events less than probable, there is no good reason to refuse the application, provided the applicant’s evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.”

Conclusions

13 Finally, we apply the facts to the law.

14 In order to lawfully initiate development pursuant to the Permission, a material operation would need to be carried out by 16th February 2018.

15 The Works clearly constitute a material operation. They are clearly demolition works to a building and required in order to undertake development pursuant to the Permission. Put simply, development cannot be undertaken pursuant to the Permission without the Works being undertaken and the Works are therefore an integral part of the development.

16 The Works were commenced on 23rd May 2016, clearly evidenced by the Letter of Intent and photographs and the statutory declaration and therefore well within the time limit in the Permission.

17 There is only one true pre-commencement condition and that was discharged and has been complied with.

18 The development undertaken at the Property is therefore lawful and has initiated development pursuant to the Permission. Our client’s evidence is more than sufficient to establish this on the balance of probabilities.

19 The Council should issue a Certificate to this effect.


HOWES PERCIVAL LLP

23rd June 2016

