

## **Chalton Street Planning Application – Permitted Development Fall back Position Note (DRAFT 12/07/16)**

### **Introduction and background**

The following note has been prepared in support of a full planning application advanced in respect of 55 Chalton Street. The proposal involves demolition of the existing building which comprises retail at ground floor and residential above (Use Class C3 and A1) and redevelopment to provide a 5 storey 56 no. room hotel (Use Class C1) fronting Chalton Street and Churchway.

The planning application follows a similar proposal which was refused by the Council by way of decision notice dated 1<sup>st</sup> February 2016 (Application Reference; 2015/5015/P). The Council cited a total of 16 reasons for refusal. In the context of this note, reason for refusal 4 stated that,

*“The proposed development by virtue of the loss of the existing retail unit and associated active street frontage would be detrimental to the character, amenity, function, vitality and viability of the Chalton Street Neighbourhood Centre, and would fail to contribute to a mix of uses contrary to policy CS7 (Promoting Camden’s centres and shops) of the London Borough of Camden Local Development Framework Core Strategy and policies (DP1 Mixed use development), DP10 (Helping and promoting small and independent shops) and DP12 (Supporting strong centres and managing the impact of food, drink, entertainment and other town centre uses) of the London Borough of Camden Local Development Framework Development Policies.”*

The Council’s decision notice was accompanied by an Officer’s delegated report (no date provided). In substantiating reason for refusal no. 4 it is explained at paragraph 5, page 5 of the Officer’s report that;

*“The site is located within a neighbourhood centre providing peoples day to day needs. As a guide Camden would resist schemes that result in less than 50% of ground floor premises being in retail use or more than three consecutive premises being in non-retail use. The proposed change from A1 to C1 Hotel would result in 3 consecutive premises being non retail and would also result in less than 50% below A1 retail in the parade. Based on the Council’s informal retail survey 2015, of the 21*

*existing units/former units, 5x are A1 Use Class (retail), 5x are B1 Use Class (office), 3x are C3 Use Class (residential); 2x are A2 Use Class (professional services), 1x is an A3 Use Class (restaurant), 1x is a gallery (Sui Generis), 4x are unknown.”*

## **Permitted Development Rights – Material Consideration**

Section 38 (6) of the Planning and Compulsory Purchase Act 2004, explains that the determining local planning authority should determine planning applications in accordance with policies contained within the Statutory Development Plan unless material considerations indicate otherwise.

Following the refusal of the above-mentioned planning application, the Applicant submitted to the Council a Certificate of Proposed Lawful Use Application (Reference; 2016/0536/P). This application sought confirmation that a change of use of the existing retail premises (Use Class A1) to Financial and Professional Services (Use Class A2) would be lawful and could be implemented by way of permitted development rights, as set out within Class D of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) England) Order 2015.

The Council confirmed by way of decision notice dated 11<sup>th</sup> March 2016 that the proposed change of use was indeed lawful, could be implemented under relevant permitted development rights and importantly without the need of any further approvals from the Council.

It is therefore the case that the Certificate of Proposed Lawful Use application has established that the site benefits from permitted development rights that allow for a change of use from retail (use class A1) to financial and professional services (use class A2). Accordingly, the Applicant could implement the Permitted Development consent immediately and without any form of further approval from the Council which would serve to remove the existing A1 retail floorspace. The permitted development consent therefore represents a fallback position which is a material consideration of such weight that it outweighs those policies seeking to protect the existing A1 use.

## **Permitted Development Rights – Relevant Case Law**

The acceptability of Permitted Development as a fallback position in the context of changes of use is clearly established in case law and most notably evidenced by Appeal Decision APP/L3625/A/13/2193152 (Trinity House, 51 London Road,

Reigate, Surrey, RH2 9PR) whereby the Inspector recognised that following the submission and subsequent approval of a prior notification application for Permitted Development rights, the Council no longer contested the reasons for refusal which in this instance related to the loss of employment use.

Similarly, the case of Zurich Assurance v North Lincolnshire Council involved a challenge by Zurich, the owners of much of the retail centre of Scunthorpe, to a decision by North Lincolnshire to grant planning permission for an out-of-town retail development on an existing garden centre site. One of the grounds of Zurich's challenge was that the Council had wrongly taken into account the potential for a fallback open retail scheme. This fallback was claimed to arise because the garden centre had, for many years, sold a wider range of goods than was permitted by the conditions imposed on its planning permission.

While Zurich sought to argue that the committee should have been advised that they could only take a fallback into account if it were a realistic possibility, the Court rejected this; finding that the fallback does not have to be probable or even have a high chance of occurring. Instead the Court held that, in order to be a material consideration, a fallback only has to have "more than a merely theoretical prospect". While the likelihood of the fallback occurring may affect the weight to be attached to it, the Court did not feel it affected its status as a material planning consideration.

### **Determination of the planning application**

The application site and in particular ground floor premises remain in retail (Class A1) use. The planning policy context cited by officers in substantiating reason for refusal no. 4 are relevant in that they seek to protect the loss of existing retail uses within the parade, subject to a number of criteria (at least 3 consecutive premises and no less than 50% retail use within the parade).

It is however the case that S38 (6) of the Planning & Compulsory Purchase Act 2004 advises that planning applications should be determined in accordance with the statutory development plan **unless material considerations indicate otherwise**.

In the instant case the site benefits from permitted development rights as confirmed by the Council which allow for a change of use from retail (A1) to financial and professional services (A2). Importantly this change of use would result in a use that is not protected by the Council in the same way as A1/retail use. Accordingly, the

permitted development rights could be exercised and therefore represent a legitimate fallback position by virtue of the fact they have more than a theoretical prospect of occurring. This being the threshold established through case law.

Should this Planning Application be refused on the basis of the loss of the existing retail unit the Applicant has confirmed that they have no option other than to implement the fallback position i.e. change of use to A2 and then reapply for planning permission. However, it is suggested that it is far more appropriate to allow this application to be approved, acknowledging the fallback position and the weight to be attached to it as enshrined within case law.