Planning Proposals by Criterion Capital Ltd under s96A (and s73) of the Town and Country Planning Act 1990.

1.0 Introduction and Background

1.1 This report is written on behalf of the Bloomsbury Association who object to the application under s96A of the Town and Country Planning Act 1990.

1.2 The application (ref: 2020/1438/P) dated 23 March 2020 is made by Centro Planning Consultancy on behalf of Central London Investments Limited.

1.3 Following the refusal by Camden Council of Planning Permission (ref: 2015/3605/P) for a 166-bedroom hotel, a Planning Inspector reversed the decision on 4 November 2016. The Inspector's decision included 13 conditions and was also subject to a s106 Unilateral Obligation by the developer covering, amongst other things, a range of operational matters: 'Plans' for Construction Management, Travel Servicing and Hotel Management.

2.0 What has changed since Planning Permission was granted in November 2016?

2.1 Since construction work started on site in October 2018, it appears that a quite different scheme is being constructed. The range of differences include amongst other things:
(a) an increase in the number of bedrooms from 166 up to 208 (about 450 bedspaces), i.e. about 25% increase and a reduction in 'back of house' areas. Together, this represents a significant increase in residential occupants and the general operational bedroom area.
(b) changes to the ramp concourses.
(c) alterations to access; alterations to firefighting access; alterations to cycle parking; alterations to ventilation and air-conditioning plant, air inlet and exhaust; an increase in the amount of servicing traffic; alterations to the volume and location and means of access to refuse storage; the ground floor entrance and servicing on both Great Russell Street and Adeline Place.
(d) alterations to the elevations.

2.3 The signed s106 Unilateral Obligation refers to the approved drawings and other aspects of the original proposal which would now be different and would therefore have to be re-written. Those s106 Plans (see 1.3 above) that have been approved will also require review and further approval because of amended layouts and other details.

2.4 The status of approved 'discharges of conditions' is unclear because layouts are now different. Outstanding conditions would also be in doubt because the Planning Inspector had only the original drawings before him, not those that are now apparent.

3.0 The nature of the proposed 'amended' planning scheme and the planning process

3.1 In order to regularise these changes and thus to comply with planning law, the developer has applied under s96A (and then proposes an application under s73) of

the Town and Country Planning Act 1990 for the Council's approval. In a pre-application letter to my client, Centro Planning Consultants acting for Central London Investments Limited, stated they have designed it as a 2-step process:

(a) *The first step involves a 'S96A' amendment simply to remove the reference to '166 bedrooms' within the approved description of development, such that it would read: "The development proposed is change of use of part ground floor and basement levels -4 and -5 from car park (sui generis) to ~~166-bedroom~~ hotel (Class C1), including alterations to openings, walls and fascia on ground floor elevations on Great Russell Street and Adeline Place". The developer's planning consultant explains that "…..the permission would still relate to the 166-room scheme (as controlled by the already approved drawings) and that this is merely a technical step, the need for which has arisen following case law late last year. Consequently, this application, which has very recently been submitted, does not contain any drawings etc…."*

(b) *The second step involves a 'S73' amendment, which is the substantive application, dealing with all the aforementioned design changes, and the planning effects arising from the increase in the number of bedrooms.*

That letter is accompanied by drawings showing the new layouts and a list of amendments, only some of which are set out in 2.1 above.

3.2 Turning now to the current s96A application as submitted to Camden Council, the accompanying letter states …*" To be clear, if the amendment is granted, the consented development would still relate to the 166 room scheme (as controlled by the consented drawings). This NMA (non-material application) application is merely a technical pre-step, necessary in advance of the applicant's substantive amendment for the reorganisation of the consented floorplans to deliver 208 bedrooms. The need for this pre-step has arisen following case law in November 2019 (Finney v Welsh Ministers & Ors. Case Number C1/2018/2922)." …….*

3.3 The drawings sent to my client broadly, but inaccurately, illustrating the scope and nature of the amendments are not submitted as part of the s96A application. Centro Planning Consultants believe, incorrectly, that a s73 application would deal with the amendments.

3.4 The reason for this device (for that is what it is) is to avoid a new planning application (the conventional route for significant changes in either use or physical form) that would then come under full public scrutiny; it would also take a considerable period of time to process a full planning application.

3.5 For reasons set out below, these statements by Centro Planning Consultants are both erroneous and misleading. Indeed, the entire 2-step process is misconceived and would be an abuse of the planning system.

4.0 The operation of Sections 96A and 73 of the Town and Country Planning Act 1990 (TCPA)

4.1 Both Section 96A (s96A) and Section 73 (s73) were drafted with the intention of keeping planning permissions flexible. LPAs and developers have considerable options open to them that allow both parties to constructively engage with one

another in order to optimise extant schemes. Flexibility is at the core of the TCPA and both s73 and s96A are the mechanisms by which this flexibility can be achieved in the granting and implementation of planning permissions.

4.2 To understand the purpose of both Sections, I set out below the relevant texts and a commentary. Firstly s96A:

4.3 *Section 96A: Power to make non-material changes to planning permission*

(1) A local planning authority may make a change to any planning permission…. relating to land in their area if they are satisfied that the change is not material (my emphasis).

(2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission …..as originally granted.

(3) The power conferred by subsection (1) includes… —

(a) to impose new conditions;

(b) to remove or alter existing conditions.

(4) The power conferred by subsection (1) may be exercised only on an application made by or on behalf of a person with an interest in the land to which the planning permission …. relates.

(5) An application under subsection (4) …. must be made in the form and manner prescribed by development order.

…..

(6) Subsection (7) applies in relation to an application under subsection (4) made by or on behalf of a person with an interest in some, but not all, of the land to which the planning permission …..relates.

(7) The application may be made only in respect of so much of the planning permission ….. as affects the land in which the person has an interest.

(8)A local planning authority …. must comply with such requirements as may be prescribed by development order as to consultation and publicity in relation to the exercise of the power conferred by subsection (1). ….

4.4 Government guidance on the application of Section 96A states:

"New issues may arise after planning permission has been granted, which require modification of the approved proposals. Where these modifications are fundamental or substantial, a new planning application under section 70 of the Town and Country Planning Act 1990 will need to be submitted. Where less substantial changes are proposed, an application for a non-material amendment (my emphasis) to a planning permission can be made.

There is no statutory definition of 'non-material'. This is because it will be dependent on the context of the overall scheme – an amendment that is non-material in one context may be material in another. The local planning authority must be satisfied that the amendment sought is non-material in order to grant an application under section 96A of the Town and Country Planning Act 1990……"

4.5 An application under s96A is not, as the covering letter to the application implies, simply a request for a change of the description of the development for which planning permission was originally granted. The clue is in the title - Power to make non-material changes to planning permission. As subsections (1) and (2) above state, supported by the NPPG (4.4 above), the determination by the Council must be based on one simple question:

Q: Is the change non-material in effect?

If so, it can make an affirmative determination.

If not, the application must be refused, irrespective of whether the Council would have approved the proposed changes. In other words, there must be no consideration of the merits of the changes and the decision hinges solely on the nature and scope of the changes.

4.6 In order to competently answer that question, the Council must be furnished with sufficient details to establish these factors. Not supplying drawings and/or adequate details of the amendments would entitle the Council to either refuse to register the application, or to refuse the application on that basis alone. To do otherwise would surely lay them open to a charge of wilful incompetence, from which another authority may overturn the decision.

4.7 In this instance, the developer's misconception of the operation of s96A, whether intentional or not, does not alter or affect the Council's commitment to getting absolute clarity on the nature and scope of the amendments. Therefore, full disclosure now of the amendments sought is paramount. To approve the application as submitted, or to assume such disclosure later under s73, would open the development in 'barn-door' fashion, to a wide range of opportunities that are not detailed here.

4.8 *S73: Determination of applications to develop land without compliance with conditions previously attached.*

(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

..

(3) Special provision may be made with respect to such applications—

(a) by regulations under section 62 as regards the form and content of the application, and

(b) by a development order as regards the procedure to be followed in connection with the application.

(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

(5) Planning permission must not be granted under this section for the development of land in England to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which—

(a) a development must be started;

(b)an application for approval of reserved matters (within the meaning of section 92) must be made.

4.9 Section 73 is a wide-ranging statutory power that can be used to **amend conditions** which attach to a previous planning permission. Whilst it is often associated with 'Minor Material Amendments', it is important to note that this particular terminology is not a creature of the law. It is, instead, intended to allow for those minor changes to be made where necessary to ensure that a development is successfully implemented and completed.

4.10 Amendments to the scale, height or footprint of a development can be dealt with under s73 provided that those amendments do not result in the scale and nature of the development being substantially different from the one previously approved. Again, the test for the LPA to consider is whether the resulting development and, perhaps more importantly, the intensity of its consequential impacts are substantially the same as that originally permitted. Noise, air volume, air quality, transport and servicing are key impacts. We now know, for example, that there will be a need for two refuse collections a day, not one as originally stated. Likewise, with the significant increase in bed-spaces, the suitability and adequacy of entrances and common spaces internally to serve guests and staff should be reconsidered. In the light of the current Coronavirus pandemic, the ability of the air-handling system to control the air quality (virus filtered) could mean an increase in plant size.

4.11 Section 73 allows an LPA to omit or amend conditions attached to a Planning Permission. If approved under s73, a new planning permission would be granted subject to any amended conditions. However, s73 is not designed nor competent to deal with amendments to the 'mother' scheme.

4.12 The correct planning procedure is first, to seek approval for **non-material** changes to a planning permission under a s96A application and then; secondly, to seek approval for changes to any pertinent conditions attached to the original planning permission under s73. However, it is critical that:

(a) the first application under s96A is substantive in detail to enable the LPA to consider whether the amendments are truly non-material;

(b) those amendments are **non-material.**

If either or both elements fail, then the application must be refused. It follows that if the s96A application is refused, a s73 application, if submitted, must also be refused.

4.13 In theory, the above two provisions should make for a flexible planning system, negating the need for the administrative, financial and timing burden of a full application. However, if a developer requires significant changes that cannot be dealt with competently under s96A, then he must resort to a full application under s70.

4.14 One LPA recently voiced concerns on the use of a s73 application where the application would have resulted in changes which deviated from the description of the development in the original permission. Equally, LPAs have concerns with regards to a s96A application being used to amend the description of a development.

4.15 To suggest, as Centro Planning Consultants do, that the s96A application is simply a change of description of the development is to misinterpret the purpose and operation of the Section, and in so doing give a false impression of it being a benign process. Neither, contrary to their statement, is it required to comply with the law. Both statements are erroneous and misleading.

4.16 By not submitting drawings and other details in support of the s96A application, Centro Planning Consultants have intentionally denied the LPA an opportunity to consider the full extent of their client's proposals, and to be able to judge whether the proposals are non-material or significant. To suggest that a s73 application would be the more substantive one, is to 'put the cart before the horse' and thus pervert the planning system.

4.17 There have been legal cases to test the limits of the applications of s96A and s73. In summary, the latest judgement by Lindblom LJ(R (Vue Entertainment) v City of York Council (Collins J, 18 January 2017) makes it clear that any section 73 application is constrained by the scope of the description of development on the existing planning permission, hence the developer's desire in this case to amend the description of the development under s96A to allow that flexibility. However, that latter facility can only be used if the changes are 'non-material'. From the latest court ruling (*Finney v Welsh Ministers & Ors [2019])* it is clear that s73 cannot be used to change the nature, scope or scale of a planning permission.

4.18 The main issue here is whether the proposed changes (or in this case, the changes already being implemented without permission and others still to come) are non-material. If the Council deems them to be non-material, then the application under s96A succeeds, and the Council can then go on to consider an application to vary conditions under s73. If the Council do not consider the changes to be non- material, the application under s96A should be refused and the developer would then have to go through a full planning application/appeal process. It is not clear form the TCPA whether there is a right of appeal under s78 specifically against a refusal to grant an application under s96A, but there appears to be no provision within that Section of the Act.

5.0 The Objections to the s96A Application

5.1 The essence of any objection to the s96A 'device' is that the nature and scope of the changes whether already made or proposed are 'material' in that the approved

scheme would be **significantly** changed. In this case, my clients argue that the nature and scope and scale of the changes cannot reasonably be considered non-material:

(a) Intensified use by about 25%, which would have a significant impact on:
(i) the movement of people and service;
(ii) air handling and the capability (as yet untested) of any system to deliver an acceptable air quality internally and externally and to limit noise emissions.

(b) The plans approved by the Inspector included room sizes and a layout at all levels would no longer apply.

(c) There would be significant changes to the activities and functions behind the elevations on Great Russell Street and Adeline Place. These will have an impact on how the spaces are accessed and how they inter-connect internally and externally. For example, there is no provision for the storage of delivered goods before they are taken down the ramp, the consequences of which have been very apparent during construction.

(d) The air-handling plant would be significantly revised in its location and operation to the extent that noise and air quality could be affected. The current drawings do not reflect, indeed they conflict with, the proposals outlined in the Construction Liaison Meetings whereby the inlet and exhaust were to be repositioned at first floor level on Great Russell Street.

(e) The conditions imposed by the Inspector would need to be reconsidered.

(f) The various 'Plans' required by the s106 Unilateral Obligation i.e. transport, servicing and hotel management, would require re-writing to accord with the amended scheme.

5.2 Although the developer has, for whatever reason, chosen not to submit drawings illustrating the changes made and proposed, my clients have been sent a courtesy copy. Because of their inadequacy, conflict and inconsistencies, we have been unable to comment beyond questioning the following shortcomings:

1. Inconsistency between what is shown on plans, sections and elevations.

2. Lack of clarity and inconsistency in the location of air handling plant and ducts through the building at all levels.

3. The lack of interface with other owners' adjacent ventilation, air handling plant and other equipment existing in the building.

4. Lack of clarity in the servicing arrangements at all levels, e.g. to demonstrate that there is adequate space for vehicle movements, delivered goods and waste to be contained and stored within the building in accordance with approved conditions.

5. Inconsistency between external door opening widths and door swings shown in plan and elevation at street level. We would like to see door openings at the top of each ramp to be reduced to facilitate better security and to prevent vehicles from entering and parking.

6. Lack of clarity and consistency of pavement level changes in line with approved conditions.

7. Lack of clarity in the requirement to remove existing dropped kerbs and pavement cross-overs on Adeline Place.

8. The adequacy and location of refuse storage? Designation of a zone is not sufficient; that it is fit for purpose needs to be clearly demonstrated.

9. Lack of clarity of what essential hotel functions and activities take pace in areas identified as 'BoH'.

10. The adequacy of the hotel entrance at street level and the lobby at basement level 4 for the increased number of people using the hotel.

11. Lack of clarity in the provision for means of escape and firefighting access.

12. Lack of clarity in the provision of staff break-out space, internal and external.

13. Designing out opportunity for crime by providing external lighting and security cameras.

14. New signage.

15. No indication of the removal of redundant car park signage on Great Russell Street and 16 unsightly hanging, plastic flower baskets with their brackets immediately above your proposed elevation to Adeline Place.

16. The absence of notes and specifications on the drawings, including the acoustic performance of proposed louvres.

17. Lack of sensitivity to maintaining the architectural integrity of the host building by using the same bronze coloured finish for metalwork.

18. Lack of clarity of how this relates to the further detailed information required by condition and how this will be provided.

15. Incorporation of indicative proposals for the proposed TfL rental bike stand on Adeline Place? BA have provided a sketch and understand this has been agreed in principal by Camden Council and TfL. It will also benefit the operation of the hotel. The proposal should demonstrate with some enthusiasm how the proposals can effectively operate with this and associated streetscape improvements in place, about which much was spoken by the Inspector at Appeal.

20. Expansion of your description of the proposal to include a commentary on the nature and scope of all changes is required.

5.3 The application is devoid of information to demonstrate with some enthusiasm how associated streetscape improvements can be implemented on Adeline Place to repair a severely damaged pedestrian environment. This presents a danger to pedestrians, especially to pupils walking to the school in Bedford Square. Much was spoken about this by the Inspector at Appeal and we suggest the developer should liaise with both Camden Council officers and other landowners to agree how this can be done, by whom and when. The design intent should then be shown on the proposals drawings, including the removal of unnecessary obstructions and street furniture, new external lighting and the extent of new footway paving and its specification.

5.4 On the current application, the address is given as 112A Great Russell Street with a two-dimensional red line location plan covering the whole block bounded by Tottenham Court Road, Great Russell Street, Adeline Place and Bedford Avenue, including the public footway on all sides. The location in section is specified in the description of development as 'part ground floor and basement levels -4 and -5'. If a S96A application that describes an unspecified number of hotel rooms were approved, it would allow more rooms to be created anywhere at ground level or below, in areas vaguely shown on the drawings as 'BOH', suggesting ‘back-of-house’

space but with no clear purpose. On this premise it could be argued that development was permitted of the entire area for a denser, capsule hotel of an unlimited number of rooms.

5.5 **Individually and collectively, these changes would be material to the extent that this s96A application should be refused. A new planning application under s70 is required to address what are fundamental and significant deviations from the approved scheme.**

6.0 Other matters

6.1 The application under s96A is deficient in that no notice has been served on owners of the site edged in red. Other than the applicant, there are a number of owners, or those with a legal interest in the site. Given the history of the proposal, it must be apparent to Camden Council that the applicant of this case (Central London Investments Limited) is not the sole owner of the site within the red line of the Location Plan. It is not clear why this section (4) is deemed 'Not Applicable' since any amendment could have a significant effect on other owners. Moreover, subsection (3) of Article 10 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 requires such notice to be given.

6.2 In section 8 of the application form, it is disclosed that pre-application advice has been sought, but no details are given on who the Planning Officer was, nor what the advice was.

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