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16 April 2020

Our ref ROGN/ASDM/O23523.00096

Dear Sirs

Matilda Apartments, 1 Saint Giles High Street, London, WC2H 8AG (the Property)
Developers' Notice – Ref: CTIL_242201_20_TF_81554_VF_15320

We act for Central Saint Giles General Partner Limited, the freehold owner of the Property.

We have received the enclosed developers' notice dated 2 April 2020 (the **Developers' Notice**) from Clarke Telecom acting on behalf of Cornerstone Telecommunications Infrastructure Limited, Telefonica UK Limited and Vodafone Limited (the **Developers**) giving notice of their purported intention to rely on Part 16 of Schedule 2 (the **PD Right**) to The Town and Country Planning (General Permitted Development) (England) Order 2015 (the **GPDO**) to construct development comprising: 10 no. antennas (top height of masts 52.10m AGL), 2 no. transmission dishes, equipment cabinets and ancillary development thereto (the **Proposed Development**).

The Developers have confirmed that they will be applying for confirmation as to whether the Council's prior approval is required for the Proposed Development (the **Application**).

We are writing to bring to your attention that the PD Right does not apply to the Proposed Development and that it would be unlawful for:

1. the Proposed Development to be carried out in purported reliance on the PD Right; and

2. the Council to allow for deemed approval to be given, or grant prior approval pursuant to the GPDO, and that either action would be open to legal challenge.

The Proposed Development requires express planning permission pursuant to an application. We request that the Council confirms this to the Developers and refuses to validate the Application. If the Council elects to validate the Application, we request the Council notifies us so that we may make further representations.

We set out below our reasons why the PD Right does not apply. We also set out why, without prejudice to our position that the PD Right does not apply, if the PD Right was to apply, the Council must refuse to give its prior approval for the Proposed Development.

Unlawfulness of the Application and the Proposed Development

Article 3(4) of the GPDO provides that: "*Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted otherwise than by this Order*". A similar restriction was included in the previous version of the GPDO.

The Property was constructed pursuant to planning permission reference 2005/0259/P dated 4 October 2006 for Redevelopment of the site for mixed use development comprising officer (Class B1), retail (class A1), food and drink (class A3), community (class D1) and residential (class C3) uses, new public courtyard and new pedestrian routes across the site (the **Planning Permission**). Conditions 8 and 10 of the Planning Permission, which provide ongoing safeguards for the Property and the surrounding area, provide the following:

> *Condition 8: No meter boxes, flues, vents, pipes, satellite dishes or other attachments not shown on the approved drawings shall be fixed or installed on the external faces of the building without the prior written consent of the local planning authority.*
>
> *Condition 10: No plant, ventilation, air conditioning, extraction or other such equipment shall be provided other than where specified on the plans without the prior written consent of the local planning authority.*

These are express conditions that restrict the installation of masts etc., and the words used in the relevant condition, taken in their full context, clearly evince an intention on the part of the local planning authority to make such an exclusion. The Proposed Development would plainly be contrary to and in breach of these conditions. As such, Article 3(4) applies and disapplies the PD Right. This is consistent with the recent case law, *Dunnett Investments Ltd v SS Communities and Local Government [2017] EWCA Civ 192* (**Dunnett**), where it was held that:

1. a condition requiring express planning consent from the relevant local planning authority (**LPA**) prevented reliance on the GPDO; and

2. prior approval was held not to constitute such express planning consent, not least because the scope of matters which an LPA can consider is limited in the prior approval process. In *Dunnett*, it was held that this would restrict the decision-making exercise of the LPA in a way that was not intended when the condition was imposed.

The Developers must therefore apply for planning permission for operational development. No application has been made by the Developers.

It follows that any grant of prior approval pursuant to the GPDO would not result in planning permission for the Development because such a permission would contradict conditions 8 and 10 in breach of Article 3(4). It would be irrational for the Council to grant such a prior approval and any decision would be open to legal challenge. Equally, if the Developers sought to rely on the PD Right, the Proposed Development would be unlawful and open to enforcement action.

It is also the case that prior approval cannot be deemed in respect of the Proposed Development, as would ordinarily be possible under part 16 of Schedule 2 to the GPDO if the Council did not respond to the Developers. This demonstrates the importance of the Council refusing to determine the Application otherwise the Council will have been complicit in the purported grant of a planning permission for development that has been excluded from the GPDO and, which could not be lawfully implemented as result of Article 3(4).

Finally, a prior approval under the PD Right cannot lawfully count as "*written consent of the local planning authority*" under Condition 8 or Condition 10 because the Council's considerations under the GPDO in respect of the PD Right are constrained to siting and appearance under the GPDO. This would unlawfully fetter the Council's considerations under Condition 8 and Condition 10, which must be broader than those permitted by the PD Right. This is consistent with *Dunnett* where the Court held that allowing the prior approval process to override an express planning condition would unlawfully circumscribe the Council's decision-making process in a way which was not intended when the condition was imposed. Furthermore, the Court of Appeal in *Dunnett* observed that under the GPDO, "planning permission is nevertheless granted, not by the [local planning] authority, but by the Secretary of State as a result of the direct effect of the GPDO". Prior approval under the GPDO is incapable of constituting the "*written consent of the local planning authority*".

We therefore request that the Council confirms by return that it agrees that the GPDO does not apply to the Proposed Development by virtue of the ongoing planning conditions and the operation of Article 3(4) and that it will confirm this to the Developers. Our client reserves its right to seek an injunction in respect of the Proposed Development, and to judicially review any decision of the Council, if it becomes necessary.

Ancillary Development – Unlawful Platform

In addition and without prejudice to what we have already set out, the Proposed Development is stated as including non-specific "*ancillary development*" which, from the plans, appears to include a significant platform and hand-rails. The GPDO does not permit the installation, alteration or replacement of electronic communications apparatus (other than a mast, antenna or radio equipment housing) if the ground or base area of the structure would exceed 1.5 square metres. The platform development appears to significantly exceed these dimensions. The platform development is outside of the scope of the PD Right, and so prior approval cannot lawfully be given for this element of the Proposed Development upon which the remainder of the Proposed Development would be sited. Express planning permission would always be required for this operational development.

As the PD Right does not extend to this platform, and as this platform does not currently exist, the Proposed Development cannot lawfully be sited as shown on the plans because it is proposed to be sited on something that does not exist and does not have the benefit of planning permission. To that extent, the Application is also premature and cannot be determined.

Pre-Requirements for PD Right

Finally, the PD Right only applies to development: "in, on, over or under land controlled by that operator or in accordance with the electronic communications code". In this respect, we note that the:

1. land is not controlled by the Developers; and

2. development would not be in accordance with the electronic communications code because no agreement is currently in place and we do not believe the operator will be able to satisfy the requirements necessary to obtain an agreement conferring rights under the electronic communications code.

Developers' Notice Deficiencies

In addition to the above legal bars to reliance on the PD Right, the Developers' Notice is not legally compliant with the requirements of the GPDO in any event. This is because:

1. it is served pursuant to Town and Country Planning (General Permitted Development) (England) Order 2016 (Amendment)(No.2) Order 2016. This is not the correct legislation;

2. it does not specify the height of the masts; it only specifies the top height of the masts;

3. it states that Application and accompanying plans **may** be available for public inspection at the Council's offices [Emphasis added]. The GPDO requires the notice to contain a statement that the application **is** (not may be) available for public inspection. We understand the Application and accompanying plans have not been made available for public inspection at the Council's offices, nor, as at the date of this letter, is the Application available to review online; and

4. even if the documents had been made available for public inspection, the Council's offices are currently closed and this deprives third parties (and particularly those without adequate internet access) from inspecting the Application documents.

Ordinarily, we would request that the Developers' Notice is reissued in a legally compliant form but given that the PD Right does not apply to the Proposed Development this is unnecessary as it would not achieve anything. If the Council considers that it can lawfully entertain the Application then the Developers' Notice must be reissued.

Prior Approval Process – Siting and Appearance

If the Council considers that it can lawfully entertain the Application, which we maintain it cannot, then the Application must be subject to the Council's prior approval and we submit that prior approval must be refused.

There are three reasons for this:

1. first, as set out above, the grant or deeming of a prior approval would not result in planning permission for the Proposed Development as it would be contrary to the conditions to the Planning Permission, which require written approval of the Council for the installation of development such as the Proposed Development. If the Council allowed this to happen it would be complicit in the purported grant of a planning permission in contravention of Article 3(4) of the GPDO and that decision (i.e. including any decision not to act) would be subject to legal challenge;

2. secondly, the Developers have failed to satisfy Conditions A2(a)[1] and A2(b)[2] to the PD Right. They has provided no evidence to support the siting and appearance of the Proposed Development. Therefore, they have not demonstrated that the siting and appearance of the Proposed Development minimise the effect of the Proposed Development so far as is practicable on the external appearance of the building and the visual impact of the Proposed Development on the surrounding area.

   The location and setting of the Property, and the Property's inherent architectural merit, make it even more essential that the Council considers the siting and appearance of the Proposed Development and the harmful impacts of the Proposed Development on the Property and the surrounding area as required under the GPDO. We submit that, given the exemplar architectural and award winning status of the Property, these conditions are not capable of being satisfied in any event; and

3. thirdly, given that the platform that is shown on the plans as forming part of the Proposed Development does not exist or even benefit from planning permission, and cannot be constructed in reliance on this PD Right, the remaining apparatus that forms part of the Proposed Development cannot be sited as shown in any event.

In respect of the first reason, it is essential to consider Conditions 8 and 10 of the Planning Permission in more detail. This is consistent with the Court of Appeal's decision in *Dunnett* which affirmed the importance of considering the condition in the appropriate context, which includes the planning history of the site and the reason for the condition. The reasons provided for Condition 8 and Condition 10 of the Planning Permission demonstrate why those conditions were necessary to regulate the ongoing use of the Property and to protect it, and the surrounding area, from harm of the kind that would occur if the Proposed Development was allowed to proceed:

1. Condition 8 was imposed because of the need to safeguard the premises (including the Property) and the character of the immediate area; and

2. Condition 10 was imposed because of the need to safeguard the visual amenity of the premises (including the Property) and the character of the immediate area.

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[1] Condition A2(a): the siting and appearance of any antenna or supporting apparatus, radio equipment housing or development ancillary to radio equipment housing constructed, installed, altered or replaced on a building (excluding a mast) are such that the effect of the development on the external appearance of that building is minimised, so far as practicable.

[2] Condition A2(b): the siting and appearance of any electronic communications apparatus installed, altered or replaced on it, are such that the visual impact of the development on the surrounding area is minimised, so far as practicable.

The Council's policy position remains substantially the same. In particular, the Camden Local Plan 2017 continues to seek to ensure the amenity of communities, occupiers and neighbours is protected including outlook (Policy A1), while the Council also continues to resist development outside of a conservation area that causes harm to the character or appearance of that conservation area (Policy D2).

The Proposed Development is precisely the form of development that the Council considered it was essential to safeguard against when imposing the conditions on the Planning Permission. In the words of the Court of Appeal in *Dunnett*, the conditions "*show that the Council was anxious to maintain close control over the planning use to which the site was put*". The siting of the Proposed Development would:

1. harm the appearance of the Property and the visual amenity of the Property; and
2. harm the appearance and character of the immediate area. This harm will extend to the adjacent conservation areas.

As the Committee Report associated with the Planning Permission makes clear, before Planning Permission was granted for the Property, a revised scheme was developed, in collaboration with the Council and Historic England, to ensure that the appearance of the Property was acceptable in planning terms. This included "*variations to the roof profile and elevations*" (see Paragraph 7.4.8) and the provision of "*greater variety to the roof profile*" (see Paragraph 7.4.9). The Committee Report also noted the "*design of a taller building would be of paramount importance*" (see Paragraph 7.4.23) and a comprehensive visual assessment was prepared to provide 360-degree coverage of the site. The Planning Permission was subject to detailed design, massing and views considerations and the separate blocks were designed as considered responses to their specific location with regard to the neighbouring listed buildings and conservation area. The Planning Permission closely circumscribed the details of the scheme in a manner that was clearly intended to preclude later annexures such as the Proposed Development.

For the above reasons, even if the Council was to entertain the Application, prior approval must be refused.

Prior Approval Consultation

If the Council considers it can lawfully entertain the Application, which we maintain it cannot, then it must move to formally consult on the Application.

Our view is that the Application would be subject to Article A.3 (6)(b) of Part 16 to the GPDO, on the basis that it does not comply with the development plan including the following policies of the Camden Local Plan 2017:

1. Policy A1 (Managing the impact of development), which seeks to protect the amenity of communities, neighbours and occupiers;
2. Policy D1 (Design), which states that tall buildings will be assessed against the Council's design criteria and the effect on the skyline and the historic context of the surroundings, and
3. Policy D2 (Heritage) which states that the Council will resist development outside of a conservation area that causes harm to the character or appearance of that conservation area.

This would necessitate public consultation, including the erection of site notices.

We do not consider that such consultation can be undertaken at this time given the COVID-19 crisis without a serious breach of natural justice in this case given its location in a residential area. This is because a site notice will be required and the current restrictions mean that those who would ordinarily see this site notice, including several commercial office tenants, retail tenants, 53 affordable housing residential tenants and 56 private residential long leasehold tenants, will not see it and so will not be aware of the Proposed Development.

In any event, as we have set out in detail, consultation is unnecessary because the Proposed Development falls outside the scope of the PD Right.

Yours faithfully

[redacted]

CMS Cameron McKenna Nabarro Olswang LLP

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