

**Proposed Change of Use at Boston House, 36-38 Fitzroy Square,
London, W1T 6EY from B1 Office Use to D1 Educational**

OPINION

1. I am asked to advise SM Planning who act on behalf of the New College of the Humanities (“NCH”) in respect of an application for planning permission Boston House, 36-38 Fitzroy Square, London, W1T 6EY in connection with the planning application for a proposed change of use from B1 office use to D1 educational use.
2. This Opinion addresses three principal issues; namely, (1) whether there is evidence lawfully capable of supporting the conclusion that this application complies with Policy E2, (2) the so-called “land use swap” and finally (3) whether it would nonetheless be lawful to grant planning permission even if the application did not comply with Policy E2 of the development plan.

Policy E2

3. Policy E2 states:

“We (the council) will resist development of business premises and sites for non-business use unless it is demonstrated to the Council’s satisfaction:

- a. the site or building is no longer suitable for its existing business use; and

b. that the possibility of retaining, reusing or redeveloping the site or building for similar or alternative type and size of business use has been fully explored over an appropriate time.”

4. The interpretation of planning policy is a matter of law.¹In the present case, it is clear in my opinion that if the two conditions of Policy E2 at (a) and (b) are met to the satisfaction of the Council then the development will comply with the Policy even though it would result in a loss of business premises.
5. Although the use of the word “business” in Policy E2 might suggest a wider definition, “business uses” are defined by the Local Plan to be B use classes (see also paragraph 7.3 of the Planning Statement).
6. Boston House was formerly used as the headquarters of ARUP the international engineering company. The supporting evidence which accompanies this planning application which is also summarised in the Planning Statement, along with the later evidence contained in the update letter by Robert Irving Burns (RIB) August 2020 and marketing analysis carried out by Mr Anthony Lorenz and Lorenz Consulting, provides more than sufficient evidence for the Council rationally and lawfully to conclude that:

(a) Boston House is no longer suitable for its existing business use. In short, it is open to the Council to conclude not only that ARUP no longer wants the site as its headquarters but there are no companies wishing to use it for a similar purposes. On the evidence before me, the Council is also entitled to conclude that Boston House is a type of building no longer suitable for current

¹ See e.g. *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

office market requirements for a building of this size and location and furthermore;

(b) the Council may also clearly conclude on the evidence that the possibility of retaining, reusing or redeveloping the site or Boston House for similar or alternative type and size of business use has been fully explored over an appropriate time. Boston House has been aggressively marketed for three plus years attracting no suitable alternative tenant.

7. These conclusions are entirely open to the Council without any reliance upon any suggested “land use swap” or taking into account the fact that the proposed educational use in this application will in fact include some office type uses.
8. In short, based on the evidence before it, the Council is fully entitled as a matter of law to conclude that this application satisfies Policy E2.

Land Use Swap

9. I turn to the “land use swap” in relation to securing a change of the use of part of County House, Conway Mews, W1T 6AA to office accommodation.
10. First, I deal with the Opinion of Andrew Byass dated 6 July 2020. I can deal briefly with the Opinion because it has largely been overtaken by events. It purports to be a legal “Opinion.” However, in essence, it goes beyond matters of law and seeks to advance Mr Byass’s

own personal opinion or those of his client as to the weight which should be given to the so-called “land use swap”.

11. Mr Byass concludes at paragraph 11 that: “Accordingly, unless the Council can be satisfied that the proposed s. 106 agreement secures office uses at the other sites in perpetuity, it should be given no weight since it will be unable to guarantee that there will be no material loss of office space.” If by that he is suggesting that the Council cannot give “a land use swap” any weight as a material consideration as a matter of law, then he is incorrect.

12. It is trite law² that weight is a matter entirely for the judgement of the local planning authority, save where such a judgement would be one so unreasonable that no reasonable authority could hold. Even in the absence of a binding legal obligation, this Council is entitled to make a judgement as to the likelihood of the swap occurring as a matter of fact and giving it due weight. Accordingly, the so-called “land use swap” is a material consideration to which the Council is entitled to give weight as it thinks fit even if there was no legal obligation securing absolutely the swap in perpetuity.

13. If however Mr Byass was, in fact, offering his personal opinion that it “should” be given no weight then such a view has no place in Counsel’s Opinion on the law.

14. In any event, as I understand matters as they now stand, the applicant NCH, is able to secure via the freeholder of County House a planning obligation which will bind the title of County House in perpetuity to

² See e.g. *Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 2 All ER 636

secure the “land use swap” as detailed in the current application. It would be common ground even with Mr Byass that on that basis the Council would be entitled to place great weight on this as a material consideration in the determination of this application.

Other Material Considerations

15. In any event, even if the Council were to take the view that it was not satisfied that Policy E2 had been met, it would nonetheless be entitled to grant planning permission as a departure from the development plan, having regard to the other material considerations in favour of allowing planning permission that might outweigh the failure to comply with this aspect of the development plan³.
16. In so doing the Council would be able to take into account a range of material considerations including the “land use swap”, the fact that the educational use would include an element of office type use. It would also be able to take into account the recent changes in socio-economic conditions resulting from COVID-19 and the desirability of securing a high quality educational institution and the associated benefits to the Borough, the city of London and the country.
17. The Council would also be able to take into account the mixed planning use nature of Fitzroy Square and its planning history which includes past educational use in the not too distant past.

³ Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that “where in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material consideration indicates otherwise.

18. In such circumstances, planning permission could also be lawfully granted.

CONCLUSION

19. I have nothing further to add as presently instructed. I am, of course, happy to advise further.

20. If those instructing me have any questions or require any further assistance, they should not hesitate to contact me in Chambers.

GREGORY JONES QC

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Temple

2 October 2020

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