

Andrew Jones BSc MRICS

PROOF OF EVIDENCE

FOR PUBLIC INQUIRY COMMENCING ON 1 December 2020

APPEAL SITE

135-149 Shaftesbury Avenue, London, WC2H 8AH

APPELLANT

Capitalstart Limited

APPEAL

Appeal against London Borough of Camden's refusal of Planning Permission and Listed Building Consent for

'The comprehensive refurbishment of the existing Grade II listed building and the provision of a new two storey roof extension and new basement level, providing a new four-screen cinema (Class D2) and spa (sui generis) at basement levels, a restaurant/bar (Class A3/A4) at ground floor level, a 94 bed hotel (Class C1) at part ground and first to sixth floors and associated terrace and bar (Class A4) at roof level, together with associated public realm and highways improvements'.

Planning Inspectorate Reference No's.

APP/X5210/W/19/3243781 & APP/X5210/Y/19/3243782

London Borough of Camden

2017/7051/P & 2018/0037/L

Introduction

I am Andrew Jones BSc MRICS of BPS Chartered Surveyors. I am a Director of BPS a company I started more 21 years ago. I have 29 years post qualification experience. My initial training was with Jones Lang LaSalle; later in my career I was appointed a Partner in the Consultancy division of Donaldsons. I have considerable experience of a wide range of major and minor developments from mixed use town centre schemes through to large housing estate developments. I have advised several national house builders in relation to scheme appraisals and financial structuring of transactions.

I have led negotiations on the financial terms of major development projects for several local authorities (as land owner and facilitator) including social housing schemes, regeneration projects and other town centre re-development schemes.

I have been involved in assessing viability for major developments for planning purposes since 2004 and currently act for 18 London Boroughs and more than 20 other Unitary and District Council's in this capacity. My company reviews in excess of 200 Major planning applications per annum including some of the largest developments currently planned in the Country. This scope necessarily involves a wide range of mixed use developments.

As a company we no longer work for developers to avoid potential conflicts of interest as a high proportion of our work is in the context of planning viability. I have worked for many large and small developers prior to this corporate decision as such I have a good knowledge of the development process from all perspectives.

Since BPS was founded the practice has advised more than 70 local authorities and governmental bodies.

I have also been a part of MHCLG's Expert Consultation Panel concerning revisions to the NPPF and PPG.

I confirm that I have prepared this report in accordance with the Royal Institution of Chartered Surveyors Practice Statement and Guidance Note, *Surveyors acting as expert witnesses* (4th Edition), issued 2 July 2014.

RICS Financial viability in planning: conduct and reporting 1st edition, May 2019 - Statement of Compliance

In preparing my evidence I confirm that I have acted with

- objectivity
- impartially
- without interference and
- with reference to all appropriate available sources of information.

My company was involved at the application stage of this Appeal and continues to act for the Council in respect of providing development viability advice in a planning context on other applications in the borough with instructions awarded on a case by case basis. I consider that I have no conflicts of interest in acting for the Council in this appeal.

My advice is not subject to a performance or success related fee basis.

Statement of truth

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

A handwritten signature in black ink, appearing to be 'AJ', with a stylized flourish extending to the right.

Signed Andrew Jones BSc MRICS

Director BPS Chartered Surveyors

Contents No.	Page
1.0 Scope of my Evidence	6
2.0 Issue of Repairs	11
3.0 Assessing Optimum Viable Use	17
4.0 The Appeal Scheme Viability	20
5.0 Alternative Use Viability	22
6.0 Summary Conclusions	29

Annexures

Annex A	Evidence of Neil Powling Dip BE FRICS Dip Proj Man(RICS)
Annex B	Iceni Viability Report
Annex C	Land Registry Title
Annex D	Letters from the Theatre Trust
Annex E	Lease, Option to Surrender + Deed of Variation
Annex F	Theatre and Cinema Transactions

1.0 Scope and Summary of my Evidence

- 1.1 The Council determined the planning and listed building consent applications under delegated powers, and on 5 July 2019 refused planning permission and listed building consent for 14 reasons. The Council considers that it would be possible to overcome reasons for refusal 4-14 by entering into a suitably worded section 106 legal agreement and I understand that Reason 3 has now been addressed. The key reasons for refusal are therefore 1 and 2 set out below:

Reason 1

The proposed rooftop extension, by reason of the proposed height, mass, detailed design and materials would compromise the form, architectural character and historic interest of the host listed building, and in combination with the change of its main use to a hotel, would result in less than substantial harm to the significance of the host listed building and nearby surrounding Seven Dials and Denmark Street Conservation Areas, contrary to policy D1 (Design) and D2 (Heritage) of the Camden Local Plan 2017.

Reason 2

The applicant has failed to demonstrate that the proposed development would ensure the provision of the maximum reasonable amount of replacement cultural or leisure facilities within the scheme contrary to Policy C3 (Cultural and leisure facilities) and Policy D2 (Heritage) of the Camden Local Plan 2017.

- 1.2 My company provided two reports to the Council in respect of the viability of the appeal scheme in the context of delivering planning obligations. The first of these reports was dated 20 March 2019 and was updated following provision of additional information by a report dated 15 May 2019.
- 1.3 The primary focus of these reports as stated was to consider the viability of the appeal scheme in the context of funding planning obligations, both of which concluded that the appeal scheme was substantially in financial deficit. Icení, the party advising the Appellant in respect of viability, concluded in their 16 January 2018 report¹ the appeal scheme generated

¹ See Annex B

a deficit of -£5.31m even allowing for nil profit and a nil existing use value. If the target profit of 17.5% on costs identified by Iceni as £13.7m, (but which I calculate as £14.7m) were factored in, the scheme would show an overall deficit of -£19.01m even allowing for a nil land cost. In this we note the site was sold to Capitalstart Ltd for £2,500,000 in March 2012²

1.4 In drafting our May 2019 report, we were also directed to consider letters of objection from the Theatre's Trust, the National Advisory Public Body for Theatres in the United Kingdom dated October 2018 and March 2019³. The essence of these letters being that the Theatre's Trust questioned the Appellant's argument that the existing accommodation was unable to meet the needs and demands of commercial occupiers, and objected on the basis that the proposal failed to evidence that continued cultural use at the current scale could not be maintained. In their letter dated October 2018 the Theatre's Trust also mentioned that they were aware of at least one operator seeking accommodation in the West End of the scale offered at the appeal site, and as such, they considered the Appellant's argument to be without basis or proper marketing evidence.

1.5 Further correspondence was received from the Theatre's Trust in March 2019 stating that since October 2018, a number of further credible operators have come forward with specific interest, and that this site represents the last and only opportunity in the West End to provide a large scale cultural venue such as a theatre, as it still has the volume and footprint to provide one, potentially being able to offer an auditorium seating up to around 1,400 seats. This position is echoed in the Theatre's Trust Statement of Case.

1.6 Our May 2019 report concluded:

2.9 The key issue is whether the scale of proposed development is necessary in order fund the repairs to the building, or whether instead a theatre use would be sufficiently valuable to subsidise these works. The applicant has previously made an 'enabling development' argument to justify the proposed scheme which involves adding floors to the building and losing D1 floorspace – i.e. that the proposed scheme is necessary to enable the building repairs. However, the apparent strong potential for theatre use holds the prospect that theatre use would be valuable enough to cover the repair costs.

² See Annex C

³ See Annex D

- 1.7 The Appellant in their Statement of Case included the following additional reports:
- a) Charcoalblue Report – Test Fit report October 2019
 - b) Gardiner & Theobald Report – Feasibility Conversion to a Theatre Version 1 (based on the Charcoalblue report) dated 9 September 2019
- 1.8 These reports have been put forward in substitution of a marketing exercise as a means of demonstrating the lack of viability of a potential theatre conversion.
- 1.9 The scope of my evidence focusses on Reason 2 and looks at what steps the Appellant should realistically have pursued in seeking to identify the optimum viable use of the property and demonstrates that the absence of a proper and meaningful marketing process and full engagement with potential theatre operators/developers means that the Appellant cannot reasonably conclude that the appeal scheme is the optimum viable use especially in light of the appeal schemes considerable lack of viability and highly questionable deliverability.
- 1.10 Furthermore it is apparent from Reason for refusal 1 that if theatre use could be viably reinstated then it would have less impact than the appeal scheme, it would also serve to maximise provision of cultural and leisure use in accordance with the Policy C3 (Cultural and leisure facilities) and Policy D2 (Heritage) of the Camden Local Plan 2017. Council policies C2.
- 1.11 Equally it is not clear what the market interest might be for continued cinema use might be given the condition of the property. The only steps taken by the Appellant in this regard having been to amend the terms of the existing cinema lease to relax the previously full repairing obligations, thereby leading to the current backlog maintenance issues and to contemplate a much smaller cinema use within the appeal scheme which is not comparable to the current scale of operation.
- 1.12 I have prepared my evidence in a time of exceptional market conditions arising from the outbreak of the Novel Coronavirus (COVID-19), declared by the World Health Organisation as a "Global Pandemic" on 11 March 2020. Until recently the RICS issued advice to its members when reporting valuations to declare 'material valuation uncertainty' as per VPS 3 and VPGA 10 of the RICS Red Book Global.

- 1.13 The RICS has since updated its position and issued *Beyond COVID-19: Valuation approaches and evidence during the COVID-19 health crisis* last updated 15 September 2020. This document builds upon on the *Comparable evidence in real estate valuation (1st edition)*, RICS guidance note, and reminds valuers about the hierarchy of comparable evidence and thought processes needed when using less reliable or unverifiable information. This latest Guidance states at Section 4 Page 5:
- Whether material uncertainty exists remains the decision of the RICS member. Insight indicates many markets are uncertain and a continued lack of empirical data could support this conclusion.*
- 1.14 My evidence considers the potential viability of cinema, theatre and hotel uses. All these sectors are considerably impacted by current restrictions regarding the need for social distancing with all three sectors having sought and received substantial Government financial support. I recognise it is currently not possible to make accurate predictions about the duration of these measures or to make accurate predictions about precisely where the market for these uses will be in the medium to longer term. Whilst ever substantial restrictions apply the inevitable focus in all three sectors will be one of survival, with cash conservation and liquidity of immediate concern.
- 1.15 However it is realistic to assume that were it possible to return to the “normality” which existed prior to the outbreak of the pandemic, it would be reasonable to assume there would be a measure of pent up demand for these uses.
- 1.16 Against this backdrop I consider it sensible to base my considerations on an assumption that at some point there will be a return to something like the market conditions for these uses that prevailed prior to the outbreak of the virus. Indeed to adopt any alternative assumption would be to assume long term collapse of these sectors which is to some extent belied by the Government support evidenced to date from for example, the £1.57bn Culture Recovery Fund which is providing support to a range of theatres and independent cinema operators, as well as a package of other measures including rate relief, employment support and business loans.
- 1.17 In addressing the reasons for refusal I have relied upon evidence provided by Neil Powling DipBE FRICS DipProjMan(RICS) who has provided an assessment of the cost information set out in the two reports identified under 1.6 above. Mr Powling had previously provided cost

analysis in relation to our March and May 2019 reports. Mr Powling's evidence is set out in Annex A.

1.18 For the sake of clarity, I do not seek to question the conclusions reached in our May report concerning the viability of the appeal scheme which concluded:

2.3 The scheme is shown to be in deficit even when the benchmark land value is set as zero. It was initially unclear why the applicant is proceeding with the scheme on this basis given the unacceptable financial performance indicated. We understand that it is willing to proceed with the scheme in spite of this insufficient level of profit, due to the limited other options available to it in respect of this site. Following our review, we are in agreement with the overall conclusion that the scheme falls far short of a 'break even' position and therefore no additional planning contributions (including affordable housing contributions) can viably be delivered.

2.4 Moreover, due to the nature of the disrepair to the building, the situation is likely to get worse over time as the building deteriorates further, thereby further compromising viability. This may in turn lead to a greater amount of 'enabling development' (i.e. additional floorspace) being required from the redevelopment, in order to cover the cost of the original cinema building's renovation.

2.5 The IcenI appraisal is a detailed Argus appraisal which includes a cashflow for all the revenues and costs; it generates a negative profit, of -£5.31m. This represents a -6.3% profit on Cost; and the total profit shortfall from the 17.5% profit on cost target, is £20.0m. Given that the Gross Development Value of the scheme is £64m, this would mean that a major uplift in scheme performance would be required in order to overcome this shortfall. This appraisal already includes CIL contributions.

2.0 Issue of Repairs

- 2.1 The Local Plan seeks to prevent loss of cultural and leisure uses through policy C3 from the which the following extract is taken:

Policy C3 Cultural and leisure facilities

Protection of cultural and leisure facilities

The Council will seek to protect cultural and leisure facilities and manage the impact of adjoining uses where this is likely to impact their continued operation. Where there is a proposal involving the loss of a cultural or leisure facility, it must be demonstrated to the Council's satisfaction there is no longer demand.

- 2.2 The Delegated report identifies that the appeal scheme would result in an overall loss of D2 floorspace:

1.3 The existing building is in use by Odeon cinema, and provides 3,265sqm (GIA) cinema floorspace. The proposals would see the redevelopment of the building, and the creation of a new smaller four screen cinema at basement level of 1,401sqm (GIA), representing a loss of 1,864sqm, or 57% leisure floorspace.

- 2.3 The Icen Planning Viability Report dated January 2018⁴ identifies the driver for the appeal scheme is the failure of the current tenant Odeon to maintain the property as illustrated from the following extract:

2.22 During over 40 years of occupation, Odeon has been responsible for the maintenance of the building, being required to:

'repair and keep the building in good and substantial repair and condition and properly decorated and in a state in every respect for use as a ...high class West End theatre'

2.23 It is clear from the building condition report completed by Hallas & Co (Appendix 8 [of the Icen report]) that they have neglected the responsibility under their lease terms.

2.24 The current occupation is producing insufficient revenue necessary to maintain the building properly and Capitalstart is keen to improve the

⁴ See Annex B

building through investment so that it can once again become a destination venue for the location.

2.25 Since acquiring the property Capitalstart have secured the ability to break the lease in order to carry out the much-needed improvements to the building.

2.4 The Iceni report further seeks to demonstrate that the existing building is in need of substantial repairs the cost of which could not be viably met by the existing cinema operation. This is evidenced by the following extracts from that report:

5.19 If the exiting Cinema operation were to be maintained and over repairs are needed to the building for it to continue. The condition survey of the building highlights a number of significant issues and cites £10,000,000 of works being required, assumed to exclude fees contingencies (say 5.25%) and cost of capital. It is anticipated for this appraisal these repair works could be carried out while the building remained trading (so as to minimise loss of rental income).

5.20 It is possible that the repairs might result in an increase in rent to potentially 10% of net revenue, or up £15 to £18 per sq ft.

5.21 The existing Cinema is 824 sq m (8,869 sq ft) with 1,013 sq m (10,904 sq ft) back of house space and 1,097 sq m (11,808 sq ft) of circulation space. This would imply a rental income of between £205,000 to £550,000.

5.22 Based on yield of 4.75% this would indicate a gross capital value of in the order of between £4.3 million and £11.6 million.

5.23 The current rent, based on up to 10% of net box office receipts of £138,000. This is under rented by comparison and therefore would attract a sharper yield because of its added security, we have assumed a yield of 4.5%, generating a gross capital value of £3,07 million.

2.5 Reflecting on Iceni's analysis as stated above, they indicate a mismatch between a cinema capital value of £3.07m and repair works of £10m representing a net deficit of -£6.93. This deficit is some £12.078 less than Iceni consider is proposed by the appeal scheme. Iceni comment further:

5.24 It is clear that there is no incentive to carry out the investment to repair the property under the current leasehold occupation, even were it

to generate at return off the higher lease there is no incentive to carry out the repairs that generate little or no profit.

5.25 The existing tenant therefore cannot sustain use of the building and there would be no incentive to any vendor transacting at the implied value. As such capitalising the existing income, taking into account value the cost of repairs, would not represent form a Benchmark Land Value for planning purposes.

- 2.6 As such it is claimed that operation of the Cinema could not continue.
- 2.7 In preparing the reports of March and May 2019 my company was provided by the Appellant with the following documents concerning Odeon's occupation of the building:
- a) Copy lease date 16 April 1970
 - b) Copy deed of variation 16 May 1985
 - c) Option to Surrender dated 5 December 2012
 - d) Unsigned and undated Deed of Variation from 2012
- 2.8 The Options to Surrender and the 2012 Deed of Variation coincide with the Appellant's purchase of the property. These documents are set out in Annex E
- 2.9 The original lease to Oden included the following repairing obligations:
- 2(7) To repair and keep the exterior and interior of the demised premises and all additions thereto and all Landlord's fixtures and fittings thereon and all drains sewers soil and other pipes sanitary water gas electrical and central heating apparatus glass pavings walls fences and railing vaults and appurtenances in good and substantial repair and condition and properly decorated and in a state fit in every respect for use as to two high class West End theatres providing as to the one cinematograph and as to the other cinematograph of theatrical exhibitions (except damage resulting from any of the [insurable] perils specified in Clause 3 (2) hereof unless the insurance money shall be wholly or partly irrecoverable by reason solely or in part of any act or default of the tenant*
- 2.10 This clause clearly places the responsibility on Odeon to keep the property in Good and Substantial repair. Given the strength of Odeon as a company there is no reason why this obligation would not have been fulfilled or otherwise entitle the landlord to pursue fulfilment of the obligation through legal means.

2.11 Following purchase of the property the Appellant purchased the right to terminate the Odeon lease which would otherwise expire on 24 March 2026. The option fee paid was £1,500,000 with a further payment of £3,500,000 due on exercise of the option, representing a total payment of £5,000,000.

2.12 I assume the unsigned deed of variation from 2012 arose because of this option. This deed crucially amended Odeon's full repairing obligation to a superficial obligation as evidenced by the following extract:

1.2 Clauses 2(7) -2(9) shall be deleted and replaced by the following:

2(7) To keep the Premises wind and watertight and in a safe condition (excepting damage resulting from any of the perils specified in clause 3(2) hereof (unless the insurance money shall be wholly or partly irrecoverable by reason solely or in part of any act or default of the Tenant) or from any other peril which is not actually insured against including damage caused by terrorism.

Provided always that the Tenant hereby agrees to remain liable to timeously carry out all such works of repair at its own cost) as may be required as a consequence of any notice or demands that may be required by English heritage, the Local Authority and any statutory authority provided that where the Tenant is actively and properly challenging the validity of such notice or demand (and there is no immediate possibility of any penalty conviction or claim against the Landlord being thereby occasioned) the Tenant's obligation under this provision shall be held in suspense pending the outcome of the Tenant's challenge

2.13 It should be noted that this considerable relaxation of the repairing obligation sets a much lower bar to be achieved when considering tenant dilapidations on expiry of the lease. Reflecting that IcenI consider backlog repairs to amount to £10m, this benefit to Odeon must also be seen as forming part of the consideration paid by the Appellant in relation to the option to surrender and helps provide an indication of the value attached to Odeon's lease.

2.14 The Option Agreement and Deed of Variation clearly signals in my view three key points:

a) Odeon considered that continued occupation of the property on the terms prevailing prior to the option to surrender (including fulfilling a full repairing obligation) highly valuable such that it was only willing

to vacate the property prematurely on receipt of a payment of £5m and to be excused the obligation to pay £10m in probable dilapidations.

- b) It signals that the Appellant was actively seeking vacant possession of the property rather than options to extend or enhance the current cinema use.
- c) The substantially watered down repairing obligations brought in through the 2012 Deed of Variation indicate that the Appellant was not concerned about the property being maintained to the standard required by the original lease. The only reason in my view why this would be considered acceptable is because the Appellant was seeking to promote a major redevelopment of the property. A fact underlined by Companies House which lists the Appellant under the following SIC code 41100 - Development of building projects.

2.15 NPPG provides the following relevant guidance concerning the impact of building condition in respect of decision making

Should the deteriorated state of a heritage asset be taken into account in reaching a decision on an application?

Disrepair and damage and their impact on viability can be a material consideration in deciding an application. However, where there is evidence of deliberate damage to or neglect of a heritage asset in the hope of making consent or permission easier to gain the local planning authority should disregard the deteriorated state of the asset in any decision (National Planning Policy Framework paragraph 191). Local planning authorities may need to consider exercising their repair and compulsory purchase powers to remedy deliberate neglect or damage.

Paragraph: 014 Reference ID: 18a-014-20190723

Revision date: 23 07 2019

2.16 It is evident that the estimated costs of repairs to the property identified by Hallas & Co survey and estimated at some £10,000,000 have occurred as a result of the Appellant's own actions in substituting the previously rigorous repairing obligation under Odeon's lease with a much lesser obligation and thereby in effect waiving the right to seek dilapidations which could have rectified the current wants of repair. It is also clear that Odeon considered the operation of the current cinema to be very valuable even allowing for the original rigorous repairing

obligations given the scale of premium they required to vacate the property.

- 2.17 Having reached this conclusion, I am not clear why continued occupation of the property by Odeon has been dismissed by the Appellant as a potential optimum viable use. It is evident that the Appellant is comparing the cost of accrued repairs to the potential additional rent a cinema operator may pay to occupy a fully repaired property as the financial justification for assuming continued cinema use is not viable. In effect assuming the liability for repairs must be paid for out of the rental income, rather than acknowledging that as these repairs now fall outside of the tenant's lease they become a Landlord's obligation. The lack of viability of Cinema use is somewhat belied by the fact that Odeon have traded from this property for 40 years.
- 2.18 The repairs are a direct result of the Appellant's own actions and therefore arguably it should meet these costs irrespective of the level of cinema income received, given that a repaired building appears sustainable based on both the past occupation by Odeon and the scale of premium required to secure vacant possession. Especially when it was evident that a rigorous full repairing covenant was economically supportable by Odeon prior to the Deed of Variation.
- 2.19 If it were decided that the cinema use must pay for the repairs it is apparent that the repair costs of £10m when netted from the capitalised cinema rental income of £3.07m would result in a net deficit of circa -£7m. As will be seen from section 3 below, this deficit is much less than the deficit the Appellant expects to generate from implementing the appeal scheme. I therefore conclude that continued cinema use on this basis would still be the more viable option than implementing the appeal scheme. Given this sector's lower employment density when compared to hotel or theatre uses it may be easier for this sector to resume normal trading more quickly than these other uses and presumably the Appellant would be reliant on demand from cinema operators for this site to occupy its appeal scheme.

3.0 Assessing Optimum Viable Use

3.1 The NPPF sets out the following policy in respect of optimum viable use:

196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.

197. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset.

198. Local planning authorities should not permit the loss of the whole or part of a heritage asset without taking all reasonable steps to ensure the new development will proceed after the loss has occurred.

3.2 The evidence provided by Colette Hatton and Laura Hazelton concludes that appeal scheme if implemented generates harm. I note also that the Delegated Report dated 28 March 2018 concludes that the appeal proposals would create harm to the heritage asset. I do not seek to give heritage evidence in this appeal and set out the following extracts as relevant background to assessing optimum viable use:

2.26 Whilst a roof extension of this form and height, if sympathetically executed could be incorporated without significant harm to the listed building, there is a duty for the Council to protect heritage assets from any degree of harm unless there are public benefits to outweigh such harm. The acceptability of any proposal at this site is considered to be dependent on an architectural intervention of exceptional quality being proposed, which responds to and enhances the building and its townscape. If any harm arises from such an extension, be that substantial harm or less than substantial harm, the Council would expect significant public benefits to be delivered to outweigh this harm, in line with the requirements of paragraphs 195 and 196 of the NPPF.

2.27 The currently proposed three storey roof extension is considered too large for the site. The height and the bulk detract from the host building and weaken its strong architectural rectangular form. The form is noted as being an important component of the building's significance

and is recognised as contributing to the surrounding architectural context. Compromising this fundamental design component would cause some harm to the building's significance and the character of the adjacent conservation areas.

2.54 As discussed above, the proposed roof extension is considered excessively large due its bulk; it would detract from the host building by weakening its strong architectural rectangular form which is an important component of the building's significance and is recognised as contributing to the surrounding architectural context. Compromising this fundamental design is considered to cause harm to the building's significance.

2.56 Linked to this is the impact arising from the proposed loss of the existing cinema floorspace and re-location to basement level. The building's use and contribution to the music and entertainment scene contributes to the building's special interest, and the loss of leisure floor space and its removal from the building's principal floors is considered to cause harm to its special interest. Although a four screen cinema is proposed within the basement, the primary function of the building within the proposals is as a hotel, fundamentally altering the character of the listed building. Given the interest from theatre providers and the lack of marketing carried out by the applicant in to alternative leisure uses, it is not considered that the applicant has sufficiently explored the potential to re-use the building as theatre, or other leisure use. In the absence of this information, it is not considered the applicant has explored feasible alternative options which may secure the optimum viable use without causing such harm to the heritage asset in its current form

3.3 NPPF establishes the definition of optimum viable use and requires a staged approach

Stage 1: Assessment of Viability

3.4 Any potential uses are assessed to determine whether or not they are viable; in particular consideration is given as to whether those uses can be rendered 'viable' in the sense of providing a workable, long term future for the asset. This is especially relevant in context of the current Covid outbreak where it is important to look beyond the immediate short term to more sustainable market conditions. In this regard the NPPG paragraph 15 states:

If there is only one viable use, that use is the optimum viable use. If there is a range of alternative economically viable uses, the optimum viable

use is the one likely to cause the least harm to the significance of the asset, not just through necessary initial changes, but also as a result of subsequent wear and tear and likely future changes. The optimum viable use may not necessarily be the most economically viable one. Nor need it be the original use. However, if from a conservation point of view there is no real difference between alternative economically viable uses, then the choice of use is a decision for the owner, subject of course to obtaining any necessary consents.

Stage 2: Identification of Optimum Use

3.5 All viable uses should be analysed with reference to the degree of harm which they would cause to relevant heritage assets. The Optimum Use is the use that will cause least harm to the heritage asset. Again, the focus is on the long-term;

3.6 If the Optimum Use can be rendered viable, then that use is the optimum viable use (OVU). If that use cannot be rendered viable, then consideration passes to such other of the various uses under consideration, as would cause the 'next least' degree of harm to the heritage asset. If that use can be rendered viable, then that use is determined as the OVU.

3.7 In terms of determining whether an Optimum Use can be rendered viable (and thus the OVU), the sale/purchase price of the Subject Premises should be regarded as being flexible. Indeed, if necessary to ensure viability, the price should be assumed to be nil. In this regard the PPG observes that "*The optimum use may not be the most economically viable one*". This guidance was the subject of comment by Cranston J in *R (on the application of Gibson) v Waverley BC* [2012] EWHC 1472 . In particular, Cranston J observed:

"...planning guidance means that the optimum viable use is not necessarily the most profitable and to test the market adequately the price might even need to be zero".

3.8 The issue of OVU is a relevant consideration. In this context it is again worth noting an observation of Cranston J in *Gibson*:

"...In my view the result is that if one of the alternatives would secure the optimum viable use, and another only a viable use, not only does that have to be taken into account in determining an application but it provides a compelling basis for refusing permission for the non-optimum viable proposal" .

4.0 The Appeal Scheme Viability

- 4.1 Section 2 sets out my reasoning why continued use as a cinema without redevelopment should be considered as potentially the OVU. However, this is not the only potential use to meet the OVU as discussed later in my evidence. It is relevant in this context to also consider the appeal scheme's credentials for being the OVU and other uses such as theatre use.
- 4.2 I note that the Icen report, submitted with the planning application dated January 2018, sets out an assessment of the appeal scheme's viability and concludes that scheme generates a negative residual value of -£5,305,410. This is before any allowance for developer profit or land value is factored into their appraisal.
- 4.3 Icen also state at paragraph 13.2 that a target developer profit of 17.5% is realistic for the appeal scheme. Icen identify total scheme costs excluding land value as £83,966,489. I therefore calculate 17.5% of this figure to be £14,694,135 which when aggregated to the apparent scheme deficit of -£5,305,410 totals -£19,999,545, or simply -£20m.
- 4.4 Icen estimate a site value of £6m derived from capitalising the current rent receivable from Odeon to generate a value of £3m to which a 100% premium is applied to reflect the long term development of the site⁵ giving a total site value of £6m.
- 4.5 With Icen's estimated £6m land value the apparent appeal scheme deficit increases correspondingly to at least -£26m. Icen's report serves to illustrate the Appellant's own view that the appeal scheme is not viable by reference to any normal measures of viability which must also question its eligibility to be considered as the optimum viable use. More specifically the appeal scheme would:
- a) Not generate any developer profit
 - b) Not generate any land value
 - c) On this basis generate a net loss of -£5.3m
- 4.6 At the time of writing the BPS May 2019 report we were advised that the Appellant was willing to proceed with the scheme in spite of this insufficient level of profit, due to the limited other options available to it in respect of this site.

⁵ Paragraph 5.32 Icen report Annex B

- 4.7 In my view this does not represent a confident or logical basis from which to conclude the appeal scheme represents the optimum viable use, particularly when the market for other uses appears not to have been tested through any recognised marketing exercise and is proposed as a replacement for a use which has been sustainable on site for more than 40 years and which on the Appellant's own assessment generates a lesser deficit than the appeal scheme.
- 4.8 Furthermore, in my view no rational developer would set out to deliver the appeal scheme based on this financial projection which raises significant concerns about the sustainability of the scheme, a concern which is echoed through the following extract from the NPPG paragraph 15
- It is important that any use is viable, not just for the owner, but also for the future conservation of the asset: a series of failed ventures could result in a number of unnecessary harmful changes being made to the asset.*
- 4.9 There can be little confidence that granting consent for the appeal scheme would not result in other more viable development options having to come forward at another point in time which may be more harmful.
- 4.10 It is also clear that the appeal scheme does not present a particularly high threshold of viability for other uses when determining what is the OVU in that an alternative use that generates a lesser loss could be said to be the OVU providing it generates less harm.
- 4.11 Whilst I proceed on the assumption in 1.15 of a return to "normality" and that there will be a measure of pent-up demand for these uses, the hotel trade, unlike the cinema trade, depends on a higher number of staff and tourist and business travel. The current cinema operation is a local operation. The recovery of tourist, and particularly business travel, to the same extent as pre-Covid has uncertainties which are not possible to sensibly quantify at the current time. Qualitatively, tourist confidence in the volume London sees is likely to take some time to recover and video-conferencing will continue to impact travel for business purposes. It is likely that this will further worsen viability in the short to medium term as the economy returns to "normality" and possibly longer.

5.0 Alternative Use Viability

Theatre Use Viability

5.1 Camden Local Plan 2017 Policy D2 set out the following policy:

The Council will not permit development that results in harm that is less than substantial to the significance of a designated heritage asset unless the public benefits of the proposal convincingly outweigh that harm.

5.2 In that the property was constructed as a theatre, alteration and resumption of this use should be considered as a potential OVU.

5.3 Camden Planning Guidance Community uses, leisure facilities and pubs March 2018 provides the following guidance in respect of proposals which will involve the loss of a cultural or leisure use.

3.5 Any proposals involving the loss of a cultural or leisure use must be accompanied by a marketing exercise and viability assessment that considers the ability of the premises or site to accommodate alternative cultural or leisure uses unless the Council confirms in writing that this is not required. The range of uses included in the marketing exercise must be agreed by the Council in advance. The value of these uses will also need to be agreed by the Council who will seek advice from an independent valuer, that the applicant will be expected to fund.

5.4 The document highlights that a realistic period for marketing is 12 months paragraphs 2.10 and 4.21. Arguably in the current uncertain post Covid climate this could be seen as a minimum period.

5.5 No marketing exercise has been undertaken by the Appellant that meets this criterion. The Appellant has sought to justify this through three routes which are discussed below:

a) The Appellant's Statement of Case states the following.

3.26 Officers acknowledged via email on 28 June 2018 that a marketing exercise may not be required

The document referred to was an email from Gideon Whittingham dated 28 June to Kieron Hodgson of Iceni which states

In noting that you consider the additional request of marketing input of a number of cinema/leisure operators to be unreasonable, this matter may not be required dependent on the conclusions of the Heritage Consultant

Gideon Whittingham wrote in an earlier email:

To support this verification, the input of a number of cinema /leisure operators outlining not only their interest in occupying the building but also their requirement/extent and cost of refurbishment to occupy the building would demonstrate the potential for the continued use of the building for wholly cinema/leisure operators.

I can therefore confirm written evidence from a number of cinema/leisure operators, outlining potential interest in occupying the building i) at present ii) following refurbishment work; and stating what works would be needed, would be sufficient to address matters of marketing which would inform the verification process by a surveyor/engineer with a conservation specialism

5.6 The exchange in my view does not undermine the validity of a marketing process as a realistic means to establish the OVU. It is also evident that the Mr Whittingham recognised the importance of testing the cinema operator market to test the sustainability of the current use, but also does not confine his request to just the cinema market.

5.7 It is relevant to note that no such exercise has been undertaken by the Appellant

b) A report from Independent Cinema Office Consultancy (ICO) report undated but commissioned in October 2017

This report drew the following conclusions in respect of the continued cinema use of the property:

The status quo option of use as a standard cinema is a known quantity and performs no more than adequately. As currently configured, and in the wider context of the cinema market described above, it is unlikely that the cinema will function better, or serve more audiences, or generate higher revenues in the coming years. Therefore this model clearly does not support any plans for the future sustainability of the building and will not generate sufficient additional

revenues to contribute to any capital expenditure which may be required to maintain the building.

5.8 Two important conclusions can be drawn from this extract, these being:

- i. The report acknowledges that cinema use though unspectacular performs adequately from this location.
- ii. It is clear that ICO consider the cost of accrued repairing liabilities to be the barrier to sustainability. As identified in Section 2 the need for repairs are a direct consequence of the Appellant's actions and the consequence of terms agreed with the current sitting tenant.

5.9 The report of itself does not constitute a marketing exercise nor does it respond to Mr Whittingham's request to directly contact cinema and leisure operators.

- c) Charcoalblue Report - Test Fit report October 2019 and Gardiner & Theobald Report - Feasibility Conversion to a Theatre Version 1 (based on the Charcoalblue report) dated 9 September 2019

This is a cost estimate for fitting out a particular theatre option as distinct from a consideration of a range of possible theatre options.

5.10 The Appellant's statement of case takes the build cost estimate provided by Gardiner & Theobald and the Charcoalblue fit out cost estimate to present a total cost for reinstating theatre use of £54.5m. This reflects an assumption of demolition of the existing building and creation of a new build theatre within a retained façade.

5.11 As can be seen from Mr Powling's evidence set out in Annex A these costs are founded on some questionable assumptions. I specifically highlight Mr Powling's conclusions at 3.9, 3.10 and 3.11 set out below:

3.9 Although there is no information on the G&T benchmark rate it is under the heading of new theatre. As the existing facades are retained and the costs of retention are shown elsewhere in the G&T feasibility the costs of external wall should be deducted from the benchmark rate for new construction. My analysis of costs (see para 5.6 and Appendix F) leads me to believe that no omission has been made of the external walls from the new benchmark rate.

3.10 I am instructed that there is uncertainty as to whether structural fabric remains. I am not able to comment on this uncertainty. However, if structural fabric remains this is likely to impact the costs of the substructure. Such costs need to be taken into account on a bespoke basis, as above.

3.11 If structural fabric remains, and if it is in a condition and location which enables its re-use at proportionate cost, this is likely to lower the costs for some of these items. It could lower the costs of some items potentially very significantly. If structural fabric remains and would require to be removed, this may add some cost. It may not require to be removed. However, costs of removal, should it be required, for example because of the condition, are not as likely to be significant.

5.12 Mr Powling also highlights the limited design basis which underpins these costs:

5.6Because of the almost complete absence of design information I am unable to give a better opinion of the construction cost but the G&T rate of £8,547/m² seems to me to be extraordinarily high. This cost is 111% higher than the BCIS mean rate of £4,078/m² – it is 81% higher than the upper quartile rate of £4,741/m².

6.2 However the existing GIA of 3,265m² is known. A build cost using BCIS average build cost for rehabilitation/ conversion of theatres at a default mean rate adjusted to a Camden location with a 10% addition for contingency yields a construction cost (excluding fees and VAT) of £11.5M. This cost may well change if better and scheme specific information is produced but it does give some perspective to the Appellants cost for a new theatre of £41,974,000.

5.13 Mr Powling concludes

7.1 For these reasons, on the information provided, I therefore do not consider the Applicant's feasibility report or cost plan when benchmarked can properly be considered as reasonable.

5.14 The appellant then translates the Gardiner & Theobald and Charcoalblue costs into a value requirement per seat for the new theatre of £55,000 to simply cover the costs involved before making any allowance for land cost. A headline analysis of theatre transactions is then provided concluding that values per seat range from £14,286 to £50,675. In effect theatre seats trade at a value below the necessary conversion costs. A suggested value range for a notional completed theatre in the subject

premises is offered of £14-£27m equating to a set value range of £14,000-£27,000.

5.15 Taking even the highest of these suggested values indicates a net deficit of -£28m. On this basis the Appellant claims the appeal scheme represents the optimum value use.

5.16 I consider this conclusion to be unsound for the following reasons:

- a) The Appellant's evidence is again no substitute for testing the market.
- b) The Charcoalblue report bases its conclusion on one possible fit for theatre use when there is likely to be a range of operator requirements which will generate a range of possible fit out costs. Equally a purchaser may take a different approach to Gardiner & Theobald by seeking a less drastic conversion option than entire reconstruction within the outer shell of the building. Consequently, it is realistic to consider there is likely to be a wide range of potential costs as there would be a wide range of potential values. Furthermore, no account is taken of the scarcity value of a theatre development opportunity which may well be a relevant factor. In light of these considerations it is simply not possible to determine whether theatre use is viable or more viable than the appeal scheme without adequate market testing and this use must remain a potential OVU.
- c) There is an incorrect comparison made between theatre use and the mixture of uses proposed by the appeal scheme in that the Appellant assumes an equal benefit and equal level of harm arising from the respective proposals, as such the only comparison presented is financial as to whether theatre use or the appeal scheme drives the greater deficit. This does not accord with the NPPF and NPPG which do not seek to identify the most profitable use when identifying the optimum viable use.
- d) There has been no meaningful engagement with theatre operators through a sustained and genuine programme of marketing as envisaged by CPG Community uses, leisure facilities and pubs March 2018.
- e) The fact that the Appellant continues to actively pursue an hotel led mixed use development of itself precludes potential theatre investors from serious engagement with the Appellant.

f) In light of Mr Powling's evidence there must be considerable caution applied to any financial analysis of the viability of theatre use given the apparently very high estimated costs of conversion and the near total absence of supporting design work underpinning these estimates. A meaningful feasibility exercise is required to determine costs based on an operator specification and a full survey of the property and a design for its conversion.

5.17 I have undertaken my own research of recent theatre transactions which is set out in Annex F. This reveals a wide range of prices for theatres and cinemas from £2,792 per seat to £131,290. It is clear to me that this is a specialised market and the purchasers are prepared to pay a wide range of prices influenced no doubt by factors such as location, scale and the nature or scarcity of the opportunity but there may be other considerations.

5.18 As a surveyor and Registered Valuer I would not presume to make a judgement as to the market value of the opportunity to open a theatre on the appeal site in light of this wide pricing range, unless I had a very clear understanding of the factors influencing price, which is not apparent to me from a headline examination of price per seat derived from a limited number of transactions. In my view this could only realistically be tested through a proper and sustained marketing exercise and one which was not competing with the property owner's own aspirations to progress an alternative use which would serve as an active deterrent to operators looking to fund feasibility testing in support of a purchase bid.

5.19 It is clear to me from my investigations that there is an active market for such opportunities as such this route cannot be overlooked in the context of establishing the optimum viable use.

5.20 Whilst I proceed on the assumption in 1.15 of a return to "normality" and that there will be a measure of pent-up demand for these uses, the theatre trade, like the hotel trade, depends on a higher number of actors/support staff. However, it is likely that it does not depend to the same extent on tourism or the business sector, although some trips to the West End are presumably related to tourist/business stays and have an association with hotel use, other trips will be from a local (by which I mean London or South-East market). The extent of the cultural support fund and the success of crowd-funding support for theatre also indicates an extremely strong desire to support Theatre and cultural venues specifically through this period. Once there is a return to "normality", the short and medium term recovery of Theatre seems likely to be strong. I also take into account Dr Wilmore's evidence"

Cinema Use Viability

- 5.21 My paragraphs 5.3 - 5.9 above also apply equally well to a cinema use in that there has not been market testing of the cinema use(s) at the scale of the existing operation, although the ICO report is noted as covering more than one option, the same point as in 5.16(a) applies. The available transactional evidence suggests that a theatre use could be significantly more valuable than a cinema use but the key points made in section 2 still stand, in that a cinema use has been viably trading for 40 years from this site and critically, it is simply not known what would happen if the market was tested, and that lack of meaningful engagement (as for theatres in 15(d)) and the Appellant's determined pursuit of a hotel-led mixed use course mean that in the absence of market testing, it cannot be concluded that the policy has been satisfied for cinema use either,
- 5.22 It can be seen from my transactional research set out in Annex F that there is also a wide range of cinema seat pricing ranging from £2,792 through to £1341,290 for prime cinema opportunities. It is clear that a range of factors influence price and that this is another specialised market where purchasers are influenced not just by location but also scarcity of opportunity.

6.0 Summary Conclusions

- 6.1 It is evident from the above that the Appellant has sought to displace a long established cinema use for the sole purpose of promoting redevelopment of this property.
- 6.2 Through its actions in significantly watering down the current tenant's repairing obligations, the Appellant must be seen as directly responsible for the current state of repair of the premises which would otherwise have been capable of remedy through the original lease to Odeon. If the repairs were not needed, it is evident even on the Appellant's own evidence, that a viable cinema operation could be sustained on the site. This conclusion should be self evident by the fact that Odeon have traded successfully from the site for more than 40 years.
- 6.3 The Appellant has sought to demonstrate that cinema and potential theatre use are non-viable uses for the property, not through testing the market which is the normal approach to evidencing optimum viable use but through feasibility studies offered in substitution. The cinema use assessment relies on the need to fund repairs which are of the appellant's creation. The theatre assessment focusses on one possible fit out option and a cost assessment unsupported by design work and which assumes total reconstruction within the outer shell of the property. Both studies have taken no soundings from operators or investors in this sector. Consequently, neither approach can claim with certainty that either cinema or theatre use is less viable than the appeal scheme.
- 6.4 In light of the Appellant's assessment of the appeal scheme generating a negative value of some -£26m there appears no reason why a rational land owner would not wish to fully test the market for other potentially more viable uses. Nor does the Appellant's assessment of viability provide confidence that further applications will not follow the appeal scheme to bolster an apparently dire viability position.
- 6.5 It is clear that both cinema and theatre uses would represent uses which potentially involve much less change to the building than the appeal scheme and which would offer much greater compliance with the need to maximise the reasonable amount of replacement cultural or leisure facilities within the scheme in accordance with Policy C3 (Cultural and leisure facilities) and Policy D2 (Heritage) of the Camden Local Plan 2017.