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Our ref: 0014/AXB/KAF/00185584/1
Your ref:

9 December 2021

Dear Patrick

**Re: 30 Percy Street, London W1T 2DB (the "Property")
Application for non- material amendment ref: 2021/14408/P (the "S96A Application")**

Introduction

We act on behalf of Simon Bishop, the freehold owner of 29 Percy Street and, on his behalf make representations about the S96A Application, more particularly we address why we do not consider that it is appropriate for the proposed amendments to be considered by the local planning authority through a s96A application.

The proposed amendments to the party wall and lightwell, owing to changes in the external appearance of the building and detrimental impacts on amenity through overlooking, clearly go beyond the scope of a non-material amendment and can only be dealt with by a section 73 application for minor material amendments.

There is no corresponding listed building consent application to address the revisions sought through the S96A Application; this is a significant omission.

The S96A Application should therefore be refused.

Application

The S96A Application, made pursuant to s96A of the Town and Country Planning Act 1990 (as amended), proposes:

"Non-material amendment to planning permission ref 2019/4241/P dated 28/08/2020, as amended by ref 2021/1374/P dated 13/08/2021 (External alterations including replacement rear extension at ground floor and basement level with roof terrace above, change of use of existing flat (Class C3) at second and third floor level to office space (Class B1a) and use of basement level as social enterprise space) namely to lower the rear terrace party wall by 345mm and remove a small glazed area, adjacent to a retained lightwell, in the basement roof / ground floor"

Specifically, the proposed changes are:

- to lower the top of the party wall on the north east side of the rear terrace to the property by 345mm; and
- to remove a small glazed area, adjacent to a retained lightwell, in the basement roof/ground floor area and replace with a solid roof/floor.

Four new plans are submitted in support of the S96A Application:

- 1808-SPP-PL-20-XX-01-01 (C01) - Proposed Level 01 (P02) (substitute for consented plan 1808-SPP-01-DR-A-P-20-01-01-01 (P02));
- 1808-SPP-01-DR-A-PL-25-XX-01-01 (C01) - Proposed rear elevations;
- 1808-SPP-PL-26-XX-01-03 (C01)- Proposed Section S3; and
- 1808-SPP-01-DR-A-P-20-OG-01-01-P2 (Ground Floor) (substitute for consented plan 1808-SPP-01-DR-A-P-20-OG-01-01-C01- Proposed level OG).

The S96A Application seeks to amend the S73 Permission.

We note that there is no corresponding application for listed building consent. A S96A application cannot be used to amend a listed building consent and as such we would expect (at the least) that a new listed building consent application is prepared and submitted, which will assess the heritage impacts of the changes being sought.

The Property and Relevant Planning History

The Property is Grade II listed and is located within the Charlotte Street Conservation Area.

The relevant planning history of the Property is as follows:

- 2019/4241/P - Planning permission was granted (subject to a s106 legal agreement) on 28 August 2020 for:

“external alterations including replacement with extension at ground floor and basement level with roof terrace above, change of use of existing flat (class C3) at second and third floor level two office space (class B1A) and use of basement level as social enterprise space”. (the **Original Permission**)
- 2019/4517/L - Listed building consent was granted on 28 August 2020 for:

“internal and external alterations including replacement rear extension at ground floor and basement level with roof terrace above, change of use of three bed flat (class three) at second and third floor level two office space (class B1a) and use of basement level as social enterprise space”. (the **First Listed Building Consent**)
- 2021/1374/P planning permission was granted (subject to a s106 deed of variation) on 13 August 2021 for:

“Variation of condition 3 (approved plans) of planning permission ref 2019/4241/P dated 28/08/2020 (External alterations including replacement rear extension at ground floor and basement level with roof terrace above, change of use of existing flat (Class C3) at second and third floor level to office space (Class B1a) and use of basement level as social

enterprise space) namely to incorporate fire safety measures including installation of rooflights and PV panels.” (the “**S73 Permission**”)

- 2021/1552/L listed building consent was granted on 16 August 2021 for:

“Internal and external alterations associated with fire safety measures including installation of rooflights and PV panels” (the “**Second Listed Building Consent**”)

It is worthwhile noting that the extant permissions have planning conditions tied to them which impose specific restrictions in relation to upholding the residential amenity to surrounding properties. These cover details pertaining to the details of the external materials and the privacy screen, the acoustic isolation, sound attenuation, and anti-vibration measures for the plant equipment and set levels for noise output and hours of use for the use of the terrace.

In the event that the Council is minded to approve the S96A Application (despite our representations) the restrictions contained in the conditions must be upheld.

The use of the terrace should be tightly enforced, so as to maintain the residential amenity value of the neighbouring properties. Any decision notice issued pursuant to the S96A Application must read as per condition no. 7 of the S73 Permission: “The proposed roof terrace hereby approved shall only be accessed between the hours of 09:00 and 18:00 Monday to Friday and not at all on weekends and bank holidays.”

Legislation

Section 96A of the Town and Country Planning Act 1990 gives power to make non-material changes to planning permission. It provides:

“(1) A local planning authority [...] may make a change to any planning permission [, or any permission in principle (granted following an application to the authority),] relating to land in their area if they are satisfied that the change is not material.

(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 [or permission in principle] as originally granted.

(3) The power conferred by subsection (1) includes power [to make a change to a planning permission] —

(a) to impose new conditions;

(b) to remove or alter existing conditions.

.....”

Section 73 of the Town and Country Planning Act (as amended) gives power to make minor material amendments to planning permissions. It provides:

(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.

(2A) See also section 100ZA, which makes provision about restrictions on the power to impose conditions under subsection (2) on a grant of planning permission in relation to land in England.

(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.

There is no statutory definition of what constitutes a non-material (S96A) and minor material (S73) amendment. Nevertheless, official guidance is contained in the “Flexible options for planning permissions” guidance on the Gov.uk website. In relation to S96A, the guidance states:

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](#).

As for S73, the guidance states:

There is no statutory definition of a 'minor material amendment' but it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which has been approved.

Pre-application discussions will be useful to judge the appropriateness of this route in advance of an application being submitted

The following tests are commonly used by local planning authorities to assess what might be considered as a minor material amendment rather than a non-material amendment:

1. Is the proposed change material/significant in terms of its scale in relation to the original approval?
2. Does the proposed amendment modify any use which was originally approved?
3. Would the proposed amendment result in a materially detrimental impact in visual or amenity terms?
4. Would the interests of any third party or body who participated in, or was informed of, the original application be disadvantaged in any way?
5. Would the amendment be contrary to any relevant development plan policy?
6. Is the proposed change contrary to a restrictive condition on the original permission?

7. Would there be significant increases in site coverage, building heights or site levels?
8. Would there be additional and/or repositioned windows/doors/openings that would have an impact on neighbouring properties?
9. Would there be any change to the external materials which would adversely affect the character or appearance of the development or erode the quality of what was originally approved?
10. Would the amendments reverse design improvements secured in the original application?
11. Would there be a greater impact on existing trees or would it reduce the quality of a proposed landscaping scheme?
12. Would there be any alteration to the application site (red line) boundary?

If the answer to some or all of the above is yes, then a S73 application should be pursued rather than a S96A application.

The latest proposals would result in the answer yes to numbers:

- 3 - as set out below, we consider the proposed reduction in the height of the party wall and consequential reduction in the height of the privacy screen will result in overlooking.
- 4 - my client will be significantly disadvantaged as will other adjoining neighbours. They must all be formally consulted and this should be undertaken as part of a S73 application.
- 5 - as set out below, the proposal will be contrary to policy.

In light of the above, we consider a S73 application must be pursued for the proposed changes rather than a S96A application. In the absence of a S73 application, the current proposal must be withdrawn or refused.

Additionally, we note there is no listed building application or consent for these revisions. A S96A or S73 application cannot be used to amend a listed building consent. The council should not consider an application for the proposed changes in the absence of a listed building application as it is essential to assess the changes in the context of the heritage assets and conservation area.

The planning conditions previously imposed under extant permissions should also be taken into consideration and upheld as part of any future amendments.

Assessment of proposal

The proposal seeks permission to lower the party wall by 345mm and the corresponding privacy screen by the same amount.

There are no contextual drawings to show the relationship between what is proposed and our client's property. Nevertheless, it is clear that a reduction in the height of the party wall by 345mm and consequential reduction in the height of the privacy screen will have a detrimental impact on the privacy of two windows to habitable rooms at our client's Property (see photograph below - central and lower window in white bay). In this respect, a reduction in the height of the privacy screen will significantly reduce its effectiveness.

It would be expected that the application submission material would have included detailed drawings assessing the impact of overlooking, particularly given the effect is material (affecting habitable rooms) to our client's property.



View east showing existing Upper Floor terraces at No. 29 Percy Street

In light of the above, the proposal is contrary to Policy A1 of the Local Plan 2017. This Policy relates to "Managing the impact of development" and states:

The Council will seek to protect the quality of life of occupiers and neighbours. We will grant permission for development unless this causes unacceptable harm to amenity.

We will:

- a. seek to ensure that the amenity of communities, occupiers and neighbours is protected;*
- b.*

The factors we will consider include:

- e. visual privacy, outlook;*

As the proposal does not comply with Policy A1 of the Local Plan, the S96A Application must be refused.

Conclusion

The S96A process is not the correct procedure to assess the proposed changes. They must be assessed via the S73 process as they are clearly minor material rather than non-material amendments. Therefore, the S96A Application should be withdrawn or refused.

Notwithstanding the above, we have demonstrated that lowering the party wall by 345mm and the consequential lowering of the privacy screen will result in overlooking of two habitable rooms contrary to Policy A1 of the Council's Local Plan. Therefore, permission must be refused.

There is no corresponding listed building application and a S96A or S73 application cannot be used to amend a listed building consent. In the absence of a listed building application, the Council cannot consider the implications of the proposed changes on the listed building and indeed the conservation

area. Therefore, the S96A Application should be refused on the basis there is no corresponding listed building application.

Yours sincerely

Russell-Cooke

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