

RIVERSIDE PLATINUM LIMITED

WHITE BEAR PUBLIC HOUSE, 264 FINCHLEY ROAD, LONDON, NW3 7AA

PLANNING PERMISSIONS REFERENCE 15/00356/S73 AND 15/03923/FUL

OPINION

1. I am asked to advise Riverside Platinum Limited ('the **Developer**') regarding the effect of planning permissions granted in relation to premises known as the White Bear Public House, 264 Finchley Road, London, NW3 7AA ('the **Property**').
2. I am asked in particular to advise upon whether planning permissions granted pursuant to references 15/00356/S73 ('the **March Permission**') and 15/03923/FUL ('the **September Permission**') (together 'the **Permissions**') independently or in combination granted consent to demolish the roof of the Property.

Summary of Advice

3. My view is that:
 - (a) The Permissions grant consent for the demolition of the roof of the Property
 - (b) Even if I am wrong, and the permissions do not grant consent for the demolition of the roof of the Property, a building with a new roof built in accordance with the plans incorporated into the Permissions would be lawful.
 - (c) The London Borough of Barnet ('the **Council**') must therefore grant a Certificate of Established Use or Development ('**CELUD**') pursuant to s 191 of the Town and Country Planning Act 1990 ('the **TCPA**').

Background

4. On 18 March 2015 the Council granted the March Permission for,

“partial demolition of the side and rear. Part single, part two storey side/ rear extension to facilitate 7no. self-contained residential units. Extension of existing basement level, including new ramp access to provide 8no parking spaces, storage and cycle store. Alterations to existing roof including 1no. side roof-light to extend existing loft. Associated hard and soft landscaping, refuse facilities, Variation to include extension of the south east gable and internal alterations to layout at first and second floors”

5. The March Permission required parts of the existing building’s retaining walls to be supported and protected during the partial demolition and redevelopment.
6. It subsequently became clear that that construction method would be unsafe and would place the retained parts of the building at risk of damage. The Developer also discovered that due to the advanced state of decay of the stone, it is likely that the stone would be damaged beyond repair during the course of construction.
7. The Developer therefore made a separate planning application to demolish the retaining walls and rebuild them at their original location with matching materials and appearance.
8. On 10 September 2015 the Council granted the September Permission for,

“Demolition and rebuild of the front north west façade and part north east façade in the same location to match the existing appearance”

9. The 5 conditions attached to the September Permission included Condition 1 which stated,

“The development hereby permitted shall be carried out in accordance with the following approved plans:

02 Existing Site Plan; (1) 06 Elevation NW Existing; 07 Existing NE Elevation; (2) 13 Rev B Proposed NW Elevation; (2)14 Rev B Proposed NE Elevation.”

10. Conditions 3 and 4 prohibited development other than demolition works from taking place before the details for the external surfaces of the replacement building and details of the proposed replacement chimneys had been submitted and approved.
11. Condition 5 prohibited any development before a tree protection plan had been submitted and approved and tree protection erected.

12. A tree protection plan was approved on 6 June 2016 and a construction management plan submitted on 17 November 2016.

13. However, in December 2016 the Council issued a Temporary Stop Notice pursuant to s 171E(b) of the TCPA.

14. In an email dated 20 December 2016, Ian Sutherland explained on behalf of the Council that,

“The most immediate concerns were those surrounding TPO trees and vibrations presenting a risk of damage to listed buildings nearby...”

This email also stated,

“We previously discussed the need for a new application if full demolition was to occur and if work is to be allowed to continue it would obviously be at your client’s own risk.”

15. Joe Henry, a planning consultant acting on behalf of the Developer responded to this email explaining that a tree protection plan had already been approved by the Council and this had been implemented and Condition 5 discharged.

16. In an email dated 19 January 2017 Emma Brown a Planning Enforcement Officer at the Council wrote to state that the Temporary Stop Notice had expired and that if the Developer were to carry out further works in accordance with the documents provided the Council “would not see the justification for serving a further stop notice.” The email again stated,

“It is our opinion that you still require further planning permission on the site which would be subject to a range of conditions. We suggest you make this application as soon as possible.”

17. It is against this background that I am asked to advise.

Legal Framework

18. S 57 of the TCPA states that planning permission is required for development. Development is defined in s 55(1) of the TCPA to include the carrying out of building, engineering, mining or other operations in, on, over or under land (**‘operational development’**); or the making of any material change of use of any buildings or other land. Pursuant to s 55(1A)(a) “building operations” includes demolition of buildings.

19. Development carried out in accordance with a planning permission is lawful. A planning permission is a public document. Its construction is a question of law. In *Dunnett Investments Limited v Secretary of State* [2016] EWHC 534 (Admin) at [37] Patterson J codified the principles for the construction of a planning conditions. She held:

- (a) Planning conditions need to be construed in the context of the planning permission as a whole;
- (b) Planning conditions should be construed in a common sense way so that the court should give a condition a sensible meaning if at all possible;
- (c) Consistent with that approach a condition should not be construed narrowly or strictly;
- (d) There is no reason to exclude an implied condition but, in considering the principle of implication, it has to be remembered that a planning permission (and its conditions) is “a public document which may be relied upon by parties unrelated to those originally involved”;
- (e) The fact that breach of a planning conditions may be used to support criminal proceedings means that “a relatively cautious approach” should be taken;
- (f) A planning condition is to be construed objectively and not by what parties may or may not have intended at the time but by what a reasonable reader construing the condition in the context of the planning permission as a whole would understand;
- (g) A condition should be clearly and expressly imposed;
- (h) A planning condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood;
- (i) The process of interpreting a planning condition, as for a planning permission, does not differ materially from that appropriate to other legal documents.

20. In addition to the above, it should be noted that in *Trump International Golf Clubs Scotland Limited v Scottish Ministers* [2015] UKSC 74 at [58] Lord Carnwath approved the words of Lord Denning in *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 where he said at 678

“It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents.”

21. These principles apply equally to the construction of the permission as a whole as they do to each individual condition imposed upon it.

The Permissions and the Demolition

22. Whilst demolition of a building is ordinarily permitted development pursuant to Class B of Part 11 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015, the Property is located in a Conservation Area. Demolition of the Property therefore constitutes 'relevant demolition' for the purposes of s 196D of the TCPA and requires planning permission.
23. It is notable that s 196D makes it a criminal offence to carry out relevant demolition without planning permission. Criminal liability will not be imposed where there is ambiguity. Thus a planning permission granting consent for relevant demolition should be construed so as to give the benefit of the doubt to any potential defendant (see *Warrington Borough Council v Garvey* (1988) JPL 752).
24. The September Permission was granted in full knowledge of the March Permission. Plan references 06 (showing the ground floor and 07 (showing the basement) indicated in red the walls demolition of which had already been granted consent by the March Permission. In green are shown the walls to be demolished under the September Permission. The effect of the two is clearly shown to be the total demolition of all walls. The only logical inference is that the roof will have to be demolished also, otherwise the effect of the permission would be absurd. The September Permission cannot have anticipated that the roof would remain aloft despite the demolition of all of the walls supporting it.
25. It is therefore quite plain that the September Consent granted permission for the demolition and rebuilding not only for the front and north west façade, and part of the north east façade, but also of the roof. Any other construction seeks to give the September Permission an unduly narrow and totally unrealistic meaning. This is not how planning permissions are construed. It certainly is not a proper basis for imposing criminal liability.
26. As set out above, the court will seek to give effect to a permission and may even infer a condition if it is necessary to do so. On a proper reading, the September Permission granted consent for the demolition of the roof of the Property.
27. This is further reinforced by the fact that Condition 1 explicitly incorporates drawing numbers 1(06), 1(07) and [2]13 (Revisions B) ('the **Revision B Plans**'). Whilst those revisions do not include

annotations they must be read as what they are, revisions of the already annotated drawings. Thus the annotations on drawing numbers 1(06) and 1(07) (Revisions A) ('the **Revision A Plans**') elucidate and assist in the interpretation of what is shown on 'Revision B' drawings. The Revision A Plans (1(06) and 1(07) state clearly "whole building to be demolished" whilst Revision A of drawing [2]13 clearly states "new roofs and roof tiles throughout". It is of course, impossible to construct a new roof without first demolishing the old one.

28. An analysis of the drawings in accordance with which Condition 1 requires the September Permission to be carried out makes it quite clear that that Permission grants consent for the demolition of the roof.

Conclusion

29. My view is therefore that the Council is wrong to assert that the Permissions do not grant consent for the demolition of the demolition of the roof and that a fresh planning application is required. The Permissions together grant consent for the demolition of the whole building, including the roof. Demolishing the roof of the Property was lawful. No further planning application is required.

30. For these reasons, the Council is under a duty to grant a CELUD pursuant to s 191 of the TCPA.

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24 March 2017