RE: GATEWAY HOUSE, MANCHESTER

&

IMPLEMENTATION OF PLANNING PERMISSION

ADVICE

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1. I am asked to advise HSBC Bank Pension Trust (UK) Limited acting through its fund managers La Salle Investment Management concerning whether a s73 planning permission relating to Gateway House has been implemented and whether it is extant.

2. The planning history goes back some years. However, the two planning permissions which are of particular relevance are the s73 planning permission No. 106792/JO/2014/C2 (referred to below as "792") granted on 17 November 2014 and full planning permission No. 106793/FO/2014/C2 (referred to below as "793") granted on 23 January 2015. They both grant planning permission for the refurbishment and change of use of Gateway House to mixed use development but differ in relation to the development permitted on the area to the rear. Planning permission 792 includes the development of a 7-storey office building and 3-storey gym to the rear; planning permission 793 is without any building at the rear and includes formally laid out car parking in this area.

3. It has been concluded by the Local Planning Authority Manchester City Council (by the planning officer Angela Leckie in email correspondence dated 27 February 2019)

that 793 has been implemented and that 792 has not been implemented for the following reasons:

i. As the ground floor car park has been formally laid out as a car park with a reduction of existing ground floor car parking spaces from 65 to 53 following demolition of the car rental office.

ii. As the former car rental office has been demolished, relating to planning permission 793.

iii. As the pre-commencement conditions 3, 10 and 13/14 have only been partially discharged. This is disputed by my clients.

iv. that the NMA application which was submitted (and granted) related to the full permission. My clients are saying this was simply a typographical error.

4. I am instructed that the following works have been carried out within the time limits required to implement the s73 planning permission 792:

a. The single storey building on Ducie Street was demolished on 04/12/2015.

b. Refurbishment of Gateway House to create 182 suite apart hotel above ground floor retail space and office floorspace within mezzanine level – completed 28/04/2017.

c. Installation of replacement ground floor shopfronts (although this is not included in the description of development) – these works commenced on 26/09/2016 and completed 15/03/2017.

5. By reason of the refurbishment of Gateway House and its change of use to Apart Hotel, it is clear that either or both planning permissions have been implemented, subject to the point concerning part implementation raised by the Council. It is therefore necessary to determine whether it can be claimed that the s73 planning permission has been implemented.

6. Taking each of the points raised by the planning officer in turn.

    i. The area to the rear of Gateway House has been laid out as a car park with a reduction in spaces. This was expressly permitted under planning permission 793 but no planning permission was required for this as there was no material change of use. It was used as a car park prior to refurbishment of Gateway House taking place. Marking of tarmac with white lines does not constitute development. These works could equally as well have been carried out regardless of whether or not planning permission 793 was granted.

    ii. The demolition of the former car rental office. This was expressly permitted under planning permission 792 as well as under planning permission 793.

    iii. None of the pre-commencement conditions referred to by the planning officer go to the heart of the planning permission, applying the law on this matter: *R (on the Application of Benjamin Cameron Howell) v Waveney District Council [2018] EWHC 3388 (Admin).* On the facts of the case concerning Gateway House, the failure to comply with the conditions relied on by the planning officer did not mean that the entire development was to be regarded as unlawful: *Hart Aggregates v Hartlepool Borough Council [2005] EWHC 840 (Admin); [2005] JPL 1602* . In any event, consistently with the analysis of Ouseley J in *R (Hammerton) v London Underground [2002] EWHC*

2307 (Admin); [2003] J.P.L. 984 , it would be irrational and an abuse of power for the Council to enforce against the developer for the late submission of the details.

iv. Even if the NMA (non-material amendment) application which was submitted (and granted) related solely to planning permission 793, this does not mean that 792 was not implemented. The making of an NMA application is not evidence of a planning permission being implemented (which is governed by s56 of the Town and Country Planning Act 1990), only of an amendment to a planning permission being sought to regularise the situation in respect of that planning permission. Assuming that the NMA did in fact grant consent for an amendment to 793 and that it was not a typographic error (or if it was this cannot be retrospectively amended), the same form of NMA can be submitted for 792. The making of an NMA application for one planning permission cannot in law prevent another NMA being sought (or granted) for another, separate and different, planning permission in respect of the same site. There is no estoppel in planning law precluding or preventing this (see *R. (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC* [2002] UKHL 8).

7. If two planning permissions exist in respect of the same site which are identical at least in respect of the first stages of development, both planning permissions can be lawfully implemented by the carrying out of the same material operations under s56 of the Act. It is only when works of construction or development are carried out that unequivocally relate to one planning permission and not to the other that a developer can be said to have elected to carry out one of the planning permissions and cannot rely on the other. Until that point has been reached both planning permissions can be relied on by the developer, who may elect to rely on the most advantageous one to the developer if they contain different conditions or

obligations. On the facts before me that stage has not been reached in this case and both planning permissions 792 and 793 can be relied on by the developer here. To answer the point raised in my instructions, nothing has been done or works of construction or development carried out to date which is incompatible with the conclusion that the s73 planning permission 792 is able to be said to have been implemented.

8. The conclusion to be reached, therefore, is that on the facts before me my clients can properly claim that the s73 planning permission 100792/FO/2012/C2 has been lawfully implemented and is extant.

John Steel QC

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8th April 2019