



## Appeal Decisions

Inquiry opened on 1 December 2020

Site visit made on 15 December 2020

**by Tom Gilbert-Wooldridge BA (Hons) MTP MRTPI IHBC**

**an Inspector appointed by the Secretary of State**

**Decision date: 10<sup>th</sup> March 2021**

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### **Appeal A Ref: APP/X5210/W/19/3243781**

#### **135-149 Shaftesbury Avenue, London WC2H 8AH**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
  - The appeal is made by Capital Start Limited against the decision of the Council of the London Borough of Camden.
  - The application Ref 2017/7051/P, dated 22 December 2017, was refused by notice dated 5 July 2019.
  - The development proposed is described on the application form as “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”.
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### **Appeal B Ref: APP/X5210/Y/19/3243782**

#### **135-149 Shaftesbury Avenue, London WC2H 8AH**

- The appeal is made under section 20 of the Planning (Listed Buildings and Conservation Areas) Act 1990 against a refusal to grant listed building consent.
  - The appeal is made by Capital Start Limited against the decision of the Council of the London Borough of Camden.
  - The application Ref 2018/0037/L, dated 22 December 2017, was refused by notice dated 5 July 2019.
  - The works proposed are the same as Appeal A.
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### **Decisions**

1. The appeals are dismissed.

### **Applications for costs**

2. Applications for costs were made by Capital Start Limited against the Council of the London Borough of Camden and by the Council of the London Borough of Camden against Capital Start Limited. These applications are the subject of separate decisions.

### **Procedural Matters**

3. The inquiry sat for a total of 12 days between 1 December 2020 and 6 January 2021 (1-4, 7-11 and 18 December 2020 and 5-6 January 2021).
4. The new London Plan 2021 (LP2021) was published on 2 March 2021. It replaces previous versions of the London Plan and can be given full weight. In

terms of policies relevant to these appeals, there have been no material changes in LP2021 from those contained in the Intend to Publish (December 2019) and Publication (December 2020) versions of the plan. The main parties have confirmed that they have no specific comments on LP2021.

5. The planning application in Appeal A was refused for 14 reasons. The Council did not seek to contest the third reason for refusal at the inquiry as the matters were addressed by an agreed condition controlling the details of the proposed rooftop plant. The Council indicated that reasons for refusal 4-14 could be addressed via a Section 106 agreement (S106).
6. A completed and executed S106 has been provided in the form of a unilateral undertaking. The Council has raised concerns about the S106 being unilateral rather than bilateral in terms of it not binding the leaseholder (the Odeon) to the agreement. I have applied a precautionary approach and assumed that the S106 is sufficient in order to consider the effects and benefits of any relevant obligation. However, due to my overall decision, I have not reached a final conclusion on whether the S106 as constructed is effective.
7. Covent Garden Community Association (CGCA) and Phoenix Garden raised other concerns in their statements of case. These focused on how the proposed changes to the building and the construction, servicing and operation would affect the occupiers of neighbouring properties, and the users and biodiversity of Phoenix Garden. I have dealt with these as specific main issues.

### **Main Issues**

8. The main issue for both appeals is the effect of the proposal on the significance of the host listed building and the nearby Seven Dials and Denmark Street Conservation Areas.
9. The main issues for Appeal A only are:
  - the effect of the proposal on the provision of cultural and leisure facilities;
  - the effect of the proposal on the occupiers of neighbouring properties and the users of Phoenix Garden, with particular regard to noise and disturbance, light, privacy and outlook;
  - the effect of the proposal on the biodiversity of Phoenix Garden; and
  - whether the proposal would make adequate provision to address effects on the local highway network, energy efficiency and climate change, and local employment, training and skills.

### **Reasons**

10. The appeal site is located on the north-western side of Shaftesbury Avenue towards the northern end of this main thoroughfare. It is an island site bounded by Shaftesbury Avenue at the front, Stacey Street and St Giles' Passage to the sides and New Compton Street at the rear. The site contains the existing Odeon cinema building (listed Grade II) and the adjoining pavements and roadways. There are commercial and retail premises either side on Shaftesbury Avenue, while to the rear is the community-run Phoenix Garden and a number of residential properties. The site is sandwiched between Denmark Street and Seven Dials Conservation Areas.

## **Main Issue 1: listed building and conservation areas**

### *The significance of the listed building*

11. The appeal building was listed Grade II in July 1998 as the 'Former Saville Theatre, Shaftesbury Avenue'. It was built as a theatre in 1930-31 by the architectural practice TP Bennett and Son. They were assisted by the specialist theatre architect Bertie Crewe who worked on a large number of theatre and cinema buildings between the 1880s and 1930s. A number of theatres were built in this part of London in the 1920s and 1930s, helping to reinforce the cluster known today as Theatreland. Based on archival video footage, the theatre narrowly avoided serious damage during the Second World War.
12. The theatre put on plays and productions through to the late 1960s, although in 1965 it was purchased by Brian Epstein and used for a while as a live music venue too. Bands such as The Who, The Rolling Stones and The Beatles performed and/or recorded music there. In 1970, the building was converted into a two-screen cinema as a flagship site for the ABC group with a documented royal premiere event in 1974. It was converted again in 2001 into a four-screen cinema for Odeon.
13. The building is a large steel framed building with a flat roof. Its shape is broadly cuboid and box-like. The architectural form and style reflects elements of Modernism and Art Deco. The long front elevation is particularly grand and imposing and is largely unaltered from the original 1930s design. A rusticated stone plinth sits beneath a highly decorative frieze by Gilbert Bayes depicting *Drama through the Ages*. Bayes was a successful and celebrated sculptor who produced several works for prominent buildings. The frieze contains dramatic figures from ancient history through to the 20<sup>th</sup> century and is considered to be one of the largest and most important works of public sculpture of its time according to the Historic England list description. Above the frieze is rusticated brickwork, five pairs of roundel plaques, and a large stone arch which originally contained metal glazing but has been tiled since the first cinema conversion. The main public entrance to the building sits below the arch as it has always done. Modern signage and poster boxes have replaced the original theatre equivalents, while the original entrance canopy and uplighters have gone.
14. The frieze and rusticated stone and brickwork turn the corner onto the side elevations, but very quickly give way to plainer brick facades with secondary and service entrances to the building. This utilitarian function and appearance continues at the rear. However, the side and rear elevations contain decorative architectural elements including rusticated brickwork between metal casement windows, and recessed bands of bricks containing narrow stairwell windows on the corners and central rear elevation. A decorative stone parapet defines the top of the building apart from the stair tower in the northern corner which provides roof access. The roof itself contains functional spaces and structures including plant equipment and a large lantern room.
15. Originally, the main entrance provided access to a foyer, the dress circle and the stalls with its basement bar and salon. A narrower door to the side of the main entrance provided access to the upper circle. The auditorium was partially sunk below ground level with a large and wide proscenium arch framing the stage. The stage house stretched the full height of the building and contained many levels from substage to roof lantern. Drawings and photographs from the 1930s reveal the ornate and grand Art Deco decoration in the public parts of

- the building, with a number of murals by A.R. Thomson in the basement bar and salon. This rich decoration continued into the 1950s and 1960s with photographs of Brian Epstein and The Beatles in front of a theatre mural by John Collins. Along the New Compton Street elevation there were a number of dressing rooms and back of house spaces served by the stairwells.
16. The 1970 cinema conversion split the auditorium in half with two screens one on top of the other. The original seating and proscenium arch were removed although the screens themselves were located within the stage house. The basement bar was remodelled and much reduced in size. Photographic evidence indicates that internal decoration was altered greatly and modernised while remaining of a quality consistent with its role as a flagship cinema.
  17. The 2001 conversion split the two cinema screens in half longitudinally. There are two screens located mostly within the stage house and two within the former auditorium. The foyer and main entrance remain in the same location but are much enlarged. A number of modern stairs and corridors access the screens above and below the foyer, although the original corner and rear elevation stairwells remain along with the back of house spaces now used by cinema staff. The internal decoration is rather plain and ordinary and typical of any modern cinema dating from the early 2000s. The basement bar has been disused for many years but retains 1970 furnishings.
  18. During the appeal process, the theatre fly grid was discovered via the roof lantern room. A fly grid allows for scenery and lighting to be fixed, lifted, and lowered over the stage. The surviving grid contains steel girders, timber beams and pulleys across a large attic-like space with a contemporary access walkway and ladder. Structural elements of the original auditorium survive above the modern screens albeit truncated when the conversion work occurred. It is also possible to stand behind the screens in the former stage house part of the building and get a sense of the considerable height and size of this space, even with modern floors and ceilings. Remnants of former stage house floors and doors can be seen within the brickwork behind the screens.
  19. The historic interest of the listed building includes its use as a theatre for around 40 years and the involvement of notable architects and artists from the 1930s onwards. Its association with key music figures and bands from the mid to late 1960s is also an important component of its historic interest. The conversion to a cinema has less association with specific figures or events apart from the royal premiere. However, it has maintained the building's role as a cultural and performance venue within Theatreland. Thus, its current use contributes markedly to the special interest and significance.
  20. The parties are broadly in agreement about the listed building's external architectural interest and the contribution to its significance and special interest. I concur that the front elevation in particular makes a considerable contribution based on its rich architectural and artistic details. The other elevations make a lesser but still significant contribution due to the consistent architectural treatment.
  21. There is significant disagreement between the parties regarding the architectural interest internally. It is evident that the focus of the list description is on the building's exterior with particular reference to the frieze. The list description is correct to say that the interior was remodelled in 1970 and nothing of the 1930-1 work remains on view. However, even relatively

- recent list descriptions are not comprehensive accounts of a building's special interest and the omission of something does not mean it is not of merit.
22. The Historic England listing selection guide for culture and entertainment buildings (first published in 2011) contains specific considerations for historic theatres that may inform a decision to list such a building. Emphasis is made to theatres retaining a palpable overall sense of space and having elaborate exteriors. It notes that the survival of a proscenium arch where there was one is generally essential. Whether or not the phrase "the survival of stage equipment is always significant" relates only to "plain working class fleapits" or theatres more generally depends on how one reads the formatting of paragraphs and page breaks within the document. Nevertheless, the document is for guidance purposes only. It does not purport to contain an exhaustive or prescriptive list of criteria to justify existing or future listed theatre buildings or settle debates relating to significance.
  23. It is difficult to appreciate the original interior of the building from an initial visit. The main entrance and foyer may be in the same broad location but there is little sense of arrival into the original theatre space. The rabbit warren of modern stairs and corridors connecting the four screens are disorientating even with the assistance of plans. The auditoria within each screen are dull modern cinema spaces and it is clear that much of the earlier building fabric has been lost. However, the ability to appreciate the height and volume of the stage house behind the screens allows a palpable sense of theatre space. The corner/rear stairwells and back office rooms provide an understanding of the theatre's layout and circulation. The lantern room and fly grid may be standard functional structures, but nevertheless are a fascinating survival of theatre engineering. They indicate how productions would have been performed and supported. Finally, the basement bar, while now largely a product of the 1970 redevelopment, is of some interest as a principal location for refreshments.
  24. It is possible that other historic features may survive behind later coverings, such as earlier foyer ceilings, structural supports for the dress circle, or murals in the bar. The parties disagree on the reasonableness and proportionality of further investigative work at this stage. However, even if nothing else of interest remains, the known internal features alone are more than fragmentary and instead make an important contribution to the significance and special interest of the listed building.
  25. There has been a range of opinions regarding the significance and special interest of the listed building, not just between the appeal parties but also from Historic England and a heritage consultant appointed to advise the Council earlier in the application process. However, others have not considered the same evidence that has been presented to this inquiry. Historic England's and the heritage consultant's advice on the proposal was given before the discovery of the fly grid for example. Conversely, another statutory consultee - the Theatres Trust (TT) which has been a main party in this inquiry - has highlighted the significance of surviving internal fabric along with the Council's historic theatre witness. From the evidence before me, my own observations on site, and the above reasoning, I conclude that the building's historic interest, its use past and present, and its surviving external and internal architectural features, make a substantial contribution to the special interest and significance of this listed building.

*The contribution of the appeal site to the significance of the conservation areas*

26. Seven Dials Conservation Area is located to the south-east of the site. The conservation area is predominantly focused on the urbanisation of the Covent Garden area from the 17<sup>th</sup> century onwards. The streets radiating from Seven Dials itself are narrow with a variety of building styles and heights. They present a series of vistas looking out of the conservation area including one along Mercer Street to the appeal building. The conservation area also includes the south-eastern side of Shaftesbury Avenue immediately opposite the appeal building. The buildings here date back to the late 19<sup>th</sup> century widening of this thoroughfare. Their character and scale is more uniform than the streets around Seven Dials and they have the backdrop of larger and mainly modern buildings on the opposite side of Shaftesbury Avenue.
27. The front elevation of the appeal building is largely obscured by buildings on either side of Mercer Street and it competes with the modern building on the north side of St Giles' Passage. However, it becomes more prominent as one moves towards it from Seven Dials. The front elevation is also appreciated from the south-eastern side of Shaftesbury Avenue although becomes increasingly obscured by adjoining buildings once one reaches Cambridge Circus or the northern end of Monmouth Street. Given the detailed appearance of the front elevation, the building makes a positive contribution to the significance of the conservation area albeit it a modest one due to the relatively limited views.
28. Denmark Street Conservation Area is situated to the north-west of the site. The area dates from at least the medieval period, with more recent 20<sup>th</sup> century associations with the music industry on Denmark Street itself. The nearest part of the conservation area includes the open space of Phoenix Garden and the churchyard of the Grade I listed St Giles' Church, the grandeur of the church itself, and the narrow historic passageway of Flitcroft Street with its historic brick buildings. The setting of the conservation area is defined by a strong urban context with historic and modern buildings of differing designs and sizes.
29. With its modern neighbouring buildings either side, the appeal building encloses the edge of the conservation area along New Compton Street when seen from Phoenix Garden and Stacey Street in particular. Although views across Phoenix Garden have only existed since previous buildings were lost after the Second World War, they are part of the surroundings in which the conservation area is experienced today. The height and form of the building's rear elevation is imposing and it has a back of house appearance. Nevertheless, the architectural detailing is attractive and the scale and bulk of the building does not overwhelm. Thus, the building has a moderate positive effect on the significance of the conservation area.
30. Both conservation areas contain theatres and form part of Theatreland. These aspects are not dominant features of either conservation area, although they are part of their overall context. The existing use of the building as a cinema contributes in a small positive way to the significance of both conservation areas as a compatible entertainment function within Theatreland.

*The rooftop extension*

31. The three-storey rooftop extension would reflect the box-like design of the existing building and would be fully glazed with translucent fritted glass. However, it would be a large addition, increasing the height of the existing



- building by around 50%. It would be set back from the front elevation, but at the sides and rear it would sit on top of the parapet. The materials would be light-weight in appearance to try and contrast with the existing stone and brick building. It might be possible to avoid seeing the paraphernalia of furniture and other items next to the windows based on internal layouts and the fritted glass. However, the extension would still create a solid and highly reflective mass on top of the building. The very modern design and materials would pay little regard to the design of the existing building.
32. The extension would be visible during the day and probably even more so at night when hotel rooms and the rooftop bar are illuminated. From views further along Shaftesbury Avenue at Cambridge Circus and Monmouth Street, the extension would be barely noticeable due to its set back and the presence of other buildings. In views closer to the front elevation, the set back would lessen the effect but it would still be a large and obvious addition. From Mercer Street, the effects would be limited by existing buildings. The extension would be particularly bulky and dominant in views from Stacey Street and Phoenix Garden to the rear due to the lack of set back and the more open nature of space in this location.
33. None of the parties at the inquiry objected to the principle of a rooftop extension. The statement of common ground between the appellant and the Council states that an extension of the form and height proposed, if sympathetically executed, could be incorporated without significant harm to the listed building. Similar views were expressed by the Camden Design Review Panel. However, in my view, the height, mass, form and choice of materials in this proposal would compete with, rather than complement, the listed building. The extension would be overly dominant and detract from the existing form and composition. It would not be sympathetically executed. Thus, it would result in less than substantial but nevertheless significant harm to the listed building.
34. There would also be less than substantial harm to both conservation areas. For Seven Dials Conservation Area, due to the modest contribution the building makes to this heritage asset and the limited and restricted views of the extension, the harm would be minor. For Denmark Street Conservation Area, due to the greater contribution made by the building, the more open views, and the bulkier appearance of the extension at the rear, the harm would be moderate rather than minor.

#### *The change of use*

35. The proposal would result in a mixed use scheme, including a hotel, restaurant, and a four-screen cinema. The entire interior of the existing building along with the roof would be removed leaving only the four outer walls. The main entrance from Shaftesbury Avenue would be in the same location as existing. The restaurant and adjacent bar would occupy a large proportion of the ground floor, while the upper floors would house the hotel rooms and a rooftop bar. The new cinema would be located in the basement, accessed via a sweeping staircase from the main entrance.
36. From the evidence before me, the intention would be to operate the new cinema as a separate part of the business for the general public rather than as an ancillary part of the hotel. The hotel use would not be obvious in the publicly accessible parts of the building with only a small check-in desk proposed on the

ground floor at the most. The restaurant and bar would be the most apparent use upon entering the building, although the cinema would be signposted from the poster boxes outside and the openness of the staircase would clearly direct customers to the basement. There is nothing odd about basement cinemas per se, with the Curzon Soho a short distance away. Even the Saville Theatre contained a subterranean stage and seating.

37. However, the existing listed building has always had a single use related to culture, performance and leisure that has occupied and maximised the full extent of the building. This is reinforced by the drama of the external frieze. Hotel rooms, bars and a restaurant cannot be described as the same type of use and yet they would occupy and dominate much of the building. The user experience would change considerably. Instead of being able to move through large parts of the building as one has always been able to do for either the theatre or the cinema, future cinemagoers would be confined to a smaller part of the building. That the existing cinema lacks vibrancy and appears tired and the new cinema would be of a higher quality does not diminish the reduction in space for this use. This is not an argument about aesthetics or the number of seats or screens, but how the listed building would be experienced.
38. Connected to this change of use is the effect on existing internal fabric and spaces. The proposal would result in the loss of surviving historic fabric, including the corner and rear stairwells, the back of house/office rooms, and the fly grid. The stage house volume that can still be appreciated from the auditoria of two of the current cinema screens would be lost by the insertion of several hotel room floors. All of these elements tell the story of the listed building and allow one to appreciate its use as a theatre and then a cinema.
39. The change of use of the listed building and the associated loss of internal fabric and spaces, would result in less than substantial harm to this heritage asset. The harm would be considerable given the fundamental change from a single cinema/theatre use across the building to a mixed use scheme where hotel and restaurant dominate, and the loss of important surviving features. The ability to understand the significance of the building would be very much reduced due to the extent of changes.
40. The change of use to a mixed use scheme would erode the Theatreland context in which both conservation areas are experienced. This would be offset to some extent by the retention of a cinema in the basement but this would be a minor part of the overall use. Thus, there would be less than substantial harm from the change of use to the significance of both conservation areas, albeit only minor given the small contribution the existing use makes to each area.

#### *Summary of statutory duties and policy context*

41. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (LBCA Act) requires decision makers, when considering whether to grant planning permission, to have special regard to the desirability of preserving the listed building or its setting or any feature of special architectural or historic interest which it possesses. A similar duty exists in relation to the grant of listed building consent under Section 16(2) of the LBCA Act. Various court judgments<sup>1</sup> have found that considerable importance and weight should be given to the desirability of preserving the listed building.

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<sup>1</sup> See for example *Safe Rottingdean v Brighton and Hove City Council* [2019] EWHC 2632 (Admin)



42. Policies D1 and D2 of the Camden Local Plan 2017 (CLP) require the preservation or enhancement of designated heritage assets, with less than substantial harm convincingly outweighed by the public benefits, and harmful proposals for change of use or alterations and extensions to a listed building resisted.
43. Paragraph 193 of the National Planning Policy Framework (NPPF) states that great weight should be given to the conservation of a designated heritage asset when considering the impact of a proposal on such an asset. This is irrespective of the level of harm. Any harm to the significance of a designated heritage asset should require clear and convincing justification based on NPPF paragraph 194. NPPF paragraph 196 states that where a 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.
44. Harm to designated heritage assets has been identified as a result of this proposal. The public benefits are considered as part of the heritage and planning balance later in the decision along with the above statutory duties.

***Main Issue 2: cultural and leisure facilities***

45. CLP Policy C3 seeks the protection of cultural and leisure facilities within Camden which includes cinemas and theatres. There is no definition of facility within the CLP although the appellant's reference to a place where a particular activity happens is reasonable. It is clear from the policy wording and supporting text that facility is not the same as use. The latter takes place within the former. Either one or both can be lost depending on the context.
46. The distinction between facility and use is echoed by LP2021 Policy HC5 which seeks to protect existing cultural venues, facilities and uses where appropriate (including cinemas and theatres). The policy also supports the development of new cultural venues and encourages boroughs to evaluate what is unique or important to residents, workers and visitors. The policy also aims to identify, protect and enhance strategic clusters of cultural attractions like the theatres and cinemas of the West End, while LP2021 Policy HC6 looks to protect and support evening and night-time cultural venues such as theatres and cinemas.
47. The existing building is focused on a sole cinema use and facility in a specific venue known as the Odeon Covent Garden. Interested parties and CGCA refer to how the existing cinema is valued by local residents as a more affordable and ordinary cinema than the flagship cinemas at nearby Leicester Square.
48. The proposal would retain a cinema use on site. However, it would be within a mixed-use scheme and would occupy only one part of the building. Regardless of arguments about floorspace, seating numbers, quality, or admission prices, the existing cinema venue and facility would be lost and would be re-provided in a different form and offer. Thus, the above policies are engaged.
49. Where there is a loss of a cultural or leisure facility, Policy C3 says it must be demonstrated to the Council's satisfaction there is no longer a demand. Alongside this, the policy sets out a number of criteria in (a) to (e) which should be taken into account when considering the loss of a facility.
50. The policy does not specify a requirement for marketing to demonstrate demand. However, supporting paragraph 4.61 anticipates that applicants carry out a marketing exercise for alternative cultural and leisure uses. It is one

potential way of demonstrating no demand but has not been carried out for this site despite the Council's requests.

51. As to whether the premises are able to support alternative cultural and leisure uses, evidence from TT shows considerable interest from a range of theatre owners and producers in reusing the building as a theatre. According to the submissions, there is significant demand for new shows and a lack of larger venues in this part of London. The submissions consider that a new theatre could work financially. There is little evidence to show that theatre use as a whole is not viable. The indicative theatre scheme included in the Charcoalblue report prepared for the appellant may not be viable, but it has not been proven that it is the only possible scheme or that the cost estimates are realistic.
52. The existing facility is large with a rather ordinary layout and design. However, it has an occupancy rate and trading figures that are above average and in the top 25 cinemas in the UK. This indicates a successful and popular cinema. Evidence that Odeon is keen to abandon the building is lacking. The facility requires investment and repairs to address existing structural issues, but it has not been shown that this could not be achieved now or that the existing cinema is unviable. In summary, there is insufficient evidence to show a lack of demand in the existing facility. Thus, the first part of Policy C3 is not satisfied.
53. The second part of Policy C3 says exceptionally it may be practicable for a cultural or leisure facility to be re-provided on-site through redevelopment, with a number of points to be taken into account in criteria (i) to (iv). If a replacement facility is provided, it should be at the same or better standard than the facility which is lost and accessible to its existing users.
54. The cinema would be in the same location on Shaftesbury Avenue and open to the public as existing. Proposed poster boxes, signage, and the sweeping staircase would help direct customers down to the basement. The proposal would seek to provide a high quality cinema facility which aesthetically would be of a better standard than the existing. However, the mix of uses, with the ground floor dominated by a restaurant/bar, would lessen the presence of a cinema use currently enjoyed by the existing facility. The new cinema, with its focus on a more boutique offer, may not appeal to users of the existing cinema. Local residents would be able to benefit from a reduction in ticket prices via the S106, but this would only be a saving of £1 (or the same proportionate discount in future as prices change). As such, while the location of the cinema would not change, the replacement would not be as accessible to existing users. Regardless of the heritage and planning balance, the proposal would also result in the loss of cultural heritage as set out in the previous main issue. Therefore, the re-provision and replacement of a cinema facility has not been justified.
55. Policy C3 does not state that the maximum reasonable amount of replacement cultural or leisure facility should be provided. Neither does it direct refusal solely on the basis of there being interest in other cultural or leisure uses. However, it is evident that there would be a loss of a facility where a lack of demand has not been demonstrated and the re-provision would not be suitable. Therefore, there is overall conflict with this policy.
56. Given the value and importance placed on the existing cinema facility by CGCA and local residents, it would be appropriate to protect the existing facility as required by LP2021 Policy HC5 rather than support the development of the

proposed cinema facility. In terms of the strategic cluster of cinemas and theatres in the West End, the proposal would diminish the presence of a sole cinema facility and use where its continuation, or the introduction of other cultural facility or use such as a theatre, has not been disproven. Thus, there would be conflict with Policy HC5. In terms of LP2021 Policy HC6, the existing cinema venue would not be protected. This does not mean that the cinema has to be left entirely untouched, but its loss has not been justified. Therefore, there is also conflict with Policy HC6.

57. In conclusion, the proposal in Appeal A would result in the loss of an existing cultural and leisure facility with insufficient evidence to support its loss or justify the re-provision of a replacement facility. The change of use would also be harmful in terms of the listed building. Thus, the proposal would have a negative effect on the provision of cultural and leisure facilities and so would conflict with CLP Policies C3 and D2 and LP2021 Policies HC5 and HC6.

### ***Main Issue 3: neighbouring occupiers and the users of Phoenix Garden***

#### *Overview of neighbouring properties and Phoenix Garden*

58. The nearest residential properties to the site are the flats at Pendrell House diagonally opposite the appeal building to the north. Flats at 1a Phoenix Street and The Alcazar on the corner of Stacey Street are slightly further north-west. There are flats along New Compton Street to the north-east.
59. Phoenix Garden is enclosed on all sides by buildings and has a recently built community building in its southern corner. The garden was created on a cleared site in the 1980s and provides an area of green space in an otherwise highly urban part of London. According to representatives of Phoenix Garden, it is used by around 35,000 visitors each year for a variety of community events and commercial hires, but also simply as a place to relax and experience plants and wildlife (as indicated by recent visitor survey data).

#### *Privacy, outlook and light*

60. Existing and proposed windows on the rear elevation of the appeal building and those at Pendrell House do not face each other directly. As such, any overlooking of residents of Pendrell House from hotel guests would be oblique and limited. Obscure glazing would not be required. Other residential properties including 1a Phoenix Street are sufficiently distant from the rear elevation and would not be materially overlooked from hotel room windows. Given the overall size of the rooftop bar and balcony, it would not be unreasonable to impose a condition restricting public access to the balcony along the entire rear elevation. This would greatly reduce any overlooking of properties or Phoenix Garden from the roof. There would be some overlooking of the garden from hotel rooms, although it would depend on the extent of vegetation and the angle and distance from any window. Moreover, the garden is already overlooked by existing residential properties. On balance, the overall effect of the proposal on privacy would be acceptable.
61. The existing height, bulk and proximity of the appeal building already dominates views from the windows and balconies of properties within Pendrell House as well as from within Phoenix Garden. As a consequence, the rooftop extension would not significantly add to the sense of enclosure that already results from the appeal building and adjoining developments on Shaftesbury

Avenue. The distance of the appeal building to other residential properties would minimise any overbearing effects of the extension. Thus, the proposal would be acceptable in terms of effects on outlook.

62. The extension would reduce the amount of daylight and sunlight to windows and balconies at Pendrell House, The Alcazar, and 1a Phoenix Street. In terms of vertical sky component, when compared to the existing levels, the percentage reduction to most windows would not be significant apart from a few with already very limited levels due to their recessed nature and/or adjoining overhanging features. In terms of no sky line, some rooms at these residential buildings would experience a reduction that would be noticeable. In terms of annual probable sunlight hours, there would also be some reduction to these buildings particularly in winter. Notwithstanding the very urban nature of the location and the suburban focus of the BRE guidelines, there would be some harm for some flats and their residents in terms of light.
63. The majority of Phoenix Garden is currently able to receive 2 hours of direct sunlight on 21 March<sup>2</sup>. Around two-thirds would continue to do so with the extension in place. Overshadowing diagrams indicate that the southern parts of the garden including the community building are already in the shade on 21 March and the shaded area would increase during mid to late morning with the proposal. This would have some negative effect on users of the garden. However, there would be little difference between existing and proposed light levels in mid-winter and mid-summer when the garden would remain in almost total shade and total sunshine respectively. Overall, the proposal would have an acceptable effect on users of the garden in terms of light.

#### *Construction effects*

64. The construction phase of the proposal would inevitably generate a number of associated effects including noise, dust, and traffic congestion. The build process is likely to take a significant amount of time with a number of vehicles accessing the site each day. For residents of nearby properties, these effects would undoubtedly affect their ability to work, study and rest within their homes. It would also diminish the enjoyment of Phoenix Garden for its visitors and reduce the attractiveness of hosting events there. It is evident that residents in this part of central London experience numerous construction projects as sites and buildings are redeveloped, which have the potential to be poorly managed.
65. The S106 requires a Construction Management Plan (CMP) that would address a large number of matters including effects on the health and amenity of local residents and the requirement for a Community Working Group (CWG) to facilitate consultation with the local community. A CMP Bond of £30,000 would be provided and drawn down in the event of a breach of the CMP. It is apparent that there have been enforceability issues with CMP elsewhere in the local area. However, this is matter for the Council to address via internal processes and its relationship with individual building projects. It has not been adequately demonstrated that the CMP would not be properly adhered to and enforced in this instance, or that the bond figure should be greater. Construction conditions, including air quality monitoring, are also proposed.

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<sup>2</sup> BRE guidelines (BRE 209 (2011) *Site Layout Planning for Daylight and Sunlight: a guide to good practice 2<sup>nd</sup> edition*) indicate that at least 50% of an open space should receive at least 2 hours of direct sunlight on 21 March for the overall space to appear adequately sunlit throughout the year.

66. It would not be necessary or reasonable for the S106 to provide construction noise insulation for windows within Pendrell House given the mitigation measures already proposed and the fact that this phase would be temporary. Moreover, it has not been sufficiently shown that the construction phase would lead to a loss of earnings for Phoenix Garden (in terms of community and commercial hires) to justify a contribution in the S106. Therefore, the construction effects of the proposal on local residents and the users of Phoenix Garden can be suitably mitigated.

*Operational effects including noise*

67. The proposed rooftop bar and balcony could result in increased noise levels to the rear of the building from music and people, amplified by the enclosure of built form around Phoenix Garden. However, the aforementioned condition would limit the use of the balcony nearest to properties and Phoenix Garden. Hours of use beyond early evening can also be restricted by condition. A condition controlling the location and noise levels of amplified music can be achieved to prevent any exceedance of existing background urban noise. The effects of noise from plant equipment can also be mitigated.
68. It seems likely that the mix of uses, including a hotel and restaurant, would generate a greater number of delivery vehicles across the day compared to the existing cinema. Vehicles would either use a quick drop-off/pick-up bay on Shaftesbury Avenue for post or courier purposes, or a loading bay on New Compton Street. The number of vehicles associated with the operational phase of the proposal is disputed between the appellant and CGCA. However, even with the numbers estimated by CGCA, a Servicing Management Plan (SMP) could coordinate deliveries to ensure that they are as spaced out as possible, notwithstanding the uncertainties of central London traffic.
69. As with CMP, it would appear that SMP for other schemes in the local area have not been properly followed or enforced. This can result in vehicle movements and noise outside of permitted hours causing harm to local residents. However, the SMP for this proposal would be secured by the S106 and required to address a number of detailed points including those relating to the frequency, duration, and timing of vehicles. A copy of the draft SMP would be sent to the CWG. It has not been adequately demonstrated that the SMP would not be properly adhered to and enforced in this instance, or that a bond is required to ensure compliance. Thus, the approach would be acceptable.
70. The loading bay would be of sufficient dimensions to accommodate larger vehicles. The internal loading area would connect to a service lift and storerooms on different floors. As such, it should be possible to load and unload vehicles within a reasonably short period and avoid lengthy dwell times and potential congestion with other deliveries. This would lessen the effect on local residents and users of Phoenix Garden in terms of noise and disturbance.
71. The loading bay would displace 3 residents' parking bays. The dimensions of the street are tight and the replacement of the bays on the other side of New Compton Street would cause a narrow gap for through traffic. According to local residents, the street is used as a rat run when there are problems on Shaftesbury Avenue and it can become congested as a result. It is apparent that greater width restrictions would add to congestion along with noise and disturbance from vehicle movements. However, the S106 makes provision for



the relocation of the bays which should ensure this is done without worsening congestion or losing parking provision.

### *Conclusion on Main Issue 3*

72. In conclusion, while there would be some harmful effects on specific flats in terms of light, the overall proposal in Appeal A would have an acceptable effect on neighbouring occupiers and the users of Phoenix Garden. Therefore, it would comply with CLP Policies G1, A1 and A4. Amongst other things, these policies require proposals to avoid unacceptable harm to amenity taking into account factors including privacy, outlook, light and noise, as well as transport and construction impacts. The proposal would adhere to NPPF paragraph 92 which seeks to plan positively for community facilities such as open space and guard against the unnecessary loss of valued facilities and services.

### **Main Issue 4: biodiversity**

73. Phoenix Garden is designated as a Site of Local Importance for Nature Conservation. It contains a wide variety of trees and plant species and attracts many different animal species including bees, birds and butterflies along with bats and other mammals. The garden is arranged into different parcels of green space including the green roofed community building.
74. The primary biodiversity concern relates to overshadowing effects from the rooftop extension. There is no specific guidance for assessing these effects on plants and wildlife, but the aforementioned BRE guidelines have been referenced in terms of light to open spaces. As noted above, there would be a reduction in light to the southern part of the garden in the spring (around 21 March) which coincides with increased plant growth and animal activity.
75. Analysis<sup>3</sup> of sunlight to the garden parcels on 21 March shows the existing and proposed percentage of sunlight received between 7am and 5pm. None of the parcels would average more than 50%, but this is the average across the 10 hour day assessed and is not the same as the 2 hours of direct sunlight test. All but one parcel would either receive less than a 20% reduction of the existing sunlight levels or 50% plus of the parcel would continue to receive at least 2 hours of direct sunlight. By 21 June, light levels would be largely unchanged.
76. The reduction in sunlight to the southern part of the garden around 21 March would have some effect on insect activity and plant growth including on the rooftop garden. However, the differences between existing and proposed levels are negligible in most cases and confined to 2 or 3 hours late morning/midday with sunlight largely unchanged after that. Foraging by bees should be able to continue. It is not evident that bees use this part of the garden for nesting even now due to existing light levels.
77. The parcel next to New Compton Street and the main entrance (A3) already gets less than 2 hours direct sunlight on more than 50% of the parcel on 21 March and would see a 31% reduction in sunlight received across the day. However, this would only affect one hour at midday with light levels mostly unchanged either side. Light levels would generally remain good later in the spring and into the summer, particularly from late morning onwards. The overall change in light levels would be unlikely to have a detrimental effect on

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<sup>3</sup> Syntegra Consulting (October 2020) *Ecology Statement of Support for Appeal and Overshadowing Report*

the two main trees within this parcel. Therefore, whilst the proposal would have a moderate adverse impact, it would not be major or significant.

78. Biodiversity concerns also include the effects of noise, dust and pollution arising from the construction phase. However, as noted above, the CMP and its bond would be secured via the S106. The CMP would be required to minimise any adverse effect on the ecology and biodiversity of the garden.
79. In conclusion, the proposal in Appeal A would have not have an unacceptable effect on the biodiversity of Phoenix Garden. Therefore, it would accord with CLP Policy A3 which seeks to protect and enhance sites of nature conservation and biodiversity. The proposal would also adhere to NPPF paragraph 175 which seeks to avoid significant harm to biodiversity.

***Main Issue 5: highway network, energy efficiency and climate change, employment, training and skills***

80. The S106 would provide for an employment and training plan and would promote local employment and procurement. It would also make provision for an energy efficiency and renewable energy plan and a sustainability plan, along with a carbon offset contribution.
81. The S106 would secure coach and car free development and a workplace travel plan to reduce reliance on motor vehicles to access the site. It would ensure necessary highway works and public realm improvements take place around the building and would contribute to pedestrian and cycling enhancements. As noted above, the S106 would also provide for a CMP and SMP.
82. In conclusion, and on the assumption that the overall S106 is effective, the proposal in Appeal A would make adequate provision to address effects on the local highway network, energy efficiency and climate change, and local employment, training and skills. Therefore, it would accord with CLP Policies G1, C1, E1, A1, A4, CC1, CC2, CC3, CC4, T1, T3, T4, and DM1. These policies seek the appropriate delivery of development in Camden, addressing health and wellbeing, economic development, amenity, noise, climate change, water and flooding, air quality, and transport matters amongst other things.

**Heritage and Planning Balance**

*The heritage balance*

83. Beginning with heritage-related public benefits, the proposal would secure repairs to the external frieze and the roundels, the repair and reinstatement of the arched window, and wider structural repairs. The proposal would also reintroduce the historic poster boxes and insert a new sympathetic canopy. It has not been shown that the damage to the frieze and roundels is extensive. Their estimated repair costs as part of the overall proposal are small. While all of the above repairs and enhancements could be secured in isolation or by an alternative proposal, they nevertheless remain significant heritage benefits relating to this proposal.
84. The parties dispute whether these repairs result from a lack of investment brought about by the appellant (as landlord in 2012) securing the release of Odeon from the full repair obligations in their lease. There was also much disagreement regarding Odeon's future intentions for this site and potential relocation/consolidation elsewhere. The exact position regarding Odeon's lease

and future intentions remains unclear and evidence of deliberate neglect is inconclusive. As such, this does not diminish the above heritage benefits.

85. The appellant argues that a mixture of uses would bring the building to life and allow a better appreciation of its historic entertainment and leisure use. This interpretation would be aided by a large internal mural based on TP Bennett's original section drawing. Cinemas and theatres are emptier and quieter spaces outside performance times. However, they can be very animated places and draw a crowd, with people passing in and out of the foyers and auditoria. Thus, the heritage benefit of a mixed use is limited. The mural would likely be of interest, but in a building that would be devoid of surviving historic internal spaces and features, the benefit would again be limited.
86. In terms of non-heritage public benefits, LP2021 Policy E10 encourages new hotels in the Central Activities Zone (CAZ) that covers the West End. However, it has not been demonstrated that the hotel would meet an identified need. The mix of uses would be compatible within the CAZ, but the same would apply to a sole cinema or theatre use. Nonetheless, there would be a reasonable level of economic benefits from the proposal in terms of additional visitor expenditure and employment including apprenticeships and work placements via the S106.
87. While the proposed cinema itself might be of high quality, it would lack the presence of the existing facility and would not be a suitable replacement as set out above. This limits any weight to the benefit of a new cinema. The building would have more active frontages than existing with the insertion of large windows at the side and rear. However, the principal Shaftesbury Avenue frontage would remain largely unchanged with a similar size and location of the main entrance. Limited weight can be attributed to this benefit. No new public entrances or routes through the building from one side to the other would be created and so there would be little benefit in terms of permeability.
88. The public realm enhancements would provide some minor localised benefit around the site. The access and servicing arrangements would accommodate a greater number of delivery vehicles rather than address any existing problems. Thus, the arrangements carry little weight as a benefit.
89. NPPF paragraph 196 says that securing the optimum viable use (OVU) of a designated heritage asset can count as a public benefit. Prior to the inquiry opening, the appellant withdrew from previous claims that the proposal represented the OVU of the building and simply argued that the above public benefits outweighed any harm. Other main parties, particularly the Council and TT, argued that OVU was a relevant matter. Their contention was that theatre or cinema use represented the OVU as an economically viable use and the one likely to cause the least harm to the significance of the heritage asset (in line with the Planning Practice Guidance<sup>4</sup>).
90. None of the parties argue that the proposal is the OVU and I have no reason to take a different view. Thus, the concept of securing the building's OVU plainly cannot count as a public benefit in the heritage balance for this proposal. The fact that the proposal is not the OVU does not diminish the weight I have afforded to the heritage benefits on this occasion either.

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<sup>4</sup> Reference ID: 18a-015-20190723

91. The proposal would deliver significant heritage-related benefits, a reasonable level of economic-related benefits and limited other benefits. Set against the no greater than moderate harm to the conservation areas, these public benefits would be sufficient to outweigh the harm to these particular heritage assets. However, the proposal would result in a considerable amount of (less than substantial) harm to the listed building through the change of use (including loss of fabric) and significant levels of (less than substantial) harm to the listed building through the rooftop extension. The harm carries greater weight than the public benefits and so clear and convincing justification for the harm has not been provided. The proposal would not preserve the listed building, which is a finding that carries considerable importance and weight in my decision.
92. Concluding on the heritage balance, while the proposal would have an overall acceptable effect on the significance of Seven Dials and Denmark Street Conservation Areas, it would not preserve the listed building. It would result in harm to the significance of the listed building that would not be outweighed by the public benefits. Therefore, the proposal would be contrary to CLP Policies D1 and D2. It would also conflict with NPPF paragraphs 193, 194 and 196, and Sections 16(2) and 66(1) of the LBCA Act.

#### *The planning balance*

93. The proposal would have not have an unacceptable effect on the biodiversity of Phoenix Garden and, assuming the S106 is effective, it would also make adequate provision to address effects on the local highway network, energy efficiency and climate change, and local employment, training and skills. The overall effect on neighbouring occupiers and the users of Phoenix Garden would be acceptable, although there would be some specific adverse effects.
94. However, the proposal would have a negative effect on heritage assets, specifically the listed building, and would also have a negative effect on the provision of cultural and leisure facilities. The proposal would conflict with CLP Policies D1, D2 and C3, and LP2021 Policies HC5 and HC6. Considerable weight can be afforded to this conflict given the extent of negative effects.
95. The benefits as set out above would be insufficient to outweigh this conflict and the negative effects. There are no other material considerations that indicate that planning permission should be granted in Appeal A. The proposal would not preserve the listed building or features of special architectural or historic interest which it possesses. As a consequence, this also indicates that listed building consent should not be granted in Appeal B.

#### **Conclusions**

96. For the above reasons, and having had regard to all other matters raised, I conclude that both appeals should be dismissed.

*Tom Gilbert-Wooldridge*

INSPECTOR

## **APPEARANCES**

### FOR THE APPELLANT

Christopher Katkowski QC and Kate Olley of Counsel, instructed by Asserson Law.

They called:

Laurie Handcock MA (Cantab) MSc IHBC Director, Icen Projects

James Dilley BA (Hons) BArch RIBA ARB Director, Jestico + Whites

Anna Snow BA MPhil MRTPI Director, Icen Projects

#### *Other participants*

Patricia Holden MSc MCIEEM Director, Syntegra Consulting

Yunok Choi Syntegra Consulting

Justin Bolton Director, Point 2 Surveyors Limited

Mike England Director, Icen Projects

James Kon Senior Associate, Asserson Law

### FOR THE LOCAL PLANNING AUTHORITY

Sasha Blackmore of Counsel, instructed by the solicitor of the London Borough of Camden (LBC).

She called:

Andrew Jones BSc MRICS Director, BPS

Dr David Wilmore BSc Director, Theatresearch Ltd

Colette Hatton BA (Hons) PG Cert Conservation Officer, LBC

Laura Hazelton BSc (Hons) MA Senior Planning Officer, LBC

#### *Other participants*

Steven Cardno Highways, LBC

Pritej Mistry Planning Lawyer, LBC

### FOR THEATRES TRUST (TT)

Stephanie Hall of Counsel, instructed by TT.

She called:

Tom Clarke MRTPI National Planning Adviser, TT



#### FOR COVENT GARDEN COMMUNITY ASSOCIATION (CGCA)

Amanda Rigby Vice Chair of CGCA

She called:

Paul Velluet BA (Hons) BArch (Hons) MLitt RIBA IHBC, Chartered Architect

Jane Palm-Gold Artist, curator and local historian

David Kaner Consultant and member of CGCA

Elizabeth Bax Local resident and chair of CGCA's Planning Subcommittee

Ashtar Al Khirsan Local resident

Nancy Hearn Local resident

Sanam Khan Local resident

Sharaz Khan Local resident

Garrard Knowles Local resident

Chris Baker Local resident

#### FOR PHOENIX GARDEN

Cllr Sue Vincent Local ward councillor

Spencer Noll Local resident

Leah Ashton-Hurst Duty Manager, Phoenix Garden

#### INTERESTED PARTIES WHO SPOKE AT THE INQUIRY

Margaret Crowe Chairperson of the Odhams Walk Resident Management Ltd

David Bieda Local resident and member of CGCA

Jo Weir Local resident and chair of CGCA

Tim Lord Soho Society

Jim Monahan Local resident and member of CGCA

## **INQUIRY DOCUMENTS**

- ID1 Appellant's opening submissions
- ID2 Council's opening submissions
- ID3 TT's opening submissions
- ID4 CGCA's opening submissions
- ID5 Phoenix Garden's opening submissions
- ID6 CGCA response to appellant's transport rebuttal
- ID7 Letter from Fiery Angel theatre producers
- ID8 Additional notes to Phoenix Garden's opening submissions
- ID9 Statement by Margaret Crowe
- ID10 Planning decision notice dated 7 October 1970 for alteration to elevations of Saville Theatre in connection with use as twin cinema
- ID11 Mural photos of Saville Theatre
- ID12 Drawing 2812-JW-303 P01 showing area of roof balcony not accessible to the public
- ID13 High Court judgment *Forge Field Society v Sevenoaks DC* [2014] EWHC 1895 (Admin)
- ID14 High Court judgment *Gibson v Waverley Borough Council* [2012] EWHC 1472 (Admin)
- ID15 High Court judgment *Gibson v Waverley Borough Council* [2015] EWHC 3784 (Admin)
- ID16 High Court judgment *Pugh v SSCLG* [2015] EWHC 3 (Admin)
- ID17 Extract from Historic England's (HE) website on The National Heritage List for England
- ID18 Extract from HE's website on Listed Buildings Identification and Extent
- ID19 HE's Good Practice Advice Note 4: Enabling Development and Heritage Assets
- ID20 Clarification note from Point 2 Surveyors on light effects to Phoenix Garden
- ID21 Email from appellant dated 3 December 2020 providing BRE paragraph reference
- ID22 Appellant's legal submissions including those relating to ID13 to ID16
- ID23 HE's Listing Selection Guide for Culture and Entertainment Buildings
- ID24 Council's response to appellant's legal submissions in ID22
- ID25 Clarification note from Point 2 Surveyors identifying the specific windows that would experience reduction in Vertical Sky Component in excess of 20% of former value
- ID26 Signed version of Alastair Crockett's statement (Senior Urban Designer LBC)
- ID27 Correspondence between the Council and HE from 30 March to 3 December 2020 regarding the review of the list description
- ID28 Appellant's note on Optimum Viable Use (following ID22 and ID24)

- ID29 CGCA response to ID20 on light effects to Phoenix Garden
- ID30 Denmark Street Conservation Area Map
- ID31 Seven Dials Conservation Area Map
- ID32 Letter from Council dated 4 May 2020 in response to the appellant's report on additional information on internal fabric
- ID33 Drawing extracts from the Construction Method Statement and Basement Impact Assessment report by Price & Myers
- ID34 Note from Council on listing selection guide (ID23)
- ID35 Response from Syntegra to ID29
- ID36 Appellant's response to Council's note (ID34)
- ID37 Correspondence from the main parties on viability matters, between 17 and 30 November 2020
- ID38 Note from the Council on Odeon's relocation plans and the Odeon lease
- ID39 Note from the Council containing extracts from the Odeon lease and email correspondence with Westminster City Council
- ID40 Statement from Haim Danous dated 23 December 2020
- ID41 Statement from David Seal dated 23 December 2020
- ID42 Further draft Section 106 agreement as of 23 December 2020
- ID43 Proposed amendments and additions from CGCA to (A) the draft planning conditions and (B) the Section 106 agreement
- ID44 Proposed additional condition from TT
- ID45 Comments from the Council dated 4 January 2021 on the draft Section 106 agreement, including appeal decision APP/V5570/W/19/3227138
- ID46 Email from Duncan Reynolds (Group Director and Real Estate Director for Odeon Cinemas Group) dated 2 January 2021
- ID47 Undated letter from Roger Harris (former Chief Operating Officer of Odeon)
- ID48 Phoenix Garden's closing statement
- ID49 CGCA's closing statement
- ID50 TT's closing submissions
- ID51 Council's closing submissions
- ID52 Appellant's closing submissions

#### **DOCUMENTS RECEIVED AFTER THE INQUIRY CLOSED**

1. Responses and final comments to costs applications from the appellant and the Council
2. Completed and executed Section 106 agreement
3. Position statements from the appellant, the Council and CGCA on the S106
4. Responses from the parties on the London Plan 2021



## Costs Decisions

Inquiry opened on 1 December 2020

Site visit made on 15 December 2020

**by Tom Gilbert-Wooldridge BA (Hons) MTP MRTPI IHBC**

**an Inspector appointed by the Secretary of State**

**Decision date: 10<sup>th</sup> March 2021**

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### **Costs Application (1) in relation to Appeal A: APP/X5210/W/19/3243781 and Appeal B: APP/X5210/Y/19/3243782**

#### **135-149 Shaftesbury Avenue, London WC2H 8AH**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6; the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 89, and Schedule 3; and the Local Government Act 1972, section 250(5).
  - The application is made by Capital Start Limited for a partial or full award of costs against the Council of the London Borough of Camden.
  - The inquiry was in connection with two appeals against the 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.
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### **Costs Application (2) in relation to Appeal A: APP/X5210/W/19/3243781 and Appeal B: APP/X5210/Y/19/3243782**

#### **135-149 Shaftesbury Avenue, London WC2H 8AH**

- The application is made under the Town and Country Planning Act 1990, sections 78, 320 and Schedule 6; the Planning (Listed Buildings and Conservation Areas) Act 1990, sections 20, 89, and Schedule 3; and the Local Government Act 1972, section 250(5).
  - The application is made by the Council of the London Borough of Camden for a partial or full award of costs against Capital Start Limited.
  - The inquiry was in connection with two appeals against the 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.
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#### **Decision Costs Application (1)**

1. The appellant's application for an award of costs against the Council is partially allowed in the terms set out below.

#### **Decision Costs Application (2)**

2. The Council's application for an award of costs against the appellant is refused.

## **Preliminary Matters**

3. The Planning Practice Guidance (PPG) advises that irrespective of the outcome of an appeal, costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The PPG states that awards against a local planning authority or an appellant may be procedural, relating to the appeal process, or substantive, relating to the planning merits of the appeal.
4. The applications were both submitted in writing on the final day of the inquiry. Both parties responded to the applications in writing and also made final comments on those responses in writing.

### **(1) The appellant's application for an award of costs against the Council**

5. The appellant submits that the Council has acted unreasonably on a number of substantive and procedural grounds.
6. The **first substantive ground** relates to the first reason for refusal in both appeals and the Council's position on heritage matters. As will be apparent from my appeal decisions, the Council did not exaggerate the degree of harm to the affected heritage assets particularly the listed building. The Council was not required to take the same position on harm as Historic England (HE) or the heritage consultant appointed to advise them during the application process. The Council adequately presented its case and evidenced the level of harm it had identified.
7. Considerable importance and weight should be given to the desirability of preserving a listed building. This applies whether the conclusion on the heritage balance is one of overall harm or overall public benefit. Therefore, given that the Council's conclusion on the heritage balance was overall harm, it was not necessary to give considerable weight to the public benefits.
8. It was common ground that a roof extension of this form and height, if sympathetically executed, could be incorporated without significant harm to the listed building. However, this did not remove any consideration of form or height from the debate as the question of sympathetic execution remained. As my decisions indicate, it was not wrong to say that the combination of height, mass, form and materials in this proposal would result in significant harm.
9. The question of whether the new cinema would be ancillary to the hotel is based on whether one looks at the cinema in quantitative terms (e.g. economic or floorspace contribution) or functional terms (e.g. supporting or secondary function). The latter was a more compelling approach in this instance and I found that the cinema would not be ancillary as it would operate separately for the general public. However, the Council was not wrong to consider the former approach and it was a matter of planning judgment. Moreover, I concurred with the Council and others on the negative effect arising from the change of use in terms of how one would experience the listed building.
10. Finally, the Council was not wrong to find harm to the significance of both conservation areas. The Council set out its case and provided sufficient evidence to justify its position. While I came to a different position regarding the contribution of the site to significance and the extent of harm, I still found there would be harm.



11. On all of the above points relating to the first substantive ground, no unreasonable behaviour has been demonstrated and so no unnecessary or wasted expense can be attributed to this ground.
12. The **second substantive ground** relates to the second reason for refusal in Appeal A regarding the provision of cultural and leisure facilities. It is correct that Policy C3 of the Camden Local Plan (CLP) does not state the maximum reasonable amount of replacement cultural or leisure facility should be provided. However, the policy does guard against the loss of a facility and its unsuitable re-provision. It requires proposals to show there is no longer a demand for the existing facility and to consider the changes in the mix of uses arising from any loss. In this case, alternative cultural or leisure uses could not be ruled out, while the mix of uses would diminish the cinema use. Therefore, it was not unreasonable to find that the proposal was not providing a sufficient or maximum amount of replacement facility. Thus, no unnecessary or wasted expense can be attributed to this ground.
13. It is feasible that if the first and/or second reason for refusal had been withdrawn, the other reasons for refusal in Appeal A may not have been sufficient to withhold planning permission. The Council cooperated with the appellant to resolve the third reason via a condition and indicated that the remaining reasons could be overcome by a Section 106 agreement (S106). However, given the Council's later concerns regarding the S106 and the objections of other main parties on living conditions and Phoenix Garden, it is far from certain that the remaining reasons would have been insufficient. Therefore, no unreasonable behaviour can be applied on this ground.
14. The **first procedural ground** contends that the Council introduced new grounds at a late stage beyond the reasons for refusal, incurring additional time and expense in the process. This relates to arguments made on the loss of internal fabric and legibility of plan form. It is evident that these arguments were not part of original decisions or the Council's statement of case. They only came to light following a site visit to the building after the appeal had begun with one of the Council's recently appointed witnesses who specialises in historic theatre buildings.
15. The Council could have made its case about fabric and legibility at an earlier point even if the survival of the fly grid was only discovered at a later date. The arguments added to inquiry time and additional expense for the appellant. However, they were important matters to my decisions relating to the listed building and its preservation that needed to be raised. Therefore, no unreasonable behaviour leading to unnecessary or wasted expense has occurred on this ground.
16. The **second procedural ground** contends that by failing to serve rebuttal proofs the Council prolonged the inquiry through the making of hitherto unknown rebuttal points during evidence in chief (EIC). Rebuttal proofs are not a requirement of the inquiry process although they can save time. EIC should focus on a witness' own evidence. Based on my notes, the Council's witnesses spent a significant amount of EIC time responding to points made in the proofs and rebuttals of the appellant's witnesses. However, it is not apparent that it led to a significant lengthening of the inquiry or the appellant having to significantly lengthen its cross-examination of the Council's witnesses or the EIC of its own witnesses.

17. In most cases, these responses did not produce new points from the Council and the appellant did not produce additional material to address these responses. The one exception relates to points made by the Council's theatre witness in EIC on architectural features. This led to the appellant tabling HE's listing selection guide for culture and entertainment buildings and a written exchange of opinions regarding this document. However, this proved necessary to better understand the parties' positions on architectural features and the listing criteria for theatres. Therefore, no unreasonable behaviour leading to unnecessary or wasted expense has occurred on this ground.
18. The **third procedural ground** focuses on the Council contacting HE about the list description without notifying the appellant. This took place in late March 2020 with further correspondence over the spring and summer and again in early December 2020. With the production of additional information on the building and the discovery of additional fabric, seeking to update the list description was not unreasonable. Other main parties including the appellant had considered seeking an update. Owners are notified once HE progresses an application. However, the significance of the listed building was a central issue to these appeals and the content of the list description was very relevant even before the inquiry opened (as indicated by the letter from the Council to HE dated 31 March 2020). Given that the appeal process was underway by the time contact was made with HE on the list description, it was unreasonable for the Council not to have informed the appellant until day 4 of the inquiry over 8 months from the initial contact.
19. The appellant had to consider the HE correspondence disclosed by the Council as an inquiry document (ID27). That in itself was not unnecessary or wasted expense as it would have had to do that even if the Council had been open about the correspondence from the start. However, the correspondence disclosed by the Council was incomplete. The appellant contacted HE directly for the full extent (including emails from April 2020 and a copy of the application form to amend the description). This is unlikely to have amounted to significant time or expense, but nevertheless it represents unnecessary expense in the appeal process. Therefore, a partial award of costs limited to this very specific point is justified.
20. In conclusion, on most of its grounds, the appellant has not demonstrated any unreasonable behaviour by the Council which has led to unnecessary or wasted expense in the appeal process. However, in relation only to the appellant contacting HE for full disclosure of correspondence on the potential list description update, the application is partially allowed.

### **Costs Order for Costs Application (1)**

21. In exercise of the powers under section 250(5) of the Local Government Act 1972, Schedule 6 of the Town and Country Planning Act 1990 as amended, and Schedule 3 of the Planning (Listed Buildings and Conservation Areas) Act 1990, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the Council of the London Borough of Camden shall pay to Capital Start Ltd, the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred by the appellant contacting Historic England for full disclosure of correspondence between the Council and Historic England regarding the updating of the list description; such costs to be assessed in the Senior Courts Costs Office if not agreed.

22. Capital Start Ltd is now invited to submit to the Council of the London Borough of Camden, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

**(2) The Council's application for an award of costs against the appellant**

23. The Council submits that the appellant has acted unreasonably on a number of substantive and procedural grounds relating to two main areas. Firstly, viability and the position in relation to optimum viable use (OVU), and secondly, the issue of heritage fabric and appraisal.

24. In terms of **substantive grounds relating to viability/OVU**, the Council contends that the appellant unreasonably changed its position at a late stage by no longer claiming that the proposal represented the OVU. The Council also contends that due to the clear lack of compliance with the development plan as a result of not being the OVU, the appeals should have been withdrawn. Finally, in substantive grounds, the Council contends that the OVU arguments were wrong in law and policy.

25. The appellant's changed position was only known once proofs had been exchanged, but it was then maintained throughout the entirety of the inquiry. In short, the appellant's position was that the public benefits outweighed the harm to the heritage assets regardless of whether the proposal constituted the OVU. The appellant acknowledged that OVU was capable of being a material consideration in this appeal but that it did not represent a basis for which the appeals could be dismissed.

26. The Council chose to continue pursuing its case regarding OVU. In my appeal decisions, I concluded that the OVU made no difference to the overall heritage balance that weighed against the proposal. The appellant's changed position may have come as a surprise, but to my mind it was sufficiently clear.

27. The absence of the proposal being the OVU did not mean that the appeals should have been withdrawn. It is conceivable that my appeal decisions could have found limited harm to the heritage assets and concurred that the appellant's cited public benefits were enough to outweigh the harm. Neither national policy nor the development plan state that the consideration of harms versus public benefits must include whether or not the OVU is or can be secured. The various legal judgments referred to me state that alternative uses should be considered but they do not prescribe how this should be done.

28. With regards to the provision of cultural and leisure facilities, CLP Policy C3 refers to whether the premises can support alternative cultural or leisure uses. The policy does not require the proposal or the alternatives to represent the OVU in order to achieve compliance.

29. Therefore, no unreasonable behaviour has occurred on substantive grounds in terms of the appellant's changed position to viability/OVU, the compliance with the development plan, or having regard to law and policy.

30. In terms of **procedural grounds relating to viability/OVU**, the Council contends that the appellant unreasonably withdrew its viability expert at a late stage. Having done this, the Council also contends that it was unreasonable for the appellant not to withdraw the written evidence of the same expert. The Council also contends that evidence was concealed, and that significant costs were incurred through external consultants preparing viability evidence.

31. It is the decision for any main party at an appeal as to whether a witness and/or their written evidence should be withdrawn. Consistent with the appellant's other witnesses, the proof of evidence from the viability witness made no claims to the proposal representing the OVU. Given the appellant's changed position on OVU and its case regarding the heritage balance, the witness and his evidence was of little value. The Council was entitled to continue to call its viability witness and the appellant was entitled to ask questions of clarification and cross-examination of that witness as appropriate. Therefore, no unreasonable behaviour occurred in terms of the appellant's viability witness.
32. Turning to the alleged concealment of evidence, the leases between the appellant and Odeon have always been publicly available and were provided to the Council as part of the application process. While the appellant's witnesses were seemingly unaware of the details behind some of the covenants, there is little proof of any concealment of evidence. As for the purchase offer, while it may have been helpful for the offer to have been appraised between the parties, it is not unusual that the details were withheld due to commercial sensitivity. It was for the appellant to decide whether it should disclose the details, but there is little indication of any deliberate concealment. Therefore, no unreasonable behaviour occurred in terms of the evidence relating to the leases or the purchase offer.
33. With regards to the Council's external consultants, it is clear that the Council's proofs of evidence were produced on the basis that the appellant was arguing the proposal represented the OVU. The proofs of the Council's viability and theatre witnesses were used to argue that the proposal was not the OVU. The appellant should have notified the Council sooner that OVU no longer formed part of its case, rather than leaving it until the exchange of proofs. This may have reduced or avoided altogether the need for the Council to prepare evidence in relation to OVU. However, it is uncertain that the Council would have dropped its OVU arguments even if it had been notified earlier. It may still have prepared evidence on this matter. The Council continued to pursue OVU arguments throughout the inquiry even after the appellant's position had changed. Therefore, it has not been demonstrated that this unreasonable behaviour led to wasted or unnecessary expense in the appeal process.
34. In terms of **substantive and procedural grounds relating to heritage fabric**, the Council contends that the fly grid fabric should have been discovered earlier and properly appraised by the appellant. The Council also contends that the appellant should have cooperated with the Council to produce proportionate and targeted investigation of fabric and should have shared evidence rather than concealing it.
35. It is unfortunate that the fly grid fabric was not discovered until a site visit after the appeal had commenced, particularly when the proposal involved a roof extension and considerable demolition works. However, once discovered, it was appraised by the relevant witnesses in their proofs of evidence and during the inquiry itself. It was an important feature and the evidence before me was sufficient for me to reach a finding on its removal. Therefore, no unreasonable behaviour leading to wasted or unnecessary expense has been demonstrated.
36. It was for the parties alone to decide whether further investigation of fabric was necessary. The lack of cooperation and agreement on this matter was

unfortunate, notwithstanding health and safety and building access issues that were exacerbated due to the Covid-19 pandemic. However, the evidence before me was sufficient to come to a view on the building's significance and to make a decision regarding the effects of the proposal. Therefore, no unreasonable behaviour leading to wasted or unnecessary expense has been demonstrated.

37. The parties exchanged views and information on heritage fabric in the weeks and months following the discovery of the fly grid. This includes the appellant's additional information on internal fabric report of April 2020 and the Council's response to that report in May 2020. A further site visit was carried out in July 2020. A heritage statement of common ground was agreed in October 2020. While it would appear that the Council's May 2020 request for the asbestos survey and other plans/photographs went unanswered, there is little indication that this added to time or expense. Therefore, no unreasonable behaviour leading to wasted or unnecessary expense has been demonstrated in terms of the sharing of evidence.
38. In conclusion, the Council has not demonstrated any unreasonable behaviour by the appellant which has led to unnecessary or wasted expense in the appeal process. Therefore, I determine that the Council's costs application should be refused.

*Tom Gilbert-Wooldridge*

INSPECTOR