

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London
EC3A 7AR

United Kingdom
Telephone: +44 (0) 20 7876 5000
Facsimile: +44 (0) 20 7876 5111
DX: 160030 Lime Street 5
www.clydeco.com

ian.ginbey@clydeco.com

By email only
Head of Planning
London Borough of Bromley
Civic Centre
Stockwell Close
Bromley
BR1 3UH

Attention: Tim Horsman

Our Ref
IG/10270401

Your Ref

Date
8 June 2021

Dear Sirs

Y Buildings, Rafford Way, Bromley
Application for a Certificate of Lawfulness of Existing Use or Development
Application Reference Number: 21/02042/ELUD

We act for Moon Y Limited in respect of the above-referenced application ('the Application').

1 Background

- 1.1 The Application seeks a Certificate of Lawfulness of Existing Use or Development ('CLEUD') to confirm that the lawful use of the Y Buildings at Rafford Way, Bromley ("the Property") is offices (per use class E(g)(i), formerly use class B1(a)).
- 1.2 The Application is scheduled to be considered by the Council's Planning Committee at its meeting on 10 June. Related to this, we have been provided with a copy of the officer's report ('the Report') that is to be considered by Members at that meeting. The Report recommends that the Application be rejected. Our client's separate application (reference 21/01985/RESPA) for prior approval ("the Prior Approval Application") in respect of the proposed change of use of the Property from office use to residential use is on the same agenda for consideration by the Committee.
- 1.3 Unfortunately, the Report does not fully and accurately record the case in support of the Application and omits to report upon the significant amount of material that has been submitted in support of the case for a CLEUD. If this omission is not corrected, it is likely to significantly mislead Members (per Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314). This omission is particularly significant given that the officer's overall recommendation (that the Council declines to grant a CLEUD) is expressed to be *on balance* and the Report acknowledges that there are factors pointing in the opposite direction.

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2 **The Report**

2.1 The officer's analysis is predicated upon an argument that the entirety of the Civic Centre municipal complex - which, in addition to office accommodation for Council employees, provides Committee rooms, the Council Chamber, the Great Hall and public parkland – being a single planning unit.

2.2 The officer's recommendation to Members is presented in the following terms:

'Whilst there is some evidence which could point to a separate Class B1/Class E(g)(i) use for the 'Y Buildings', including the 1979 permission for use of the site as offices, on balance it is not considered sufficient to warrant granting this certificate, as the most persuasive evidence is that the Y Buildings were used as part of the overall Civic Centre use, which is a 'sui generis' use comprising a number of different components such as receptions, public halls, offices etc which are found at a Civic Centre site which was operated as a single planning entity'

2.3 It is, therefore, clear that the officer has informed Members that the lawful use of the Property is *sui generis* (in association with the overall Civic Centre use). It follows that, in the officer's view, planning permission is required to use the Property for office use because it would comprise a *material* change of use of the relevant planning unit (being, in the officer's view, the complex as a whole). It is unclear whether this conclusion proceeds on an assumption that the lawful use of the wider complex is a mixed use and/or whether the lawful use of each and every building within that complex is deemed to be *sui generis*.

2.4 Nevertheless, and in any event, we would argue (with respect) that the officer's approach is misconceived and inconsistent with the Council's oft-stated position in respect of the Property (as to which please see further below). Related to this, we are concerned that the officer has downplayed – and/or left out of account - the nature and extent of the evidence that has been submitted in support of the Application. The officer's reference to *some* evidence conveys a false impression to Members. We also note that, by reference to the material that has been submitted in support of the Application, the officer adds that:

'There are numerous references to the use of the word office in planning and other documents in reference to [the Property]. However the use of this word in the contexts provided does not preclude the offices being a component of another use...'

2.5 In fairness to our client, it was incumbent on the officer to articulate (or, at least, to fairly summarise) the nature and extent of the evidence that has been submitted in support of the Application. This evidence includes the following:

(a) on 11 July 2018, the Council's Executive resolved to dispose of the Property and on 30 April 2019 it resolved to appropriate the Property from office use to residential use. Throughout this process of disposal and appropriation, the Council has consistently referred to - and represented to prospective purchasers - the office use of the Property;

(b) related to this, on 25 July 2019, the Council published (in a local newspaper) notice of its appropriation of the Property from office use to housing. Later, on 16 October 2019, the Council's Executive considered a report from the Council's Head of Asset and Investment Management in respect of objections that had been received in response to the proposed appropriation of land for residential purposes. In this report, the officer records the office use of the Property and the intention (by a developer) to convert it into residential use pursuant to established permitted development rights (being our client's precise intention). It is trite that

such a change of use would only be permissible if the lawful use of the Property is as offices: it would not be a permissible change from any *sui generis* use;

- (c) related to the above, a marketing brochure produced by the Council's own retained agents, Cushman & Wakefield, in relation to disposal of the Property describes the Property as *existing office buildings*;
- (d) the Application is supported by a letter dated 7 August 2019 from Mr Andrew Champion who is the Council's Facilities and Support Services Manager and has been employed by the Council since 2003 (his letter was submitted in support of a previous application for a CLEUD that was later withdrawn). He states:

‘...

To my understanding [the Property has] been in office use since 1982 and certainly to the best of my recollection, they have been used as offices for the duration of my time with the Council until they were vacated in 2012. During this time, the Council have owner occupied [the Property] as offices and the following functions have been housed within [the Property]: Children's Social Care, Property Services and Environmental Services.

I can confirm that this statement for the CLEUD application to establish the existing use of the [Property] is true to the best of my knowledge and recollection.’ [our emphasis]

- (e) similarly, a letter is produced from Amy Milton who is the Council's Head of Estates and Asset Management pursuant to which she confirms:

‘...it is my understanding that [the Property was] used from 1982 solely as administrative offices (Class E use) for various council departments until 2012 when they were vacated. They have remained vacant since this time.’ [our emphasis]; and

- (f) on 14 August 2020, the Council granted planning permission for the change of use of North Lodge from residential purposes to class D1/B1 (use for the provision of services for young people). The related officer's report to Committee made it plain that North Lodge is located within the confines of the wider Civic Centre site but, nevertheless, concluded that it was in lawful residential use. It is evident that the officer regarded the building as its own planning unit benefitting from its own (residential) use. This is wholly inconsistent with treating the entirety of the Civic Centre site as a single planning unit.

2.6 Individually and cumulatively, this is powerful evidence that easily crosses the evidential threshold (being *on the balance of probability*) to warrant the grant of a CLEUD. Yet, inexplicably, it does not feature expressly in the Report and/or it is not specifically drawn to the attention of Members. This is an important omission. Had Members been provided with this information, they would have been driven to the inexorable conclusion that the case for a CLEUD is satisfied.

2.7 The officer's conclusion also relies heavily upon the judgment of the Court of Appeal in London Residuary Body v Secretary of State for the Environment [1989]. However, reliance on this case – which concerned the planning status of County Hall in London – should be exercised with caution. As was accepted by the Court in that case, it very much turned on its own facts and the exercise of a planning judgement by the decision-maker in response to those facts. It is clear that the Court was concerned with the *singular features* and *precise use* of County Hall.

2.8 Moreover, the submitted evidence in respect of the Application demonstrates (on the balance of probability) that the Property was functionally and physically separate from the activities carried on in the wider Civic Centre complex (per Burdle v Secretary of

State for the Environment [1972] 3 All ER): its use was almost exclusively confined to office use throughout the relevant period. In response to the officer's observation above, it is trite law that, even though the entirety of the Civic Centre complex had been occupied by the Council, for the purposes of planning control it is perfectly appropriate to identify the Property as a separate planning unit(s). Not only would this be consistent with the Council's own approach in respect of North Lodge, it would also accord with the approach of the Court in Church Commissioners v Secretary of State for the Environment (1995) 71 P & CR 73. Ultimately, it is a matter of fact and degree as part of an overall planning judgement to be exercised by Members.

3 Request of Members

- 3.1 Members will be aware that, as a matter of law, they are entitled to depart from their officer's recommendation provided that their reasons for doing so are properly articulated and otherwise reasonable. In this respect, it is important to note that the officer's conclusion was expressed to be *on balance* and recognised that it is possible to conclude that the Property was used separately (as offices) from the rest of the Civic Centre site in any event. As a whole, there is sufficient evidence before Members to justify the lawful grant a CLEUD in the proper exercise of their planning judgement and we would respectfully invite the Committee to do so.
- 3.2 If, without prejudice to the above, Members do not feel able to do so, then the appropriate course of action would be to defer their determination of the Application in order to allow officers to prepare a further, more accurate report that presents the full case in support of a CLEUD. If so, it would also be sensible to defer the Prior Approval Application given the Council's intention that it be considered alongside the Application.

Please confirm that a copy of this letter will be shared with Members of the Committee in advance of their consideration of the Application.

Yours faithfully

Clyde & Co LLP

CC: Russell Penn (Case Officer)