Appendix 2 – Advice of Simon Bird QC 22 August 2016 (submitted by the applicants)

CITYLIFE HOUSE

STURTON STREET, CAMBRIDGE CB1 2QF

A D V I C E

---

1. My advice is sought by CRU Sturton Street ("CRU") and Cambridge Arts and Science Limited ("CRU") on the interpretation and scope of a full planning permission granted by Cambridge City Council ("the Council") authorising the change of use of Citylife House, Sturton Street, Cambridge CB1 2QF ("the Building"). CRU own Citylife House and CAS who operate the Cambridge School of Visual and Performing Arts ("CSVPA") and who are the intended tenants of the building.

2. The planning permission was granted under reference 14/1252/FUL ("the Planning Permission") and the description of the authorised development is:

> *"Change of use* from *the permitted use as a studio/cafe bar/multimedia education centre and community facility (sui generis) granted under planning permission 97/1020 to a Class D1 dance school/studio including limited alterations to the external envelope of the building".*

3. Some 12 conditions were attached to the grant of the planning permission and those principally relevant to this advice are as follows:

> *"7. Noise limiting devices (specification and design to be agreed with the LPA) shall be fitted within the studios so that all amplified music is channelled through the devices. The maximum noise levels will be set by agreement with the LPA and will be reviewed from time to time as appropriate.*
> *The Premises Management and/or nominated person shall ensure that the noise limiting device is sealed after commissioning, so that sound operators cannot override the system during any performance or class and that the agreed settings are kept unless otherwise agreed in writing by the LPA.*
> *The use hereby approved shall be carried out in accordance with the approved specifications and details.*
>
> *Reason: To protect the amenity of nearby properties (Cambridge Local Plan 2006 policy 4/13)*
>
> *8. During performances, practices or classes all doors and windows in the studios being used must be kept closed at all times'*
> *Reason: To protect the amenity of nearby properties (Cambridge Local Plan 2006 policy 4/13)*
>
> *9. The premises shall only be used for performances, practice sessions and dance classes between the hours of 08.00 and 22.00 Monday to Saturday and between 10.00 and 21.00 on Sundays.*
>
> *Reason: to protect the amenity of the adjoining properties. Cambridge Local Plan 2006 policy 4/13)*
>
> *12. No development shall take place until a Travel Plan for the Bodywork use has been submitted to and approved in writing by the local planning authority. The Travel Plan shall be focused on encouraging sustainable modes of transports for its students, staff and visitors. The approved plan shall be implemented and monitored according to the provisions approved by the local planning authority.*
>
> *Reason: To increase sustainability, limit pollution, and mitigate any air quality impact of the development. (Cambridge Local Plan (2006) policies 3/1, 4/13, 4/14 and 8/2)."*

4. The permission was applied for to facilitate the occupation and use of the Building by Bodywork Company Dance Studio ("BCDS") who operate from a number of sites within Cambridge. BCDS provide high-level courses in professional dance and musical theatre and also offer a range of dance and fitness uses. The works to the building as approved would provide nine dance studios ranging in size from 35 sqm through to 131 sqm, with ancillary facilities such as a small community coffee shop.

5. Although the exact status of the existing use of the building is very unclear, the Council consider that its lawful use is that permitted by planning permission 97/1020 and referred to in the grant of the Planning Permission. The Council regards this as a community use which has planning policy implications under its adopted Local Plan.

6. During 2014/2015 extensive discussions were held between CRU and BCDS. During these discussions it became apparent that BCDS would be unable to take a lease of the building. Instead, CRU agreed to enter into a lease for the occupation and use of the building by the CSVPA.

7. CSVPA is a school specialising in the teaching of visual and performing arts related courses between NQF3 and NQF7 (for illustration, A levels fall at NQF3 and Masters degrees at NQF7). Programmes include partnerships with University of Arts London, Kingston University and the Royal Academy of Dramatic Art.

8. The principal issue upon which my advice is sought is whether use of the converted building by CSVPA whether jointly with BCDS or on its own would be authorised by the Planning Permission. I understand that the Council are concerned that condition 12 could be read as restricting the use of the premises to BCDS alone.

Interpretation

9. The principles to be applied in interpreting the scope of planning permissions are well established and were recently reviewed by the Supreme Court in Trump International Golf Club Scotland Ltd v Scottish Ministers [2016] 1 WLR 85 (albeit that the case concerned the validity of a consent granted under the Electricity Act 1989 rather than the grant of a planning permission). The authorities establish that in the absence of ambiguity, in interpreting a planning permission regard may be had only to the terms of the planning permission, any conditions attached to the relevant planning permission and any documents expressly incorporated by reference (see Ashford Borough Council v Shepway District Council [1999] PLCR 12).

Implication

10. The Trump case touched on (albeit obiter) whether it was possible for words to be implied into a statutory consent in order to give it efficacy. It was in that context that the Supreme Court considered the principles applicable to the implication of words into planning permissions which, until the Trump the Courts had generally ruled against on public policy grounds. The Supreme Court held that there was no general principle that words cannot be implied

into a statutory consent such as a planning permission and that the approach should be as follows:

(i) Whether words are to be implied into a document depends on the proper interpretation of the words used;

(ii) The potential (ultimately) for criminal liability calls for both clarity and precision in the drafting of conditions;

(iii) In interpreting a statutory consent the question is what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole;

(iv) The exercise is an objective one i.e. having regard to the ordinary and natural meaning of relevant words, the overall purpose of the consent and other conditions, the purpose of the relevant words and also commonsense;

(v) Implication can be justified only where it must have been intended that the document would have a certain effect, although the words to give it that effect are absent;

(vi) Great restraint should be shown towards implication in relation to public documents.

11. These principles were endorsed by the Patterson J in the specific context of a planning permission in Dunnett Investments Ltd v SSCLG [2016] EWHC 534 (Admin).

Application of the Principles to the Planning Permission

12. The grant of planning permission here is expressed in terms which incorporate the application documents. However, whilst the supporting documentation was directed at and anticipated use by BCDS, neither the application for planning permission or the terms of the grant are expressed in terms personal to BCDS.

13. Further, there is no condition attached to the planning permission which expressly restricts the permitted use to BCDS. If it had been the intention to do so, I would have expected to see an express condition to that effect particularly as it would have been contrary to the guidance on planning conditions (restricting occupation to a named company is likely to prove ineffective as companies can change control (and operation) through share transfer and name changes) and would have required special justification.

14. Looking at the permission as a whole, the only reference to the potential occupant is in condition 12, however, the condition refers not to the company but to *"the Bodywork use".* The reason does not refer to any need to restrict occupation to BCDS; it simply refers to general transportation sustainability concerns. Looked at in this context and objectively, a reader of the permission would conclude that the reference to "*the Bodywork use"* is no

more than shorthand for the use as described in the terms of the grant i.e. *"a Class D1 dance school/studio"* but in the context that the anticipated (but not required) first user was BCDS.

15. Applying the principles laid down in Trump and Dunnett, the planning permission cannot properly be interpreted as being personal to BCDS nor can a condition be implied that only BCDS can occupy and use the premises under its terms. A reasonable reader would not conclude from the wording of Condition 12 read in the context of the permission as a whole that the overall purpose of this consent was that it should be personal to BCDS and that it must have been intended that it would have that effect.

D1 Use

16. The reference within the terms of the grant to Class D1 indicate that, absent some restriction, the intention was that the operation of the Town and Country Planning (Use Classes) Order 1987 should not be restricted. There is no condition attached to the permission which expressly excludes the operation of the Use Classes Order. There would have been no reason in principle why such a condition could not have been attached to the permission if the Council had been able to justify it, but no such condition was imposed.

17. The Courts have consistently held that conditions which exclude the operation of otherwise available statutory rights must be clearly and unambiguously expressed. Whilst there is no need for a reference to the relevant statutory instrument, the words used must be clear in preventing reliance on the relevant statutory right (see Dunoon Developments v Secretary of State for

the Environment (1983) 65 P&CR 101 and Carpet Decor (Guildford) v Secretary of State for the Environment [1981] JPL 806. A good example of the strictness of the approach is Telford & Wrekin Borough Council v SSCLG [2013] EWHC 79 (Admin). The case involved a challenge to the grant on appeal of a certificate for unrestricted A1 use of a site with a permitted use as a garden centre. A condition (condition 19) had required the submission for approval of a list of products to be sold prior to the garden centre opening but the condition did not go on to restrict the sale of products to those on the list.

Beatson LJ held the Inspector had been correct to conclude that the permission authorised unrestricted A1 use. The condition did not say that the use was confined to a garden centre use, it merely required that prior to opening the applicant should provide details of the proposed type of products to be sold. It did not say that no others were to be sold. Whilst some of Beatson LJ's reasoning was rejected in the Trump case, the correctness of the judge's conclusion was not doubted.

18. Having regard to the terms of the Planning Permission, there are some parallels with the Telford & Wrekin case. Whilst a number of the conditions require prior approvals of control measures appropriate to a dance studio use, none of the conditions restricts the subsequent use of the premises for other uses within Class D1. Even condition 9 which refers to *"The premises shall only be used for performances, practice sessions and dance classes between the hours of 08.00 and 22.00 Monday to Saturday and between 10.00 and 21.00 on Sundays"* is clearly directed not at restricting the use to use as a dance studio but rather the hours of operation of the premises. That is clear

from the reason for the imposition of the condition. The conditions are consistent with the dance studio use being the first use to be made of the premises under the permission as opposed to being the exclusive permitted use.

19. Again, there is no scope for implying a condition which excludes the operation of the Use Classes Order. A reasonable reader would not conclude that this must have been the intention from the permission read as a whole.

Implementation

20. In my view, in order for the planning permission to be lawfully implemented, the pre-commencement conditions would need to be discharged and use would have to be made of the premises as a dance studio. Once those have both occurred, it would then be possible for the use to change to another D1 use without the need for planning permission in reliance on the Use Classes Order.

21. Discharge in this context means compliance with (a) each of the elements of the conditions which require written approvals of the Council prior to the development (e.g. conditions 3, 4 and 12), the use (e.g. conditions 10 and 11) or occupation (condition 6) commencing and (b) those elements which require the approved facilities etc. to be in place before the use or occupation commences (e.g. conditions 6, 10,11).

22. The general rule is that works commenced in breach of conditions precedent are incapable of lawfully implementing a planning permission and whilst the context (which includes the importance of the relevant conditions) will be important in deciding whether a breach of condition has this effect, in my view the majority of the conditions precedent attached to the Planning Permission are properly regarded as going to its root and therefore any breach would prevent lawful implementation.

23. Whilst it is open to a local planning authority retrospectively to validate works of implementation, there is no obligation on it to do so and unless and until the details are approved, it remains open to it to take enforcement action if it decides to do so. There is no restriction in law on a local planning authority discharging conditions after the date by which, according to their terms, they should have been complied with. Provided that the relevant planning permission has not expired, it remains open to a local planning authority to approve details submitted under conditions precedent after the development has commenced. The process for, and effect of, any such retrospective approval is the same as if the approval and discharge had been sought/obtained at the relevant time (see F G Whitley & Sons v Secretary of State for Wales (1992) 64 P&CR 296 and Ellaway v Cardiff County Council [2015] Env LR 19

24. No reliance can be placed on the Use Classes Order unless and until the initial use is lawful which means that the full terms of all of the conditions have been complied with.

25. There is no specific period of time over which a dance studio use would have to occur before reliance could be placed on the Use Classes Order to change to another D1 use where the initial use is lawful, but the use would have to be a material first use judged as a matter of fact and degree which, as a very general rule of thumb would be no less than 10% of the floorspace, provided that there is no other use made of the premises. It must be a use which is of sufficient extent and duration which, if not authorised, could be the subject of enforcement action. I understand that the initial use will be of some 30-40% of the building as dance studios and as a matter of fact and degree that would, in my view, be sufficient to implement the change of use provided that it is sustained over a period of months rather than days.

26. Unless and until it has been lawfully implemented, the correct description of the change of use in any subsequent application would refer to the use permitted by the 1997 permission. Equally, any unauthorised development would be an immaterial consideration in the determination of any subsequent planning permission, although until 2018, the Planning Permission provides the baseline for assessment as a fall-back.

SIMON BIRD QC
22 August 2016

Francis Taylor Building
Inner Temple
London
EC4Y 7BY
DX: 402 LDE

CITYLIFE HOUSE

STURTON STREET, CAMBRIDGE
CB1 2QF

A D V I C E

Carter Jonas
6-8 Hills Road
Cambridge
CB2 1NH