

Our Ref: AR/MH/RG/69474.2

Your Ref: APP/X5210/C/23/3320287

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Dear Ms Gray

**Combined Appeals APP/X5210/C/23/3320287 and APP/X5210/C/23/3320288
Appellants' Response to LPA and Third Party Statements of Case**

1. INTRODUCTION

1.1 We act for the Appellants in relation to linked appeals reference APP/X5210/C/23/3320287 and APP/X5210/C/23/3320288.

1.2 Pursuant to the Start Letter dated 10 May 2023 and the letter from Rebecca Gray dated 22 June 2023, we write to submit comments on behalf of the Appellants regarding the following:

1.2.1 Camden Council's statement of case dated 18 June 2023 (the "**Council's Statement**"); and

1.2.2 Representation submitted by Rob Barlay dated 12 June 2023 (the "**Third Party Representation**").

1.3 We respond to the Council's Statement and the Third Party Representation in turn below and adopt the headings used in those documents.

2. THE COUNCIL'S STATEMENT

Paragraphs in the Council's Statement are not numbered. Accordingly we have arranged our response under sub-headings which correspond to the headings used in the Council's Statement. In some instances we have also set out quoted passages from the Council's Statement.

2.1 Council heading "Appeal Grounds A, B, C, D / Appellant's Case"

2.1.1 The Council's Statement notes that "*The Appellant argues that the original units were installed in 2009 and the 3 x replacement units were installed in 2018...*"

(a) This is a reference to the Appellants' Appeal Statement submitted on 13 April 2023 (the "**Appeal Statement**"), and is out of date. The Appellants have subsequently clarified that the original units were in fact installed in or about the summer of 2008 (see Antonia Lester's second statutory declaration dated 20 June 2023 ("**AL Second SD**"), paragraph 7).

(b) The Appellants have also clarified (having obtained contemporaneous documentation) that the replacement units were installed in or about September 2017 (AL Second SD, paragraphs 10 – 13). That evidence is supported by a further sworn statement from Mr Tomasz Polak, who installed the replacement units (see Document 21 Annexed to AL Second SD).

2.1.2 The Council's Statement notes that "*The Appellant claims immunity from enforcement action due to the passage of time, as the original Units were in place for approximately seven years without interruption...*"

(a) Given the clarification regarding the date of installation of the original units referred to at 2.1.1(a) above, relevant time period has now been shown to be approximately eight years without interruption.

2.2 Council heading "Appeal Grounds A, B, C, D / Council's Case / Ground A"

2.2.1 The Council argues that that planning permission ought not be granted on the basis of (i) sustainability; (ii) noise and vibration; and (iii) design and heritage.

2.2.2 The Council has approached this ground of appeal on entirely the wrong basis, by assessing the replacement units against a baseline of no air conditioning units at the Property. However, the correct starting point is that the original units were lawful due to their presence at the Property for over 4 years. Therefore, the assessment of the planning merits of the replacement units should be carried out against the baseline position of the original units.

2.2.3 The Council seeks to rely on video evidence which it states has been provided to the Planning Inspectorate. These files have not been provided to the Appellants. In any event, we wish to draw to the

Inspector's attention paragraph 8.2.13 of the "Procedural Guide: Enforcement notice appeals – England" which states:

"8.2.13.1 We will return any audio/video evidence sent to us. We cannot accept audio or video evidence, as we cannot be sure that everyone involved has exactly the same version or that they have the equipment needed to access the evidence. However, you may send a written summary within the 6-week deadline"

- 2.2.4 In addition, the Council's reliance on photographic evidence drawn from Google Maps is inherently flawed. A parking sign in the photographs discloses obvious and substantial differences in both height and position of the vantage point of the photographs. The corresponding parallax error makes it impossible to draw any reliable conclusion from them.
- 2.2.5 The evidence is clear that the original units had been in place for a considerable period, on any view more than four years, at the date of the 2016 fire. Nothing has been submitted to contradict that. In addition, the date of installation of the replacement units has been confirmed by sworn evidence supported by contemporaneous documentary evidence. Nothing has been submitted which provides any rational basis for departing from that sworn evidence.
- 2.2.6 **Sustainability** - The Council argues that the replacement units are contrary to policy CC2 in its local plan (Adapting to climate change) and that insufficient details have been provided. The Council argues that the units are not justified given the availability of opening windows and the Property's location on a quiet residential street.
- (a) As stated above, the Appellants' case is that any assessment of the merits of the replacement units should be against the baseline of the lawful original units. The Council's Statement does not engage with this point and instead seeks to assess the replacement units against the baseline of no air conditioning units at the Property.
- (b) The Policy objection on which the Council relies goes to the only principle of active cooling. That principle is clearly established as lawful in this case, so the policy objection does not arise.
- 2.2.7 **Noise and vibration** – The Council argues that the units cause undue harm to neighbours through noise and vibration, contrary to policies A1 and A4 in its local plan. The Council seeks to rely on video evidence provided by the complainant.

- (a) We refer to our comments above regarding the baseline assessment and video evidence.
- (b) The only evidence on this subject is therefore the assessment carried out by KP Acoustics (Document 14, AL Second SD). That assessment concludes that acceptable noise impacts can be achieved by acoustic screening. The Appellant has repeatedly stated that it is willing to install acoustic screening subject to the outcome of this appeal, and that is a matter that can readily be addressed by planning conditions.

2.2.8 **Design and heritage** - The Council argues that the units conflict with Policies D1 and D2 of its local plan, in that they negatively impact the character of the property and the surrounding conservation area, being "*bulky, and incongruous, obscuring the architectural scale and rhyme of the building*".

- (a) We refer to our comments above regarding the baseline assessment. Any difference in the external appearance and therefore design/heritage implications of the replacement units is minor in the context of the previously existing units and does not justify refusal of planning permission.

2.3 Council heading "Grounds B, C, D"

2.3.1 The Council's Statement argues that "*the evidence provided by the Appellants is deemed insufficiently precise and unambiguous by the Council to establish, on the balance of probability, that the three air conditioning units located at the side of the property have been continuously present for a period of four years or more...Furthermore, the Council possesses evidence that contradicts and undermines the Appellant's account*".

- (a) We respond to specific arguments made in the Council's Statement in this regard below.

2.3.2 "*Statutory Declarations - None of the declarations (see Appendix 1 attached) provide specific details regarding the number of units. The declarations do not accurately describe the exact location, height, or position of the units.*"

- (a) The absence of absolute precision does not in and of itself amount to ambiguity. The Council's case in this regard is an exercise in smoke and mirrors, seeking to conjure uncertainty where there is none. The evidence is clear that replacement units were installed in approximately the same location as the units being replaced. This has been confirmed by sworn statements (see, for example, AL Second SD, paragraph 14).

- (b) There is no need for additional or more precise detail, however it is noted that in any event the precise location of the replacement units would be apparent on any site inspection.

2.3.3 *"Camden New Journal Extract (2016) - A comparison of photographs from the Camden New Journal on March 2016 (see Appendix 2 attached) with a planning officer's photograph from 2022 (see Appendix 3 attached) shows that the equipment was situated in a lower position on the side wall in 2016 compared to the existing equipment currently in place."*

- (a) The Council's approach seems – in this context at least – to accept that the original units provide the appropriate baseline for the current assessment.
- (b) The replacement units are situated in approximately the same location as the original units (AL Second SD, paragraph 14). Any difference in positioning is de minimis.

2.3.4 *"Cover Letter Boyer Planning Ltd - This difference is also evident when considering an Appeal Statement from Boyer Planning Ltd. (agent for application) that includes photographs which show the existing equipment at the time of the enforcement appeal in November 2020 (ref. APP/X5210/C/20/3262422). One particular photograph (see Appendix 4 attached) shows that the equipment is not in the same location in November 2020."*

The letter claims that the three air conditioning units have been present on the site for at least four years prior to 22/09/2020. However, this statement contradicts information provided by the same agent in a planning application for full planning permission ref.2021/5353/P. The Planning Justification Report (see Appendix 5 attached) from Finkernagel Ross (ref. 10ANT-B3-GE211021 rev B) dated 21/10/2021 states, "As part of this reconstruction, which included all services, the heat pump units for the comfort cooling that are the subject of the enforcement, were installed in 2018."

- (a) We have addressed the location of the units and the dates of installation above.

2.3.5 The Council's Statement places reliance on Google Maps images. The Council claims that photographs dating from March 2018 and April 2019 do not show visible equipment on the side elevation of the Property.

- (a) As noted above it is necessary to treat these photographs with caution due to differences in the height and position of

the vantage points used. It is apparent that the photographs have not been "taken from similar positions in the street" as claimed in the Council's Statement and instead appear to have been taken from significantly differing angles.

- (b) Consequently, we submit that the photos produce parallax error and the conclusions which the Council seeks to draw from them are invalid. There is clear sworn evidence of the installation date, the photographs do not provide a reliable basis for contradicting that evidence.

2.3.6 *"Second Bite Provision [...] As outlined in the sections above, the Council argues that the units were installed in 2018. The first enforcement notice was served in September 2020 but subsequently withdrawn in July 2021. Although the notice that is the subject of this report was served in March 2023, the Council argues that the four year rule must be considered from the date when the notice was withdrawn. The Council therefore argues that the air conditioning units will not be exempt from enforcement action until July 2025."*

- (a) We do not dispute the Council's legal point regarding the 'four year rule' or the effect of an earlier (valid) enforcement notice.
- (b) However, the Council's starting point of July 2021 (being the date of withdrawal of the first enforcement notice) is incorrect.
- (c) The correct starting point for the four year rule is the installation of the original units in or about the summer of 2008.
- (d) The Council did not commence enforcement action regarding the original units. The Appellants' evidence is that the original units were in situ prior to the fire for approximately eight years, and they thereby became immune from enforcement action due to the effluxion of time.
- (e) Any differences between the replacement units and the original units are de minimis or at least less than material in the context of the building as a whole. The installation of the replacement units therefore did not constitute development, comprising maintenance, improvement or other alteration which did not materially affect the external appearance of the building. Consequently the 'second bite' provisions are of no assistance to the Council. Both this and the earlier enforcement notice are hopelessly out of time.

- (f) For these reasons, the Council is out of time in bringing enforcement action against the replacement units.

2.4 Council heading "*Ground F*"

2.4.1 The Council's Statement states that insufficient details were provided by the Appellants regarding proposed acoustic enclosure measures for planning application 2021/5353/P.

- (a) We refer to the Appeal Statement and the enclosed planning compliance (acoustics) report dated 15 October 2020 which evidences that acoustic and design considerations for the replacement units can be mitigated via a planning condition (now also included as Document 14, AL Second SD).
- (b) The Appellants are willing to box the units in an acoustic enclosure, and as previously stated would welcome a discussion with the Council regarding steps which could be taken to mitigate the alleged harm caused by the units.
- (c) As noted above, acoustic screening is easily capable of being required by planning condition under Ground A.

3. **THE THIRD PARTY REPRESENTATION**

3.1 The Third Party Representation also lacks paragraph numbers, however given its more concise scope we respond to it by reference to the points raised.

3.2 The Third Party Representation asserts that the replacement units are not like for like replacements of the original units with reference to (i) position; (ii) size; and (iii) number and power of units.

3.2.1 As stated in the Appeal Statement and the AL Second SD, following the fire at the Property in March 2016, identical replacement air conditioning units could not be sourced.

3.2.2 **Position** – the replacement units have been installed in approximately the same location as the original units (AL Second SD, paragraph 14).

3.2.3 **Size** – the replacement units are a similar size to the original units (AL Second SD, paragraph 14, Appellants' Appeal Statement, paragraph 3.7).

3.2.4 **Number and power of units** – We refer to the AL Second SD, paragraph 14, which observes that the new units are quieter than the previous system. Further, we understand that the new units cool the same parts of the Property as were cooled by the original units, which would be consistent with them having similar power/output capacity.

- 3.3 The Third Party Representation argues that the statutory declarations of Damien Pitman and Darryl Lazarus (initially submitted with the certificate of lawful use or development application reference 2022/2473/P and resubmitted with the Appellants' Appeal Statement) "*merely confirms the existence of Air Conditioning and has no relevance to the case, which is all about the size, power and critically the position of the units.*"
- 3.3.1 The existence of the air conditioning units prior to the fire at the Property in 2016 is clearly relevant to these appeals. As outlined above, the original units became immune from enforcement action due to the effluxion of time and it is the Appellants' case that the replacement units are therefore also immune from enforcement action.
- 3.3.2 As to the size, power and position of the units, we refer to our comments at 3.2.1 to 3.2.4 above.
- 3.4 The Third Party Representation states that "*[t]his saga started in June 2019*".
- 3.4.1 It is not clear what significance is attached to the date of June 2019.
- 3.4.2 As noted at paragraph 2.1.1(b) above, the AL Second SD confirms that the replacement units were in situ in or about September 2017.
- 3.5 The Third Party Representation appends a screenshot of a Whatsapp conversation and offers the following commentary:
- "Very shortly after the installation of the new Air Conditioning units I started a WhatsApp Group with Philip Bloom and Antonia Lester. Unsurprisingly the name of this group is AirCon. The WhatsApp messages have a clear date stamp (see attachment). They also contain a very clear message that Philip Bloom had verbally offered to both lower the A/C units and to box them in to reduce the noise level and the endless hot air that blows directly into my house."*
- 3.5.1 The screenshot provided does not evidence when the Whatsapp group was started. It merely shows that messages were exchanged regarding the units on 9 August 2019. It is, however, implicit in the message shown that on 9 August 2019 the discussion had been ongoing for an unknown period of time before that date.
- 3.5.2 The screenshot further strengthens the Appellants' Ground F argument that a planning condition would have been sufficient to remedy the alleged breach. In the messages the Appellants' immediate neighbour (i) states "*I don't want you to get rid of it [the units]*" and (ii) requests that the units be lowered and enclosed.

4. **CONCLUSION**

- 4.1 We trust that the above is clear and look forward to receiving the outcome of the Inspector's determination of these appeals.
- 4.2 Should the Inspector require any further information, please do not hesitate to contact Martyn Hanmore (martyn.hanmore@mishcon.com) and Rebecca Gough (rebecca.gough@mishcon.com).

Yours faithfully



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