

MICHAEL LOVERIDGE

Appellant

and

THE LONDON BOROUGH OF CAMDEN

Local Planning Authority

**GROUNDS OF APPEAL/
 STATEMENT OF CASE**

Introduction

1. Devonshire House School (the "Appellant") is the owner of the property the subject of the appeal being one of the sites of Devonshire House School ("the School") at 69 Fitzjohn's Avenue (the "Appeal Site").
2. The Appeal Site is a large Victorian house converted for educational use standing on circa one acre. The Appeal Site has been in use by the School since 1989.
3. The School also occupies two neighbouring sites in Hampstead, north London at 2-4 and 6 Arkwright Road.
4. This is an appeal under section 78(2) of the Town and Country Planning Act 1990 against the failure of the Local Planning Authority (The London Borough of Camden) ("LPA") to determine an application for planning permission in respect of a proposal for an "*extension of the existing basement area, new lightwells to the south and north elevations and the erection of a glazed flat roof rear extension*" ("the Proposed Development") at the Appeal Site ("the Application") (LPA reference 2015/1635/P).
5. The Appeal Site lies within the Fitzjohn's Netherhall Conservation Area in the London Borough of Camden.

6. Pre-application advice was received under reference 2014/6727/PRE on 11 December 2014. The LPA advised that "*the development may be considered acceptable*" (see annex 1).
7. The Application was registered on 8 April 2015 following its submission on 18 March.
8. In June 2015 a Transport Statement was submitted at the request of the LPA. Notwithstanding that the NPPF only requires such a transport assessment to be provided for proposals which generate "*significant amounts of movement*" (see para. 32), and the Proposed Development would not generate such, this was provided.
9. The Transport Statement was prepared by TTP Consulting Ltd, transport planning specialists following "*a site visit and a discussion with a highways officer from the council*" (see annex 4 at para. 1.7). The Transport Statement's conclusions included the following:
 - (i) "*The proposals in the plan submitted are not for development of extra classrooms but for improvements to buildings and thus the development will not in itself generate any significant vehicular traffic*" (para 1.4, and see also para. 4.2);
 - (ii) "*Site observations indicate that the area is congested at peak times, ... though that in itself parent drop off/collection activity relating to the [appeal] site did not contribute materially to the situation*" (para. 2.13);
 - (iii) Recent surveys indicated that "*that of the 652 pupils that attend the school, 135 (c.21%) currently travel to and from the school by car. A higher proportion of pupils walk or are transported by buggy (c.38%). Overall, a significant proportion of pupils (c.80%) travel by sustainable modes of transport*" (para. 2.21);
 - (iv) The Appeal Site is very accessibly by non-car modes (see section 3) including walking, cycling, bus services (public and provided by Transport 4 Schools); London Underground and Overground Services. The Appeal Site has a PTAL rating of 5.
 - (v) "*... the proposals are not for development of extra classrooms but for improvements to buildings. A replacement teaching room will be created at basement level with an existing teaching room on the top floor level converted to a learning support room. A dedicated dining room will also be*

provided replacing an existing facility which is used as a combined dining room, teaching room and play area, which is far from ideal” (para. 4.7) and “ [t]herefore, the development will not in itself generate any significant vehicular traffic” (para. 4.8);

(vi) *“A review of the relevant transport policies at national, regional and local level in the context of the development proposals has been undertaken and it is considered that the proposals are consistent with national and local transport policy guidance” (see para. section 5 and para 6.9)*

(vii) In conclusion (emphasis added):

“6.4 The proposals aim to improve the existing school facilities, improve the connectivity and circulation with the basement level and the rear garden, enhance the character of the building and improve the energy performance of the building.

6.5 The proposals in the plan submitted are not for development of extra classrooms but for improvements to buildings and thus the development will not in itself generate any significant vehicular traffic.

6.6 Given the above, the proposals will not result in any change to the trip generating characteristics of the site and as a consequence the effect of the proposals on the local transport network will be negligible.”

10. The period for determination was extended on 4 September 2015 to the 30 September 2015 (see appendix 6).
11. The Application if granted would reorganise the basement to allow for better movements of pupils and matters relating to kitchens, lavatories and boilers. The development to the rear contains a medium-sized dining room / school hall and one classroom to replace a small classroom to the upper floor. It needs to be made clear at the outset that the Proposed Development creates no additional classroom.
12. The works proposed would comprise the following (see para. 1 of the Planning Statement at annex 2):

“a) Extension of the existing basement under the existing raised terrace and to the south of the existing toilets (involving basement excavation of approximately 168sqm).

b) Creating a new light well to the south of the building measuring approximately 6.9m by 1.83m (1.26m in front of the proposed bay window). The lightwell would join to an existing lightwell on the southern elevation.

c) Creating a new light well to the north of the building measuring approximately 3.9m by 3.2m and small new lightwell (3.4m by 1m) to front of the building covered by a grille at floor level.

d) The replacement of the non-original full width pitched roof rear extensions with a new glazed flat roofed extension. The existing extension projects approximately 2.22m from the rear elevation with a staff room projecting 6.07m from the rear elevation. The proposed replacement extension would project 3.9m from the existing rear elevation increasing to 5.83m to incorporate a staff room”

See further the plans showing the existing and proposed facilities.

The Application – chronology

13. Between 8 April 2015 and the present time four different planning officers at the LPA have dealt with this Application.
14. On 4 June 2015 the LPA stated that a cap on numbers of children based at the Appeal Site secured by condition was necessary to make the development acceptable in planning terms. This was disputed in emails from the Appellant’s architects who noted (in an e-mail dated 4 September 2015 sent at 7.40) that such a condition “*would not be necessary (test 1), relevant to the development to be permitted (test 3), enforceable (test 4) and reasonable in all other respects*”.
15. The position of the LPA in this regard was reversed on 28 September 2015 when the LPA agreed to recommend the Application for approval without any cap on numbers. In an e-mail dated 28 September 2015 and sent at 12.34 the planning officer, said “*I am going to be recommending this application for approval. I have looked at the proposed condition and as the number of teaching spaces is not increasing, there will not be a condition on the application stating the number of students*”.

16. In further e-mails it was indicated that the application was being written up with a recommendation for approval by Members at a Members Briefing on various dates including 30 November 2015. In the course of on-going discussions, and at the LPA's urging, the Appellant agreed to provide more cycle spaces at the Appeal Site.
17. The Application was not reported to members in November 2015 and on 8 December 2015, the LPA then changed position again to advise that without a section 106 obligation to limit pupil numbers across not just the Appeal Site but "*both school sites*" (as noted above the School also occupies two neighbouring sites in Hampstead, north London at 2-4 and 6 Arkwright Road and which do not form any part of the Application) the Proposed Development was unacceptable. The correspondence from the LPA said (see email dated 8 December 2015 at 14.25 "*[w]e are not suggesting a condition, we are insisting that a clause is added to the S106 to restrict the number of pupils across both school sites*"). In the absence of such a clause it was said that the application would now be refused "*on the grounds of cumulative impact of increased pupil numbers and potential impact on the local transport network*". An earlier e-mail (sent 8 December 2015 at 10.46) said that such a clause in a s. 106 "*would mean a better environment for children and staff, and as is mentioned in the planning statement will be a benefit to the school as a whole as it will improve the circulation of pupils and staff*".
18. In response solicitors instructed by the Appellant wrote a letter dated 14 January 2016 explaining why there was no justification for any cap on numbers either through a condition or an obligation. Reliance will be placed on this letter and the further letters dated 4 and 17 February 2016 which set out the Appellant's position.
19. In the 14 January 2016 letter it is said:

"The overall conclusion of the transport assessment is that the planning application is acceptable in traffic and transport terms. We are not aware of any evidence before you which runs contrary to this clear conclusion and you have not disputed the assessment. Indeed, so far as we are aware there has been no objection from the local highway authority to the proposal on highway grounds. The agreement by my client to include extra covered cycle parking spaces has a positive impact on the local transport network which seems to have been given no [weight] whatsoever in the determination of the application to date"
20. In the later correspondence from the Appellants solicitors in February:

- (i) The Appellant refuted a suggestion made by the LPA that previous permissions granted to the School “*directly led to an increase in pupil numbers*”. Thus it was noted that “ *... the only significant planning permission [and not on the Appeal Site] which has been implemented was three years ago for two specialist classrooms for ICT and Music Technology. The floorspace constructed by virtue of this permission is still used specifically for these purposes.*”
 - (ii) In any event the Appellant indicated it would agree to conditions: (i) “*limiting the use of the basement dining room/school hall for that purpose only and not to use the same for teaching space or classrooms*” and (ii) limiting “*the use of the classroom adjacent to the hall ... as a replacement to the classroom in the eaves of the Property*” with “[t]he former classroom in the eaves of the Property” being limited to use “*solely as a special needs tutoring room and not as a general classroom or for activities commensurate with use as a classroom*”.
21. On 9 March 2016 the LPA altered its position yet again and officers recommended the Application for approval subject to a condition restricting the use of non-teaching space and in addition imposing a cap on pupil numbers.

The School

22. The School is an independent day school providing education to children ages 3 to 11 years old. The Appeal Site is used for children aged 5 to 8 (corresponding with Years 1 to 3). As recorded in the Transport Statement there are 652 pupils on the School roll, with 228 of these based at the Appeal Site. The School has 126 staff, 31 of whom are based at the Appeal Site.
23. The School has the benefit a planning permission which has been implemented. This does not impose any condition or obligation capping number of pupils. A planning permission was granted in respect of the Appeal Site (PWX0002203) for replacement of existing rear extension by the erection of a single storey rear extension to provide dining and wet weather facilities and staff office on 20 November 2000. This contained a condition that capped the number of pupils on the Appeal Site at 200. An application under s. 73 of the Town and Country Planning Act 1990 to remove that condition was later made (2005/0151/P) and was withdrawn as it was decided not to implement the 2000 permission. Accordingly the 2000 planning permission was never

implemented and so there is currently no condition limiting numbers on the Appeal Site.

24. In February 2013 the LPA granted planning permission 2012/3910/P for the erection of roof extension to single storey outbuilding to create additional classroom space to existing school (Class D1) at 2 Arkwright Road, one of the other sites occupied by the School and which lies in close proximity to the Appeal Site. No condition was imposed limiting numbers of pupils.

Background

25. The LPA have failed to determine the Application in accordance with the extended time as agreed between the parties, namely by 30 September 2015.
26. The LPA have published a Delegated Report in relation to the Application. It recommends that full planning permission be granted subject to completion of a section 106 Agreement to secure a Construction Management Plan and a Highways Contribution. A preliminary draft section 106 as supplied to the Appellant by the LPA is appended at 10.
27. The Delegated Report (appended at 7) contains a draft decision notice, condition 12 of which states: *“The proposed dining hall, kitchen, catering and plant rooms at basement level and the hall at ground floor shall not be used as classrooms or activities commensurate with classrooms and the former classroom in the eaves of the property shall not be used for purposes other than as a special tutoring room and no more than 228 pupils shall be based at the site”*. The reason for this condition is said to be *“[t]o ensure the proposed development would not result in an increase in private vehicle trips which would harm the already congested local transport network ...”*. For the avoidance of any doubt the Appellant’s case is that those parts of the condition which are underlined fail the relevant tests for the imposition of a condition. The Appellant has maintained a position with the LPA throughout the course of the Application that a cap on pupil numbers is not justified nor is it compliant with the statutory tests for the imposition of a condition on a planning permission
28. The following points should be noted in relation to the Delegated Report:
 - (i) It confirms that in terms of design and conservation, basement impacts, neighbour amenities, sustainability and energy, noise and trees the proposed development is, subject to the imposition of appropriate conditions, acceptable.

- (ii) It notes (see para. 1.3) that *“The additional facilities provided include a dining hall, kitchen, catering and plant rooms at basement level. The existing dining room/hall at ground floor level is proposed to be used as a school hall (with the dining element relocated to the new hall at basement level).”*
- (iii) It wrongly appears to assume (see para. 1.4) that the planning permission granted in 2000 (PWX0002203) in respect of the Appeal Site was implemented and that a condition capping the pupils on the Appeal Site at 200 is applicable. This is incorrect (see above). It goes on to conclude in any event there would be no proper basis for enforcement in respect of that condition for other reasons. The condition is in fact wholly inapplicable as the permission in which it is contained was never implemented.
- (iv) It notes (see para. 1.5) that the Transport Statement says *“The proposals in the plan submitted are not for development of extra classrooms but for improvements to buildings and thus the development will not in itself generate any significant vehicular traffic. Given the above, the proposals will not result in any change to the trip generating characteristics of the site and as a consequence the effect of the proposals on the local transport network will be negligible” (paragraphs 6.5 and 6.6).* But it goes on to say that *“Whilst the application does not explicitly state that there would be an increase in numbers, the Council has concerns that an increase in the floor area of this site by 205sqm would over time lead to an increase in pupil numbers. This would have a knock-on effect on the local transport network which is already stretched due to the number of schools in the local area”*. The current application is thus accepted on the evidence as itself giving rise to a “negligible” impact on the transport network as it is not proposing extra classrooms but rather improvements to the existing facilities. No explanation is given of how despite this over time the proposal *“would over time lead to an increase in pupil numbers”*. This phrase is repeated, again without explanation, in para. 1.18 of the Delegated Report.
- (v) At para. 1.17 it says *“However, the numbers of pupils has increased over the last 15 years and the increase in floor area by 200sqm would add additional capacity to the school facilities, which has the potential to further expansion elsewhere within the school campus.”* The suggestion that this proposal could have *“the potential to further expansion elsewhere within the school*

campus” is wholly unexplained or justified. There is no evidence to support the LPA's position that modern facilities to replace unsuitable multi-function spaces will somehow lead to more pupils enrolling at the school.

- (vi) It also contains inconsistencies and errors regarding the extent of the additional floorspace which the LPA says is detrimental. There are references to this being 205 sqm (paras 1.3 and 1.5) and 168 sqm (para 1.19).
29. It should be noted that the highway officers have not raised any objection to the Proposed Development on highway grounds.
30. The requirements to be met for the imposition of a condition to a planning permission are set out in paragraph 206 of the National Planning Policy Framework, to summarise:-
- (i) the condition must be necessary to make the development acceptable; and
 - (ii) it must be relevant to planning; and
 - (iii) to the development to be permitted; and
 - (iv) it must be enforceable; and
 - (v) precise; and
 - (vi) reasonable.

Grounds of Appeal

31. The Appellant appeals on the following grounds:
- (i) The LPA has not relied on any evidence to conclude that the Proposed Development will have an impact on the local transport network;
 - (ii) Without prejudice to the Appellant's position that there is no impact on the local transport network from the Proposed Development, even if there were any significant impacts, there is no evidence which justifies the LPA in concluding that such impacts would be significant and hence justify the imposition of a condition capping numbers of pupils; and
 - (iii) Condition 12 as proposed does not meet the statutory tests in that no impact has been identified to mitigate, it does not directly relate to the proposal and it is not fair or reasonable to impose such a Condition given the nature of the Proposed Development.
32. In support of these grounds the Appellant's case is as follows.

33. First, the Appellant maintains that the Proposed Development does not have any impact on the local transport network. The Transport Statement (appended at 4) concludes that the development will not in itself generate any significant vehicular traffic. The Statement also concludes that the Proposed Development will not result in any change to the trip generating characteristics of the Appeal Site and the effect on the local transport network is therefore negligible. The LPA have not sought to question the content or conclusions of the Transport Statement despite having had this since June 2015. Nor have the LPA itself provided any evidence in support of a contention that the Proposed Development would have any impact on the local transport network. As noted above the highway officers have not raised any objection to the Proposed Development on highway grounds.
34. Second, the condition sought does not relate to the Proposed Development which is not for an increase in classrooms but for a rationalisation and modernisation of the current building. The Proposed Development is for an improvement to the existing school facilities which is very much needed; and the need is not disputed by the LPA. The Transport Statement makes clear (see e.g. para. 1.4) that “[t]he proposals in the plan submitted are not for development of extra classrooms but for improvements to buildings”. There is no evidence that justifies a conclusion that the Proposed Development leads to an increase in pupil numbers and consequently traffic.
35. Third, moreover, the Appellant has proposed a condition that will ensure that the new dining hall, kitchen, catering and plant rooms at basement level shall not be used as classrooms or activities commensurate with classrooms and that the former eaves classroom, to be replaced by a new classroom at basement level, shall only be used as a “*special tutoring room*”. This prevents the Proposed Development creating any additional classroom space.
36. Condition 12 in the draft Decision Notice seeks to go further and to limit the use of the existing ground floor hall. That existing hall is currently used for some teaching activities. It would continue so to be used. This does not give rise to any additional traffic, or the possibility of additional children being based at the school. There is no proper basis for seeking to restrict what is the existing use of this exiting hall. Moreover the Appellant has also confirmed in e-mail communications in response to a question from the LPA that the new hall proposed in the basement “is not a replacement facility for a hall elsewhere on the campus” (see e-mail dated 10 March

2016 sent at 12.57, annex 6, emphasis in original, and in response to an email sent on 9 March 2016 at 19.18)

37. Fourth, the condition proposed is not reasonable given the nature of the Proposed Development. The Proposed Development is not for an increase in the number of classrooms and is not commensurate with a conclusion that there will be an increase in pupil numbers. There is no evidence to give any weight to such a conclusion, and indeed it is unreasonable given the lack of evidence.
38. Fifth, the LPA appears to accept that the Proposed Development itself does not give rise to any increase in pupil numbers and increased traffic but that in some way unspecified it “*would over time*” (see para. 1.5 of the Delegated Report) lead to increased pupil numbers “*elsewhere within the school campus*” (see para 1.17 of the Delegated Report). There is no explanation of, or evidence to support, these assertions that the Proposed Development will indirectly have these possible effects in the future. To infer an increase in numbers as a result of the Proposed Development and then to give this significant weight in the determination of the application is wholly unreasonable. There is no evidential basis for the imposition of conditions to deal with these alleged possible future (but unspecified and unsubstantiated) impacts.
39. Indeed the position is that the School could if it chose to increase numbers across the School without the Proposed Development. There are no conditions that prevent it from so doing. The possibility of any increase in future numbers is not in any way connected with the Proposed Development. It is something that could lawfully happen in any event.
40. Sixth, focussing on the Proposed Development itself there is no basis for saying that it will increase pupil numbers and hence traffic. The only evidence available, namely the Transport Statement, supports the opposite conclusion. But even if that were not the case the LPA would need to evidence what any increase in pupil numbers it says would occur and what traffic impact that would have in order to justify such a conclusion. No such evidence has been adduced.
41. Seventh, the LPA’s approach is contrary to that taken in appeal cases. The Appellant has made reference to Appeal Ref: APP/U5930/A/08/2090054 in respect of land at 32 Lindley Road, Leyton, London (see annex 13) The proposed development there was change of use from residential to use class D1 (non-residential school) to provide a staff room, resource room and library for an existing school. The council there argued that the proposal would be “*an intensification of the educational use*” and that there

would be traffic congestion at dropping off and collection times. The Inspector rejected this saying:

“although the proposal would consolidate and expand the existing educational floorspace, there is no clear evidence that the proposed library and staff facilities would be likely to generate such a significant increase in persons visiting the school so as to cause any material increase in traffic movements or intensify demand for on-street parking”.

No condition capping numbers was imposed. The position here is similar. The facilities actually proposed will improve the existing school but do not provide extra classrooms or increase pupil numbers. There is no “*clear evidence*” or indeed any evidence to support a contrary view.

42. Eighth, the position of the LPA is wholly inconsistent. Previously the relevant planning officer indicated that no condition limiting numbers was to be imposed because “*the number of teaching spaces is not increasing*” (see above). The LPA has thus at various times in the history of the application: agreed no such condition is justified, sought to impose via an obligation a restriction on numbers across the whole school and now seeks a condition limiting numbers on the Appeal Site itself. It also notable that in respect of an application for extra classrooms for the School at 2 Arkwright Road (application 2012/3910/P) no condition limiting numbers was sought to be imposed. Moreover at times when the LPA has been seeking to impose a limitation on numbers it has not been consistent in the alleged reason for this citing at different times increased traffic congestion and at other times that this would result in “*a better environment for children and staff, and ... will be a benefit to the school as a whole as it will improve the circulation of pupils and staff*”.
43. Ninth, in addition, the LPA is giving no weight to the efforts that already been made by the School to promote sustainable travel. The School has in place a detailed Travel Plan (see Appendix F to the Transport Statement at annex 4) that has been developed in consultation with TfL. The School is also an accredited member of the TfL STARS School Travel Plan Scheme. The LPA has never suggested that the Travel Plan is not adequate nor suggested that this be used to promote more sustainable travel. The School also has an Eco Club that encourages pupils to act in a sustainable manner. The School also has launched an on-line forum facility to enable parents to assist each other with the school run and arrange car-shares. See further the Transport Statement at paras. 4.10-4.14.
44. The Appellant has also, without any requirement in policy terms to do so, agreed to provide extra covered cycle spaces, this has been given no weight.

Third party objections

45. The Delegated Report (see annex 7) contains a summary of the objections received. Many of these relate to matters which the LPA has (rightly) concluded would not justify refusal e.g. design and conservation, noise amenity etc. Some matters raised are not relevant to planning. Other issues raised around alleged transport impacts are considered above.

Conclusion

46. There is no evidence that there is a impact on the local transport network adduced by the LPA in respect of the Proposed Development.
47. Even is such an impact were to be found, there has been no assessment of the impact to lead to a conclusion that the impact is so significant as to warrant the imposition of a condition or section 106 obligation to mitigate against the impact.
48. The tests for the imposition of a condition as proposed by the LPA are not met.
49. For the reasons set out in these grounds, the appeal should be allowed and we request that the Inspector grant full planning permission for the Proposed Development subject to a section 106 agreement (not dealing with pupil numbers) and without the imposition of Condition 12.

Mode of Determination

50. The Appellant seeks that the appeal be determined by inquiry (having regard to the criteria in Annexe K to the Appeals Guidance). The LPA's case relies on alleged traffic impacts. The Appellant will adduce expert transport evidence in support of its case. To date the LPA has adduced no evidence to support its position. If it does produce evidence on appeal this evidence will need to be tested by formal questioning by an advocate (James Maurici QC has been instructed). Moreover, the appeal will need to consider operational issues related to the School. The Appellant will seek to call expert planning evidence on the same.

Costs

51. The Appellant intends to make an application for costs against the LPA on the basis that it has acted unreasonably and that this has necessitated the appeal. A full award of costs is sought.
52. The following will be relied on in support of that application:
 - (i) The LPA failed, without good reason, to determine the application within time limits: see the NPG Paragraph: 049 Reference ID: 16-049-20140306. The LPA has acted in a tardy manner and has constantly shifted its position;
 - (ii) Having regard to the NPG at Paragraph: 050 Reference ID: 16-050-20140306:
 - i. The LPA has prevented/delayed “*development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations*”;
 - ii. The LPA has sought to impose a condition without having any evidential basis for so doing;
 - iii. The LPA has made “*vague, generalised or inaccurate assertions about a proposal’s impact, which are unsupported by any objective analysis*”;
 - iv. The LPA has not determined “*similar cases in a consistent manner*”;
 - v. The LPA has acted unreasonably in seeking to “*impos[e] a condition that is not necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the National Planning Policy Framework on planning conditions and obligations*”;
 - vi. The LPA has previously acted unreasonably in “*requiring that the appellant enter into a planning obligation which does not accord with the law or relevant national policy in the National Planning Policy Framework, on planning conditions and obligations*”.
53. Further more detailed costs submissions will be made in due course.

Documents

The following documents are attached:

1. Pre-application advice was received under reference 2014/6727/PRE
2. Planning Statement
3. Design and Access Statement
4. Transport Statement
5. Construction Traffic Management Plan
6. A full set of mails and correspondence and attachments between the Appellant (and his agents) and the Council concerning the Application in date order
7. Delegated report and draft decision notice for meeting on 14 March 2016
8. Draft decision notice 21 October 2015 and draft s. 106 dated 21 October 2015
9. Relevant policies from the Development Plan:
 - a. Core Strategy policies: CS5; CS11; DP16; DP17; DP18; DP19; DP26; DP32;
 - b. CPG3 – Sustainability 2015 (Guidance)
 - c. CPG7 - Transport 2011 (Guidance)
10. Draft s. 106 obligation
11. Previous planning permissions relating to the Appeal Site
12. Planning Permission and delegated officer report on application 2012/3910/P, 2 Arkwright Road.
13. Appeal Ref: APP/U5930/A/08/2090054

Mishcon de Reya LLP

24 March 2016