

**RE: 65-69 HOLMES ROAD,
LONDON NW5 3AN**

NOTE

1. I am instructed by KR Planning in respect of a development at 65-69 Holmes Road, London NW5 3AN.

2. Recent and relevant planning history includes the issue by the Council of the London Borough of Camden ("the Council") of a decision notice dated 6 March 2014 granting planning permission for development ("the Scheme") described as follows;

"Erection of part seven, part three storey building above two basement levels to provide student accommodation comprising 273 units (337 rooms and 439 bed spaces) with ancillary facilities (sui generis), warehouse (Class B8) at basement and ground floor levels and coffee shop (Class A1) at ground floor level following demolition of existing B8 buildings."

2. Since issue of the decision notice, the Council has approved further applications that have been made pursuant to section 73 of the Town and

Country Planning Act 1990 (“the 1990 Act”). The subject of those further approvals has been some minor changes to the Scheme.

3. The most recent decision notice issued by the Council is dated 3 May 2017. Changes to the Scheme that were effected by the 3 May 2017 decision notice are described in the following terms, “changes are to configure the warehouse levels and ground floor areas to provide an enlarged social area for the student accommodation use; additional row of windows on Holmes Road elevation; additional rooflights into basement and changes to positioning of windows.”
4. Some further changes to the Scheme are proposed. Those changes are all at basement level. The ground and upper floors of the Scheme are unchanged by the further proposals. The main component of the proposed changes comprises a lowering of the lower basement floor in order to create a greater volume of accommodation at lower basement level together with a slight reduction in floor area within the basement levels of the Scheme¹.
5. The Council’s approval for the proposed changes is sought pursuant to an application made under section 73 of the Town and Country Planning Act 1990.

¹ Those slight reductions in floor area within the basement levels have arisen as a result of construction constraints.

Legal Framework & Guidance

6. Section 73 of the 1990 Act makes provision for, “the determination of applications to develop land without compliance with conditions previously attached”.

7. By section 73(2);

“On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and-

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.”

8. Accordingly, pursuant to section 73(2)(a), a local planning authority may grant planning permission subject to conditions that differ from those attached to a previous permission.

9. Section 73 of the 1990 Act does not circumscribe the scope of those differing conditions².
10. A general principle of application to planning conditions is that, “A condition may have the effect of modifying the development proposed by the application, provided that it does not constitute a fundamental alteration in the proposal”³.
11. That general principle applies with equal force to the grant of planning permission pursuant to section 73 of the 1990 Act;

“Thus the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application.”⁴

² The only limitation imposed within section 73 is at section 73(5) concerning time limiting conditions within planning permissions. As recorded by Collins J. in the case of **R on the application of Vue Entertainments Limited v. City of York Council** [2017] EWHC 588 Admin, “It is to be noted that section 73(2) does not limit in any way the nature of the condition, other than as to time, which can be amended under that section.” (at paragraph 8 of the judgment).

³ Paragraph P72.10 of the Encyclopedia of Planning Law and Practice, Vol 2.

⁴ per Sullivan J. (as he then was) in **R v. Coventry City Council ex p. Arrowcroft Group plc** [2001] P.L.C.R. 7 QBD, at paragraph 33 of the judgment. For completeness, it is noted that the case of **Bernard Wheatcroft Ltd. v. Secretary of State for the Environment & Another** simply advances another formulation of the “fundamental alteration” principle, namely, whether the effect of a planning condition has the effect of altering, “the substance of the development for which permission was applied for.” per Forbes J, at page 5 of the judgment.

12. Accordingly, the legal power enjoyed by local planning authorities pursuant to section 73 of the 1990 Act is broad.

13. The Government has published guidance within its National Planning Practice Guidance (“NPPG”) stating that;

“An application can be made under section 73 of the Town and Country Planning Act 1990 to vary or remove conditions associated with a planning permission. One of the uses of a section 73 application is to seek a minor material amendment, where there is a relevant condition that can be varied.”⁵

and,

“There is no statutory definition of a ‘minor material amendment’ but it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which has been approved.”⁶

14. As such, application of Central Government’s Practice Guidance may limit the extent to which changes to proposed development may be effected pursuant to section 73 of the 1990 Act⁷.

Application of Legal Principles and Guidance

15. Lowering of the lower basement floor (and reducing the floor areas within the basement levels of the Scheme) may be effected by approval of an

⁵ Paragraph: 013 Reference ID: 17a-013-20140306

⁶ Paragraph: 017 Reference ID: 17a-017-20140306

⁷ Again, as Collins J. noted in the **Vue Entertainment** case, “There is nothing in the section itself which limits it to what are called ‘minor amendments’” (at paragraph 8 of the judgment).

application pursuant to section 73 of the 1990 Act. The Scheme, as changed, will still comprise a, “part seven, part three storey building above two basement levels to provide student accommodation comprising 273 units...with ancillary facilities...warehouse (Class B8) at basement and ground floor levels and coffee shop (Class A1) at ground floor level following demolition of existing B8 buildings”.

16. Similarly, and by reference to Planning Practice Guidance, the proposed changes may be described as a minor material amendment. In particular;

(i) the proposed changes generate no significantly different impact (to the previously-approved Scheme) whether in terms of impact on the character and appearance of the area, the local highway network, residential or neighbouring occupiers’ amenity, or any other recognised interest,

(ii) it is notable that the above-ground components of the Scheme are unchanged by the proposed changes,

(iii) the nature of the proposed uses to be accommodated in the basement levels (and the Scheme as a whole) are unaffected by the proposed changes.

17. For all of those reasons, the Council may;

(i) accept as valid and determine the application made pursuant to section 73 of the 1990 Act, and,

(ii) conclude that the proposed changes comprise minor amendments to the Scheme.

Kings Chambers,
Manchester, Leeds, Birmingham.

Ian Ponter,
28 November 2017.

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NOTE

KR Planning

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