



The Heath & Hampstead Society

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7 September 2017

Dear Mr Thuaire

Appn. No. 2017/4346/P – Certificate of Lawfulness (Proposed)

I refer to my letters of 16 August and 5 September 2017. The purpose of this letter is to supplement the objection contained in my last letter. References below are to the numbered points in that letter.

With regard to point 1, we wish to emphasise Camden's undertaking to protect MOL in accordance with Policy A2 under the Local Plan. Paragraph 6.28 of the Plan refers to the need to preserve open space as a "break" to a built-up area. This is so even if the space itself is not a "green" space (such as the Heath itself). And paragraphs a., c., g. and j. of the Policy are all engaged by this application in so far as the application is in contravention of them.

We withdraw our objection in point 4, which incorrectly refers to the superseded Local Plan.

The legal advice from our counsel has been re-issued and is now attached. Please disregard the advice dated 4 September 2017 attached to my previous letter which is now withdrawn.

Yours sincerely

Marc Hutchinson
Chair

RE: PLANNING APPLICATION: 2017/4346/P – NORTH FAIRGROUND SITE

ADVICE

Introduction

1. In this matter, I am instructed by the Vale of Health Society and the Heath & Hampstead Society regarding the North Fairground site, Vale of Health, London NW3 1AU (“the site”).
2. The site is just over half an acre in size. It is in a very sensitive position, lying on the fringe of Hampstead Heath, on MOL and within the Hampstead Heath Conservation Area. It is bounded to the west and to the south by residential properties and to the north and east by Hampstead Heath. A number of footpaths crossing the Heath pass close to the site, including ones leading to the nearby ponds.
3. Knightsbridge Parks LLP (“the developers”) hold an option on the site. Through agents, they have applied for a Lawful Development Certificate for a Proposed Use pursuant to section 192 of the Town and Country Planning Act 1990 (“the Act”). I am now asked to advise.
4. In my opinion, there are five issues to be considered, namely:
 - (i) What is the present use of the site in land use planning terms?
 - (ii) What is the proposed use?
 - (iii) Is that a material change of use which constitutes development within the meaning of section 55 (1) of the Act?
 - (iv) What would be the off-site effects, if any, of the proposed use?
 - (v) Is the proposed use truly “intensification”?

(i) The present use

5. In 1997, the site owners applied for permission to erect an apartment containing 15 residential units on the site. In the report to the committee considering that application, Camden's case officer described the site in the following terms:
"The north and south fairground sites consist of two large open semi-vacant sites....The north site is owned by the Abbott family who live on the site in caravans and use it for occasional fairground purposes. At present the north site is used for the storage of numerous caravans, lorries, trailers, kiosks and associated fairground equipment...."
As I understand their supporting statement, the developers accept that description.
6. In 1998, the planning inspector, in his report rejecting the site owners' appeal against Camden's failure to determine the application, found that the site was *"used for the storage and maintenance of fairground equipment"* and that it contained *"a number of residential caravans and several small structures"*. He suggested that the lawful use was *"probably as winter quarters as described in Circular 22/91 on travelling showpeople. This is a 'sui generis' use..."*
7. In 2003, proposals were made by Metropolitan Development Consultancy to develop the site. They stated that it was owned by the Abbott family and that its use was in connection with showground people. No planning application was made.
8. In 2010, an application in respect of the site was made for a CLEUD as a caravan site, on the basis that residential use not associated with the travelling fairground industry had been the dominant and sole continuously active use for the past 10 years. Statutory Declarations were made in support of that case. The site owners' description, the developers now appear to accept, was not accurate.
9. Nevertheless, the Vale of Health Society produced a number of Statutory Declarations in opposition to the application to the effect that the site had always been used as a fairground site and that, when more caravans appeared than had

formerly been on site, the Abbott family maintained that they were occupied either by family or by workmen employed on repairing fairground equipment. Fairground vehicles continued to be parked on the site on an intermittent basis. The application was subsequently withdrawn.

10. In 2014, information was submitted to Camden that a number of members of the Abbott family lived on the site. Cy Abbott and Charles Abbott Jnr, who occupied the site as their winter quarters and stored equipment there, were the only resident members of the Showman's Guild.
11. The developers now suggest in their supporting statement that the site's present use is a mixture of *"the siting of caravans for the purposes of human habitation (residential caravans), storage of caravans, storage of equipment and vehicles for fairground purposes"*, to which I would add maintenance and repair of fairground equipment. On the evidence before me, I would agree with that description of the mixed use. Inevitably the intensity of uses within that mix fluctuates over the year as can be seen from the Google Earth images reproduced in the supporting statement. I shall, however, comment further on the individual uses within that mix.
12. In responding to a query from the Local Plan Inspector (examination document ED4), Camden consulted Council Tax records and noted a reduction in the number of permanent residential plots on the site from five in 2010 to three in 2016. Camden added:
"The Council Tax team advises that the VOA has issued current valuation bands for three pitches only. One caravan is considered by VOA to be an appurtenance or annex to a banded pitch. The team's inspection history shows that the number of caravans on the site is typically approximately 10 to 12 but only caravans permanently available for residence are given a valuation band and a caravan in storage use is not chargeable by VOA. The Council Tax information....confirms that the residential use of the site has reduced over the period 2010 to 2016."

13. I conclude that the three permanent residential units are occupied by members of the Abbott family, which would accord with my instructions; that the remaining caravans are in storage; but that some may be occupied from time to time by family members or by travelling showpeople, including workmen employed on repairing fairground equipment, or by others (on my instructions) on a temporary and ad hoc basis with limited washing and sanitary facilities.
14. According to my instructions, with the possible exception of the permanent caravans of the Abbott family, neither the number of caravans on site nor their positions on site remain constant. That observation would appear to be consistent with the Google Earth images.
15. I am also instructed that fairground equipment is still brought onto the site, where it is stored, repaired and maintained. There is a pattern of particularly heavy user at the time of the Winter Wonderland fair in Hyde Park. It is not accepted that such user is either insignificant or de minimis.

(ii) The proposed use

16. The heading of the supporting statement gives the proposed use as *“a site for the stationing of seven static caravans for the purpose of human habitation.”* However, at the conclusion of the statement, there is reference to use of the land as a caravan site with twelve caravans. Indeed, if it was thought right to grant a certificate in the terms sought, either for 7 or for 12 static caravans, it is difficult to see how the developers could be prevented from increasing that number, if they were so minded.
17. The reference is to “static” caravans, photographs of which are shown in the supporting statement. They are substantial structures resembling bungalows.
18. The illustrative layout shows a tarmacked roadway leading into the site, driveways and grassed areas. There would clearly need to be some operational development in

order to achieve that layout, rather than simply bringing the caravans onto the existing site and dropping them into place.

(iii) Material change of use

19. A material change of use occurs when there is a change in the character of the use of the land: see, for example, **East Barnet Urban District Council v British Transport Commission** [1962] 2 QB 484, per Lord Parker CJ at 491. Whether there has been such a change is a matter of fact and degree for the judgment of the planning authority.
20. In the present case, I would strongly argue that a change of use from a mixed sui generis use involving the siting of caravans for the purposes of human habitation (residential caravans), the storage of caravans, the storage of equipment and vehicles for fairground purposes and the maintenance and repair of fairground equipment to a sole use for the stationing of seven static caravans for the purposes of human habitation would manifestly amount to a change in the character of the use of the land. That change would involve the removal of the storage and repair and maintenance elements of the present use and their replacement with a single residential use. Such a change may or may not be beneficial in land use planning terms, but it would be, in my opinion, a material change of use that should be considered by the planning authority on a proper planning application.
21. At the conclusion of their supporting statement, the developers argue that no planning permission would be required for the removal of the fairground equipment and the cessation of that element of the mixed use, leaving only a caravan site. I disagree. The change of use from a site having the mixed uses described above to one as a caravan site would be material and a breach of planning control if undertaken without planning permission.
22. The extent to which a particular use fulfils a legitimate or recognised planning purpose is relevant in deciding whether a change from that use is a material change of use. That proposition was expressly accepted by the Court in **Richmond-Upon-**

Thames London Borough Council v Secretary of State for Transport [2000] 2 P.L.R. 115, which held that where a change of use gave rise to planning considerations (such as the loss of residential accommodation), those considerations were relevant to determining whether or not the change was material. In that case, the conversion of seven flats to a single family house was a material change of use. The Judge quashed the Inspector's decision on the grounds that he had expressly disregarded the effects of the extinguishment of those seven units: see also **R (Royal Borough of Kensington & Chelsea) v SCLG & others** [2016] EWHC 1785 (Admin), where Holgate J at [5] confirmed the above proposition.

23. That brings me to the issue of MOL. It is the policy of the Mayor (see Policy 7.17 of The London Plan) and of Camden (see Policy A2 (g) of the Local Plan) to give strong protection to maintaining the openness and character of MOL. At present, the site is not completely open. There are caravans and fairground equipment on it. However, as I indicated above, with the possible exception of the permanent caravans of the Abbott family, neither the number of caravans on site nor their positions on site remain constant. The site was described in the 1997 officer's report as being "*large, open, semi-vacant*", a description with which the developers apparently concur. The Inspector in his decision letter concluded that "*the somewhat untidy appearance of the site does not preclude its valuable role as part of MOL*" He shared the Council's view that "*the existing low intensity of its current use enables the site to provide a soft edge to the Heath*" and that the development proposed would inevitably alter the site's "*present open character.*" I remind myself that the developers are of the view that the pattern of land uses has remained fairly constant from at least 1999. In those circumstances, it seems to me that the Inspector's observations continue to be valid.
24. In my judgment, the proposal to site seven or twelve static caravans – in other words, seven or twelve permanent structures closely resembling built development- on the site as shown on the illustrative layout would be inimical to its openness and to its position on the fringe of the Heath. Taking into account the photographs and the illustrative layout, the proposal, if implemented would give the site the appearance

of a suburban residential street. The potential erosion of the openness of the site would detract from a legitimate and recognised planning purpose and is another reason why the proposal represents a material change of use.

(iv) Off-site effects

25. It is trite law that in determining whether a change of use is material, off-site effects of the change may support the contention that it is a material change. While it may be true, as the developers' supporting statement asserts, that the proposal would result in less large commercial vehicles using the highway, that would be more than offset by the problems caused by increased traffic generated by the caravans' residents using the inadequate road through the Vale of Health. There would be increased activity in the form of comings and goings of residents and their visitors, on and off street parking and deliveries. There would be a consequential increase in light pollution from the large caravans and noise from the residents and their children.

(v) intensification

26. The developers appear to be putting their case on the basis of a simple intensification of use. However, this is not a true case of intensification within the context of a mixed use. This is a case in which it is proposed to change a mixed use to a sole use. In the case of a mixed use, provided the mixture of uses on the premises remains substantially unchanged, there will be no material change of use. The intensity of uses within that mix may fluctuate but such change is unlikely to amount to a change of use, still less a material change of use, unless one of those uses substantially exceeds what Ouseley J in **Hertfordshire County Council v SCLG & Metal and Waste Recycling Limited** [2012] EWHC 277 (Admin) at [36] called "*the not very clearly defined baseline*". It is also worth recalling the words of Sullivan J in **R v Thanet DC ex parte Tapp** (2001), 81 C&PR 37:

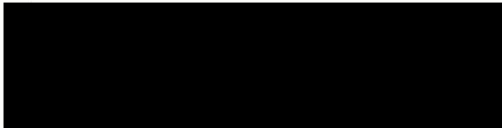
"It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use; it is far more difficult to apply it in practice. There are very few cases of 'mere intensification'. Usually the increase in activity will have led to some other change: from hobby to business, from part to full-time employment, or an increase in one use at the expense of other uses in a previously mixed use."

27. The developers' reliance on the Herts CC case (see above) is misplaced. The facts of that case are far removed from the present case. That case involved the operation of a scrapyard which had the benefit of a planning permission. Over the years, there was a substantial increase in the throughput of waste. Following the owners' successful appeal against an enforcement notice, the County Council applied to the High Court. It contended that, although the significant increase in throughput was by itself insufficient to constitute a material change of use, the consequences on- and off-site of that increase demonstrated a material change of use. Not surprisingly, both the High Court and the Court of Appeal rejected that argument.

Conclusion

28. Members of both Societies are concerned that this application is but a first step towards achieving a full-scale residential development of the site. "It represents an attempt to get one foot in the door" is the way in which one member put it. I accept that those are legitimate concerns and may well be true. However, the issue as far as the present application is concerned is simple: would the proposal amount to a material change in the use of the site so as to constitute development within the meaning of the Act? For the reasons given in this Advice, I conclude that the answer to that question is "yes" and that Camden should refuse the application for a certificate. If the developers wish to proceed with their proposal, then they should make a proper application to Camden for planning permission supported by proper drawings and an appropriate design and access statement.

7th September 2017



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