

# 1 INTRODUCTION

1.1 This appeal follows the refusal of the London Borough of Camden for my Client's scheme to delete a condition purporting to restrict PD rights on a property.

# 2 SITE AND SURROUNDS

2.1 The site is located on a short cul-de-sac off Brecknock Road (A5200) in west Kentish Town. It is approximately 0.03ha in area and contains a mixed use 4 storey residential block with B1 use at the ground floor. The building is not listed nor within the setting of a Listed Building, nor is it located within a Conservation Area.

2.2 The site is located in a predominately residential area, to the rear of the shopping parade fronting Brecknock Road, which is identified as a Local Centre in the LB Camden Core Strategy and characterised by commercial, food and drink, entertainment and residential uses. Buildings in the immediate vicinity of the site vary in age, form, height and architectural style. It is not located within a defined Employment Area.

2.3 The property was formerly in the ownership of the Borough who disposed of it in 2013.

CIP Cabinet Report Appendix 2_Final.xls					
					Appendix 2: CIP Asset Review Implementation
General Fund - Freehold / leasehold disposals					
Site Description	Location	Ward	Project description	Proposed timescale	Consultation
Residential property Grade II listed 2 bedroom house in the grounds of a cemetery in Barnet	High Road Finchley 318	Out of Borough	Freehold sale of vacant house	2013/14	Not applicable.
Community Centre and adjoining garden land	Carol Street 43	Camden Town with Primrose Hill	Sale of freehold with vacant possession		Disposal Agreed by Cabinet - October 2012 consultation complete.
2 storey Victorian former cemetery lodge operational and commercially let	Fortune Green Road 69	Fortune Green	Freehold sale subject to existing commercial lease		This is a preliminary proposal which will be subject to full consultation.
Site of workshops, car-park, play area and Fleet Road community centre	Lawn Road/Fleet Community Centre	Gospel Oak	Site has been marketed and bids being assessed		Disposal Agreed by Cabinet - April 2012.
Purpose built car park on 6 floors with 2 floors office accommodation leased to NCP	Saffron Hill Car Park	Holborn & Covent Garden	Sale of freehold with development agreement in partnership with existing lessee, NCP. Potential for comprehensive redevelopment of the site		Ward Councillors consulted. Tenant to be approached.
Former Council Offices	Camden Road 79	Canislowes	Freehold sale. The site is subject to bids for purchase, currently commercially confidential		Cabinet approved. Sale in progress.
Two storey plus basement detached property situated in public open space (Montpelier Gardens) currently used as Pupils Referral Unit	Montpelier PRU	Kentish Town	Sale of long leasehold. Proposal to relocate service in 2014/15 and declare premises surplus to requirements	2015/16	This is a preliminary proposal which will be subject to consultation when a decision is made on relocation of services.
Land subject to long ground leases for mainly warehouse/distribution uses	Other land at Camley Street	St Pancras & Somers Town	Potential for linkage to other Camley street sites for disposal or sale of council freehold to long lessees		Tenants to be contacted and detailed negotiations undertaken.
Former leisure facility vacated and occupied by Frank Barnes School	Jubilee Waterside (105 Camley St)	St Pancras & Somers Town	Cabinet approval for sale in connection with provision of new school P1 at Kings Cross Central	2016/17	Cabinet Approved.
General Fund - Redevelopment / improvement projects					
Site Description	Location	Ward	Project description	Proposed timescale	Consultation
Single storey workshop let on commercial tenancy	1-7 Hargrave Place	Kentish Town	Freehold sale, B1 provision envisaged in any redevelopment scheme	2013/14	This is a preliminary proposal which will be subject to full appraisal and discussion with existing tenant.
Ground floor retail unit and first and second floor community	Hamstead Community Centre	Hamstead Town	Discussion with community sector occupier to be undertaken	2015/16	This is a preliminary proposal which will be subject to full review with the community association to identify

### **3 LEGISLATION AND POLICY**

- 3.1 Section 70(1)(a) of the Act enables the local planning authority in granting planning permission to impose “such conditions as they think fit”. This power must be interpreted in light of material factors such as the National Planning Policy Framework, this supporting guidance on the use of conditions, and relevant case law.
- 3.2 Section 70(1)(a) of the Act enables the local planning authority in granting planning permission to impose “such conditions as they think fit”. This power must be interpreted in light of material factors such as the National Planning Policy Framework, this supporting guidance on the use of conditions, and relevant case law.
- 3.3 S72 of the Town and Country Planning Act 1990 contains a general power to impose conditions on a planning permission regulating the development or use of land for which planning permission is granted. This power is in wide terms but has been curtailed by judicial decisions and for a condition to be lawful it must satisfy the tests set out in *Newbury DC vs. SSE 1981 A.C. 578* and other subsequent cases.
- 3.4 The Planning Practice Guidance (PPG) identifies the appropriateness of imposing conditions in order to enable planning permission to be granted where otherwise planning permission would have to be refused.
- 3.5 Paragraph 203 of the National Planning Policy Framework states “Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions”.
- 3.6 Paragraph 206 of the National Planning Policy Framework states “Planning conditions should only be imposed where they are:
- Necessary
  - Relevant to planning, and
  - To the development to be permitted
  - Enforceable, ]
  - Precise, and
  - Reasonable in all other respects

The policy requirement above is referred to in this guidance as the 6 tests.

- 3.7 The LPA are not at liberty to re-consider the principle of beneficial grant of permission only the conditions in dispute as noted in the PPG

*Some or all of the conditions could be removed or changed by making an application to the local planning authority under S73 of the Town and Country Planning Act. In deciding an application under section 73, the local planning authority must only consider the disputed condition/s that are the subject of the application – it is not a complete re-consideration of the application. A local planning authority decision to refuse an application under section 73 can be appealed to the Secretary of State, who will also only consider the condition/s in question.*

- 3.8 The leading case as to the extent of changes to a planning permission which can be secured under section 73 remains Coventry City Council ex p Arrowcroft Group plc (Sullivan J, 21 July 2000), where there is the often quoted passage from Sullivan J:

*“It is true that the outcome of a successful application under section 73 is a fresh planning permission, but in deciding whether or not to grant that fresh planning permission the local authority ‘... shall consider only the question of the conditions subject to which planning permission should be granted’...*

- 3.9 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.

- 3.10 Section 73(2) states that “on such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted“.

#### **4 CONSIDERATION OF TESTS OF THE PPG**

##### Test (i) That the Condition is Necessary

4.1 In order for a condition to be imposed, it must be necessary. Necessity is not simply a question of desirability but it must clearly demonstrate that without such a condition a development should not be allowed to proceed i.e. that planning permission ought to be refused. Let us recall the sage words of Lord Denning in *Pyx Granite Company Limited v Ministry of Housing and Local Government* (1958) 1 QB 554

*The planning authorities are not at liberty to use their powers for an ulterior motive, however desirable that object may seem to them in the public interest."*

4.2 Judicial authority has held that to exclude the application of the GPDO, the words used in the relevant condition, taken in their full context, must clearly evince an intention on the part of the local planning authority to make such an exclusion: *Dunoon Developments v Secretary of State for the Environment and Poole BC* (1993) 65 P. & C.R. 101 and *Carpet Decor (Guildford) v Secretary of State for the Environment* (1982) 261 E.G. 56.

4.3 It must be noted that at the time of the relevant disposal, the property had the PD right to move from B1c to B1a.

4.4 Class B1 is defined within the Use Classes Order 1987 (as amended) as being:

*Class B1. Business*

*Use for all or any of the following purposes—*

*(a) as an office other than a use within class A2 (financial and professional services),*

*(b) for research and development of products or processes, or*

*(c) for any industrial process,*

*being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.*

4.5 Within Class I of Part 3 of the General Permitted Development Order 2015 (As amended), the only PD right granted to B1 space is:

Class I – industrial and general business conversions

Permitted development

I. Development consisting of a change of use of a building—

1. (a) from any use falling within Class B2 (general industrial) or B8 (storage or distribution) of the Schedule to the Use Classes Order, to a use for any purpose falling within Class B1 (business) of that Schedule;
2. (b) from any use falling within Class B1 (business) or B2 (general industrial) of the Schedule to the Use Classes Order, to a use for any purpose falling within Class B8 (storage or distribution) of that Schedule.

#### Development not permitted

I.1 Development is not permitted by Class I, where the change is to or from a use falling within Class B8 of that Schedule, if the change of use relates to more than 500 square metres of floor space in the building.

- 4.6 No planning permission is required to move from B1c to B1c, as that change does not fall outside of the excluding restrictions of Class I of the GPDO 2015, and therefore is not a material change of use as defined by S55(1) of the Town and Country Planning Act 1990 (As amended).
- 4.7 The Appellant is mindful of the clear advice of the PPG that:  
*Conditions restricting the future use of permitted development rights or changes of use will rarely pass the test of necessity and should only be used in exceptional circumstances*

#### Test (ii) Relevant to Planning:

- 4.8 The PPG advises that planning conditions should be relevant to planning and not duplicate other controls.
- 4.9 The condition as framed prevents the owner occupiers from using the premises in a way that Parliament and the Secretary of State (SOS) has determined is not a change that requires planning permission.

- 4.10 Within the relevant policy in the Local Plan, there is no policy criteria which seeks to alter S55 of the Town and Country Planning Act 1990 (As amended) or restrict the PD rights within the GPDO 2015, and the Appellant is cognizant that policy should be construed by reference to its content not to its label.
- 4.11 Policy E1 and Policy G1 reflect the findings of the Camden Employment Land Study (2014) (CD2.12) which identifies need for an additional 695,000 sqm net of office floorspace between 2014 and 2031. As of April 2016, a total of about 25,000 sqm had been completed and some 380,000 sqm of floorspace had outstanding planning permission.
- 4.12 Para 5.40 of the Local Plan advises that:  
*Where premises or sites are suitable for continued business use, the Council will consider higher intensity redevelopment schemes which improve functional efficiency, maintain or, preferably, increase the amount of employment floorspace and number of jobs*
- 4.13 The HCA Employment density guide is a referred document within CPG 8, and it indicates that the difference in potential employment between the two uses is from a low of 3 employees for B1c, as opposed to between 13-17 people if the B1 is unrestricted.

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### Appendix 1: Employment density guide

Use Class	Sub-Category	Sub-Sector	Average Employment Floorspace per Worker (sqm)	Notes
<b>B1a Offices</b>	General Office (NIA)	Corporate	13	NIA
		Professional Services	12	NIA
		Public Sector	12	NIA
		Tech	11	NIA
		Finance & Insurance	10	NIA
	Call Centres (NIA)		8	NIA
<b>B1b</b>	R&D Space (NIA)		40-60	NIA lower densities will be achieved in units with higher provision of shared or communal spaces
<b>B1c</b>	Light Industrial (NIA)		47	NIA

4.14 The Appellant is aware of a property across the road where as resolution to approve for the change of use of a 650sqm B1c space to 330 sqm B1a space was supported by members on 22 March 2018. In the report to Committee (appended) Officers conclude with a lifting of para 5.40 of the Local Plan. No similar condition was sought!:

Test (iii) Relevant to the Development to be Permitted:

4.15 The planning permission sought replacement B1 floorspace, as was envisaged by the Borough when it disposed of the property, with a slight shortfall in floor area but significant increase in quality.

4.16 The CPG includes criteria for which to assess against (Appellant comments in italics)

Ideally, new light industrial, industrial, and storage and distribution space should have the following features:

- good access or servicing and delivery;  
*No. The outside street is either permit parking or single yellow line. No roller door or similar was ever shown on the drawings to be installed.*
- clear, high floor to ceiling heights (at least 3 to 5 metres);  
*The office space has a height of 3m without servicing*
- lots of natural light;  
*No BRE assessment done but we assume no issue with light*
- level access – normally ground floor; and  
*Access is available at ground floor*
- ability to function at all times to meet its operational needs.  
*No. There are residential uses above and on directly abutting sites*

4.17 The Development Plan and CPG is silent on the wording of conditions which seek to restrict permitted development right so is not examined for the purpose of this application. Therefore S73(2) requires that the LPA consider only the condition, in light of Government policy as to requirement that these conditions be imposed in only exceptional circumstance and to be framed as suggested by the Appellant.

Test (iv) Enforceable:

- 4.18 The Planners are aware that there is no breach of planning control, and have suggested instead to pursue a breach of condition notice.

Test (v) Precision:

- 4.19 This advice in the online PPG, where it states:

*Is it appropriate to use conditions to restrict the future use of permitted development rights or changes of use?*

*Conditions restricting the future use of permitted development rights or changes of use will rarely pass the test of necessity and should only be used in exceptional circumstances. The scope of such conditions needs to be precisely defined, by reference to the relevant provisions in the [Town and Country Planning \(General Permitted Development\) \(England\) Order 2015](#), so that it is clear exactly which rights have been limited or withdrawn.*

- 4.20 As drafted, the condition does no such thing. There is no S55 requirement to seek the LPA consent, nor does the GPDO even seek to distinguish between the different B1 uses.

Test (v) Reasonable In All Other Respects:

- 4.21 36 is applicable to this particular case. It states: "Even when a condition would not be so unreasonably restrictive as to be ultra vires (ref paragraph 35 authors comments), it may still be so onerous that as a matter of policy it should be avoided

- 4.22 The test of "reasonableness in all other respects" is such that even if the first four tests were met, that a condition could still be regarded as inappropriate. The Appellant submit that in this case the various issues identified in relation to the first four tests "spill over" in to the issue of reasonableness. The Appellant submit that the condition is unreasonable and should be removed from the planning permission. .