In the matter of an appeal by Polar Bren Limited and Jita Lukka against an Enforcement Notice (EN17/1284) issued by the London Borough of Camden in respect of land at the South Fairground, Vale of Health, London, NW3 1AU

Appeal Reference: APP/X5210/C/18/3193167

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|  | Submissions on behalf of the City of London Corporation |  |

**Introduction**

1. These are the submissions of the Superintendent of Hampstead Heath for the City of London Corporation (“the City”) in support of the enforcement notice that was issued by the London Borough of Camden (“the Council”) on 20 December 2017 and the defence of that notice on appeal, in respect of land at the South Fairground Site, Vale of Health, London, NW3 1AU (“the Site”).
2. The City owns and manages Hampstead Heath and is obliged, by virtue of various Acts of Parliament, and specifically by the provisions of the London Government Reorganisation (Hampstead Heath) Order 1989 and the Hampstead Heath Act 1871, to forever keep the Heath open, unenclosed and unbuilt upon, to prevent, resist and abate all encroachment and attempted encroachment on the Heath, and to protect and preserve the Heath as an open space.
3. The Site that is the subject of the appeal is in an extremely sensitive location on a direct boundary with the Heath. It is located in the Hampstead Conservation Area. The land is designated as Metropolitan Open Land and private open space.
4. It is in the City’s role as the concerned custodian of the Heath, and in accordance with its statutory obligations to protect the Heath, that it makes submissions in this matter.

**Procedural Matters**

1. The City understands that the Council has now made a request to the Planning Inspectorate that the appeal procedure be changed from that of an informal hearing to a public inquiry. The City endorses the Council’s request in this regard. When the criteria for determining the appropriate appeal procedure (see Annexe G of the Planning Inspectorate’s Procedural Guide for Enforcement Notice Appeals) are considered, it is plain that this appeal fulfills the guidelines set for the inquiry procedure. First, the appeal has generated substantial local interest including from two local civic societies, namely the Heath and Hampstead Society and the Vale of Health Society. Second, and more significantly, the nature of the case that is advanced by the Appellant will require evidence to be given on oath regarding highly pertinent matters of fact. In addition, the City would wish to be given the opportunity to cross-examine Mr Covey and Ms Cox with regard to their expert reports.

**Response to the Grounds of Appeal**

1. The Appellant’s Statement of Case states that *“there has been no breach of planning control under Section A(1)(a) as the work effected was refurbishment of an existing structure built in 2005 which had been occupied continuously as a residence”*. Albeit the appeal is advanced under grounds (b), (c) and (d), it is clear that ground (c) is the primary submission and it will be addressed first, as follows.

The Ground (c) Appeal

1. In order for the Appellant to succeed under its ground (c) appeal, it must establish (i) that there was a dwelling house or other building on the Site that was immune from enforcement action (there never having been granted planning permission for any development on the site) prior to the construction of the dwelling house in 2017, and if this can be established, that (ii) the building work carried out by the Appellant in 2017 did not constitute development within the meaning of s. 55 of the Town and Country Planning Act 1990 (“TCPA 1990”). With regard to (ii), the Appellant appears to rely on s. 55(2)(a) of the TCPA 1990, which provides:

*“The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—*

*(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—*

*(i) affect only the interior of the building, or*

*(ii) do not materially affect the external appearance of the building….”*

*(i) Was there a dwelling house or building on the Site prior to 2017?*

1. The City does not consider that there was any ‘building’ on the Site prior to the erection of the dwelling house in 2017. The City supports the description of the *“previous situation at the site”* in the Council’s Enforcement Delegated Report, which describes the site as having been “*semi-vacant and used by squatters, mostly on a seasonal basis, with little occupation during the winter”,* with caravans and *“temporary structures”* located on the property that were “*made of tarpaulin, timber, ropes and wooden pallets”* and which could be “*quickly and easily dismantled”*. This is consistent with the witness statement of Daniel Murphy (see Appendix), a Heath Ranger Supervisor for more than thirty years, who describes having observed a caravan and temporary shack-like structures on the Site in the 2000s at various points in time but never having observed *“any permanent structures on the South site prior to the installation of the new fence and the new dwelling house/structure”.*
2. The City considers that the temporary shacks seen on the Site at various points from the mid-2000s onwards ought not, as a matter of law, to be regarded as ‘buildings’ within the definition at s. 336(1) of the TCPA 1990, which extends the term ‘building’ to include any ‘erection’ or ‘structure’. The City’s view is that, having regard to the size, permanence and degree of physical attachment to the ground of the shacks (see *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2)* [2000] 2 P.L.R. 102), they did not, as a matter of fact and degree, amount to ‘buildings’. The effect of this, in the City’s submission, is that the Appellant does not overcome hurdle (i) in its ground (c) appeal and as such s. 55(2)(a) of the TCPA 1990 is of no relevance to these proceedings.
3. It should further be noted that the City does not consider Ms Cox’s expert report to bolster the Appellant’s position in respect of this matter. Ms Cox describes a series of forms viewed on aerial imagery of the Site as *“likely residential structures”,* and concludes that the *“same house structure, with a small annexe and sometimes a light extended cover”* was present on the site since 2006. There is no basis for her conclusion that any of the forms viewed via aerial imagery were ‘residential’ or ‘house structures’. Further, aerial imagery taken at intermittent snapshots in time does not assist in determining the nature of any forms seen on the Site nor their permanence or physical attachment to the ground. Further, the City considers that the aerial imagery produced by Ms Cox, and particularly the variation in number, size and location of the forms seen in the photographs over time rather reinforces rather than diminishes the City’s position that the Site was used on a temporary basis by itinerant occupants accommodated in caravans and/or temporary shacks.

*(ii) Did the Appellant carry out works “for the maintenance, improvement or other alteration of any building” that only affected the interior and/or did not “materially affect the external appearance of the building”?*

1. In light of the conclusion that the City invites the Inspector to make with regard to the absence of any building on the Site prior to 2017, the Appellant’s claim that the works carried out were solely “refurbishment” of a pre-existing building falls away.
2. However, the City wishes to make the following points in respect of the works in fact carried out by the Appellant in the event that it is found (contrary to the City’s position) that there was some form of pre-existing building on the Site.
3. First, the City does not consider that it can sensibly be suggested that the dwelling house constructed by the Appellant amounts to “maintenance, improvement or other alteration” of any pre-existing shack present on the Site. This is demonstrated by a comparison of the photographs appended to the Statutory Declaration of Mr Litvoi of 31 March 2017 (see pages 7-8 in particular) with the dwelling-house as erected by the Appellant, as shown on photographs taken by the City’s officers in 2017 (appended to Mr Murphy’s witness statement), and as will no doubt be experienced by the Inspector on his or her site visit. The contrast between the tumbledown and temporary nature of shacks on the Site prior to 2017 and the large, permanent, legibly house-like structure now on the Site is stark.
4. With regard to the question of whether such works materially affect the exterior of the “building”, the City would invite the Inspector to consider the 2017 photographs appended to Mr Murphy’s witness statement, which highlight the visibility of the dwelling house from important public vantage points at the Vale of Health Pond. It is clear from these photographs that the works have “materially affected” the building’s exterior – in fact, the dwelling house is demonstrably new (for example, the timber is new and not aged). The City is extremely concerned by the unsightly impact of the development (which is highly inappropriate in this sensitive location) on views across the Pond and on the openness of the Heath more widely.
5. The City also wishes the Inspector (and the Council) to note that the Appellant has erected high fencing around the perimeter of the Site, which the City considers to exceed permitted development tolerances and which does not have the benefit of planning permission. The City is concerned by the height of the fencing and its unsympathetic appearance and considers it to have an adverse impact on views from the Heath and the experience of the Heath as an open natural space.

The Ground (b) Appeal

1. The matter alleged as constituting the breach of planning control, namely the construction of a one-storey dwelling house, has evidently occurred as a matter of fact.

The Ground (d) Appeal

1. The City does not accept that the development was immune from enforcement action by the time the notice was issued on 20 December 2017. The dwelling house was both initiated and substantially completed in 2017. For the reasons set out above, the City does not consider that there was any dwelling house or building on the Site prior to that date.

**Conclusion**

1. The City considers that this appeal should be dismissed and the enforcement notice upheld.

19 July 2018

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Submissions on behalf of the City of London Corporation

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APPENDIX

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