

FS/P18-0743

29 May 2019

The Planning Inspectorate  
Registry/Scanning  
Room 3/05 Kite Wing  
Temple Quay House  
2 The Square  
Bristol  
BS1 6PN

Dear Sir/Madam

**Planning Appeal by Written Representations**  
**Appeal Against Refusal Ref: 2018/3951/P**  
**35 Pratt Street, London, NW1 0BG**  
**Application for Award of Costs**

Pegasus Group has been instructed by Domino's Pizza UK & Ireland Plc to submit an appeal against the decision of London Borough of Camden Council (the Council) to refuse planning permission for the following development at the above address:

*"Change of use from a restaurant (Class A3) to a hot food takeaway (Class A5), installation of extraction and ventilation equipment and associated works."*

It has been requested that the Appeal is dealt with via the Written Representations procedure. The Appellant hereby submits an application for an award of costs in conjunction with this planning appeal.

The National Planning Practice Guidance (NPPG) was introduced on 6<sup>th</sup> March 2014. The NPPG comprised a full and consolidated review of planning practice guidance, including a section on the subject of the award of costs at appeal. At paragraph 028 (ID: 16-028-20140306 revision date 06.03.2014) sets out why an award of costs may be given:

*"...Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.*

*The aim of the costs regime is to:*

- *encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case,*

- *encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay,*
- *discourage unnecessary appeals by encouraging all parties to consider a revised planning application which meets reasonable local objections”.*

It is confirmed at Paragraph 035 (ID: 16-035-20140306) that applications for costs should be made as soon as possible. The Planning Inspectorate has the flexibility to set an alternative deadline, which would be notified to all parties.

Paragraph: 049 (ID: 16-049-20140306) Revision date: 06 03 2014 sets out the types of behaviour which may give rise to a substantive award against a local planning authority. This states:

*“Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include (inter alia):*

- *preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.*
- *failure to produce evidence to substantiate each reason for refusal on appeal.*
- *vague, generalised or inaccurate assertions about a proposal’s impact, which are unsupported by any objective analysis.*
- *not determining similar cases in a consistent manner...”*

A copy of the Decision Notice and Committee Report is included with this costs appeal.

#### Refusal Reason 1

The first reason for refusal relates to the perceived fact that the proposed development, by reason of its size, operation and close proximity to schools and other hot food takeaways, would result in an overconcentration of A5 hot food takeaway uses that would have a harmful cumulative impact on public health, contrary to policy TC4 (Town centre uses) of the Camden Local Plan 2017, and policy E9 (Retail, markets and hot food takeaways) of the Draft London Plan, and relevant planning guidance.

However, the Council provide no policy justification to support their assertion that the proposal would result in a harmful accumulation of hot food takeaways within proximity to schools which would result in a detrimental impact to public health.

As set out in detail within the appellant's Appeal Statement, the proposal is compliant with the only adopted policy guidance available in relation to the concentration of food and drink uses in certain areas i.e. in that it does not result in any unacceptable concentration in the number of food and drink uses in a designated centre/frontage nor does it actually result in a change in the proportion of food and drink uses in the frontage given the existing use of the site as a Class A3 restaurant. It is not therefore contrary to the guidance set out within Appendix 4 of the Camden Local Plan (adopted July 2017).

The Council do not have any specific policy guidance preventing takeaways within certain distances from schools or setting out a particular threshold in the number of such uses which will be permitted near schools. Furthermore, whilst the Council sought to introduce such a policy as part of the Camden Local Plan (adopted July 2017), during the course of the examination the Inspector recommended that this policy was removed as there was insufficient Camden-specific evidence to demonstrate a causal link between A5 uses and childhood obesity/eating habits in relation to a 400 metre zone around secondary schools.

There is no evidence or objective analysis put forward by the local authority with regard to the assertions on the harmful accumulation of hot food and drink uses. Indeed, the Planning Officer's professional report to Committee does not raise an issue with the concentration of such uses and instead echoes the above comment in that the proposal is compliant with the only policy guidance on the concentration of similar uses.

Therefore, the Council have behaved unreasonably in preventing development which is clearly in accordance with the development plan and in not producing any evidence to support the reason for refusal. As set out within the NPPG, this is the type of behaviour which could justify costs being awarded against a party.

#### Refusal Reason 2

The second reason for refusal highlights that the Council feel that the operation of the site as a hot food takeaway would cause harm to residential amenity due to unacceptable impacts in terms of noise, disturbance, air-quality and anti-social parking contrary to A1 (Managing the impact of development), A4 (Noise and vibration), and TC4 (Town centre uses) of the Camden Local Plan 2017, and relevant planning guidance.

The site is located within close proximity to Camden Town Centre and is within a row of commercial units including other food and drink uses. The opening hours will be conditioned so that the unit closes at 11pm on a daily basis. Therefore, the proposed takeaway will not stay open later than other existing commercial uses within the centre including other food and drink uses. The level of customer activity is unlikely to be significantly higher than other commercial uses.

The site has previously operated as a Class A3 restaurant and could be reopened as a restaurant operating until 11pm or later without the need for planning permission. This would create a similar or greater number of customers than the proposed takeaway and similar levels of staff. Furthermore, customers would consume food and drink at the site increasing the potential for disturbance on the nearest residential occupiers.

As such, the levels of noise associated with general activities of the proposed takeaway could realistically be exceeded by another use without the need for planning permission and it is considered that the Council were unreasonable to refuse the proposal on the grounds that the noise and disturbance from the general activities associated with such a use would cause unacceptable harm to residential amenity.

In addition, despite this being an appropriate location for the proposed use, the appellant provided management plans which could be conditioned to any decision notice which set out how delivery drivers would be managed to minimise any potential noise outbreak which could result in any disturbance to residents.

A Noise Report was prepared by Cole Jarman in support of this change of use which provides evidence which demonstrates that the noise generated through the installation of the proposed plant equipment will not cause any harm to nearby residential properties provided certain attenuation measures are added. This Noise Report was reviewed by the Council's Environmental Health Officer who agreed that the potential for noise impacts from the proposed takeaway would not result in unacceptable noise impacts, subject to the implementation of the noise mitigation measures (which would be secured through a suitably worded planning condition). A further Noise Report has been prepared in support of this appeal taking into account potential noise from delivery drivers and clearly demonstrates that no unacceptable harm would arise from the operation of delivery drivers in this location.

The Council's Environmental Health Officer has also reviewed the proposed extraction system and has agreed, that with the inclusion of suitable odour abatement measures and conditions, the proposal would cause no harm to amenity through harmful odours.

Overall, the proposal will not lead to a detrimental impact upon the residential amenity of nearby properties. This was also the professional opinion of both the Council's Environmental Health Officer and the Planning Officer. The Council have provided no evidence to support their opinion that the proposal would cause detrimental harm to residential amenity and ignored the advice of their specialist Officers. This is considered to be unreasonable behaviour.

An application for costs in relation to appeal ref: APP/N5090/W/18/320776 was submitted against London Borough of Barnet Council following the refusal of an application for a change of use from a bank (Class A2) to a takeaway (Class A5) at 127 The Broadway, Mill Hill. This site was within a district centre. A copy of the costs decision is enclosed with this letter and states the following in relation to the Council's decision to refuse the application on amenity grounds:

*"6. In this case, the Council has produced very little evidence to support their stance and have relied on little more than an assertion that the development has the potential to result in noise and odour nuisance. Furthermore, no evidence was submitted to rebut the applicants compelling evidence in relation to the odour and noise mitigation measures proposed.*

*7. In respect of these matters, I find that the Council have not provided sufficient evidence to substantiate their reason for refusal. Furthermore,*

*it appears to me that having regard to the provisions of the development plan, national planning policy and other material considerations, the proposed development should reasonably have been permitted. The refusal of planning permission therefore constituted unreasonable behaviour contrary to the guidance in the National Planning Policy Framework and the PPG and the appellant has been faced with the unnecessary expense of lodging the appeal."*

Similarly, the Council have provided no evidence to substantiate their assertion that this proposal would result in an unacceptable increase in noise, odours and anti-social parking at the site and it is considered that an award of costs is justified in relation to this reason for refusal.

I look forward to receiving confirmation that you have received this letter and are considering the Appellant's application for costs.

Yours faithfully



**Fergus Sykes**  
**Principal Planner**  
**e-mail: [fergus.sykes@pegasusgroup.co.uk](mailto:fergus.sykes@pegasusgroup.co.uk)**

cc London Borough of Camden Council

encs





---

## Costs Decision

Site visit made on 4 December 2018

by **Chris Forrett BSc(Hons) DipTP MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 4<sup>th</sup> January 2019

---

### **Costs application in relation to Appeal Ref: APP/N5090/W/18/3207746 127 The Broadway, Mill Hill, London NW7 3TJ**

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
  - The application is made by MKJ Property Holdings Limited for a full award of costs against the Council of the London Borough of Barnet.
  - The appeal was against the refusal of planning permission for the change of use from a former bank (Class A2) to a hot food takeaway (Class A5); installation of extraction and ventilation equipment and other minor external alterations.
- 

### **Decision**

1. The application for an award of costs is allowed in the terms set out below.

### **Reasons**

2. The National Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. The PPG also makes it clear that a local planning authority is at risk of an award of costs if it prevents or delays development which should clearly have been permitted having regard to its accordance with the development plan, national policy and any other material planning considerations or fails to produce evidence to substantiate each reason for refusal at appeal and/or makes vague, generalised or inaccurate assertions about a proposal's impact which are unsupported by any objective analysis.
3. The Applicant submits that the Council has acted unreasonably as they have provided no evidence to substantiate their vague assertions that the proposal would result in an unacceptable increase in noise and odours at the site, particularly given that their own officers reviewed and agreed the noise and odour mitigation measures. Additionally, the Council have not cited any particular physical alterations to the building which would cause harm to the character and appearance of the building or the surrounding area, yet this formed part of the reason for refusal.
4. The Council have responded that the application was refused by members of the Planning Committee contrary to the advice of its officers. However it is a fundamental principle of local decision making that a planning committee is not bound to follow the advice of its officers. The Council accepts where this occurs it should show reasonable planning grounds and produce sound, substantive and defensible evidence. In this case the Council prepared a statement of case to address the reasons for refusal which is based on the

likely harmful impacts of the proposed change of use and cite valid and material planning grounds for objection which are supported by the Council's planning policies. In summary, the Council does not consider it has acted unreasonably.

5. The Council have correctly identified that a Planning Committee decision which goes against officer advice is not a reason to give an award of costs in itself as the Committee were entitled to come to their own conclusions on the merits of the proposal. However, a key issue is whether the Council have provided sufficient evidence to substantiate their reason for refusal at appeal.
6. In this case, the Council has produced very little evidence to support their stance and have relied on little more than an assertion that the development has the potential to result in noise and odour nuisance. Furthermore, no evidence was submitted to rebut the applicants compelling evidence in relation to the odour and noise mitigation measures proposed.
7. In respect of these matters, I find that the Council have not provided sufficient evidence to substantiate their reason for refusal. Furthermore, it appears to me that having regard to the provisions of the development plan, national planning policy and other material considerations, the proposed development should reasonably have been permitted. The refusal of planning permission therefore constituted unreasonable behaviour contrary to the guidance in the National Planning Policy Framework and the PPG and the appellant has been faced with the unnecessary expense of lodging the appeal.
8. In relation to the character and appearance issue, from the Council's statement this related principally to the service areas at the rear of the building. Whilst in my decision I found in favour of the applicant on this issue, I find that sufficient evidence was provided by the Council to articulate their concerns and as such no unreasonable behaviour occurred on this matter.

### **Conclusion**

9. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated in relation to noise and odour matters and therefore a partial award of costs is justified.

### **Costs Order**

10. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that the Council of the London Borough of Barnet shall pay to MKJ Property Holdings Limited, the costs of the appeal proceedings described in the heading of this decision; limited to those costs incurred in contesting the odour and noise issues, such costs to be assessed in the Senior Courts Costs Office if not agreed.
11. The applicant is now invited to submit to the Council of the London Borough of Barnet, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

*Chris Forrett*

INSPECTOR