IN THE MATTER OF
THE TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

AND REGARDING LAND AT
5 THE HEXAGON, FITZROY PARK, LONDON, N6 6HR

B E T W E E N:

RACHEL MUNRO-PEEBLES

Appellant

- and -

LONDON BOROUGH OF CAMDEN

Local Planning Authority

RE: THE COUNCIL'S USE OF
SECTION 106 OBLIGATIONS TO SECURE
CONSTRUCTION MANAGEMENT PLANS

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1. I have been asked to advise the London Borough of Camden ("the Council") regarding the appropriateness of the Council's use of Section 106 agreements rather than planning conditions to secure and enforce Construction Management Plans ("CMP"s) on new developments in its area.

2. The issue has been specifically raised in a planning appeal regarding the proposed development at No.5 The Hexagon, Fitzroy Park, London N6 6HR (LPA ref: 2019/0508/P). The appeal has not yet been allocated a start date, although it is likely to proceed on the written representations basis. I would be happy for this Advice to be shown to the Inspector and at any future appeal where this point is being considered, both to support the Council's case and to inform the discussions generally.

Policy and legal background

3. Whilst it does not appear to be in dispute that there should be controls in place on how the construction is carried out, it is worth identifying the reasons why these controls are seen to be necessary and reasonable.

4. The Council will protect the quality of life of occupiers and neighbours, and ensure new developments avoid causing unacceptable harm to amenity. The relevant development plan policies are A1 (Managing the impact of development), A4 (Noise and vibration) and DM1 (Delivery and monitoring) of the Camden Local Plan 2017. Further guidance on the application of these development plan policies is given in the Camden Planning Guidance, available on the Council's website, in particular the one on Amenity (March 2018) (Section 5: CMPs and planning obligations).[1]

5. As the development plan states, one of the factors the Council will consider under Policy A1 of the Camden Local Plan is the impact of the construction phase, including the use of Construction Management Plans (CMPs). The Local Plan gives a number of examples in para 6.13 where a CMP may be sought. Two of these are where there are "developments with poor or limited access on site" and "developments that are accessed via narrow residential streets". Their appropriate use is not of course limited to these examples. Equally, a CMP will not always be required, and "Whether a Construction Management Plan is required for a particular scheme will be assessed on a case by case basis" (para 6.15).

6. These policies have been discussed in several planning appeal decisions, which are discussed further below. The broad point is that the Inspectorate have supported the Council's approach in its area.

The use of planning obligations or conditions for a CMP

7. The advantage of a Construction Management Plan is that it can set out detailed measures to reduce the impact of demolition, excavation and construction works that must be followed during the construction phase. There is a useful model Plan that can be adapted as appropriate.

8. The issue has therefore become one about how it should be enforced – as a condition that no development shall take place before a plan is approved or as a planning obligation.

[1] See also the references in Transport (March 2019) (Section 2: Assessing Transport Impact) and the general points made in Developer contributions (March 2019).

9. The powers to impose planning conditions are well known,[2] and it is national policy that they should be kept to a minimum and only imposed "where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects" (NPPF para 55).[3]

10. It is in theory possible that a condition could be imposed stating that development works on site must not be carried out at any time when the approved CMP was not being complied with, but that is normally seen as unreasonable.

11. What has been used is a condition requiring that a Construction Method Statement is approved and applied. The Planning Inspectorate used to publish a Standard Condition for Construction Method Statements. This required a statement to be submitted to, and approved in writing by, the local planning authority. The Statement could provide for matters such as the parking of vehicles of site operatives and visitors, loading and unloading of plant and materials, storage of plant and materials used in constructing the development, security hoardings, wheel washing facilities, onsite measures to control the emission of dust and dirt during construction, and for the recycling/disposing of waste arisings. Notably, all the measures required were to manage construction impacts within a construction site.

12. However, there is one limitation that is not explicitly set out in national policy, but which remains good law. A planning condition cannot seek to control matters outside the applicant's control. This includes the use of the highway. This was one of those matters that used to be set out in national policy – it is reflected in the old Appendix B of Circular 11/95 which noted that a condition seeking to control parking and unloading on the highway would be unacceptable because a condition cannot seek to exercise control in respect of a public highway. That legal point has not changed. Even if a condition is framed as a "Grampian style" condition (to the effect that the works could not start until the applicant had entered into a CMP) that does not get around this

[2] The planning authority's power to impose conditions on planning permissions are set out in ss. 91 and 92 (the compulsory statutory conditions) and the broad powers in ss. 70 and 72 of the TCPA 1990.
[3] These six tests go a little further than the 3 legal tests in *Newbury District Council v Secretary of State for the Environment* (1981).

restriction- the compliance element of the wording would still clearly be outside the scope of what a condition could lawfully secure and would be unenforceable.

13. It is important to bear this constraint on the use of planning conditions in mind. The NPPF (2019) discusses the use of Planning Conditions and Obligations at paras 54 to 56. The point is made in para 54 that :

> "… Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition."

14. Planning obligations can be used to address more than a planning condition can achieve. Section 106 obligations can be used to restrict the development or use of land as well as to require sums of money to be paid in order to make the development acceptable in planning terms. They can assist in mitigating the impact of unacceptable development to make it acceptable in planning terms.

15. If a planning obligation is being considered, then it still needs to meet all of the tests set out in regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (a point repeated in NPPF para 56),[4] in that they are:

> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development.

16. This debate about the appropriate use of a planning condition or a planning obligation has been discussed already by the Council in the context of the problems that arise in its own area. The scale of most schemes, coupled with the fact that most development in the borough takes place on constrained sites within heavily built-up areas, means that building projects will generally have impacts outside the site - in particular on the highway network. The Council's planning policies for managing traffic and other highways impacts will usually be one of the key issues arising from the build out of schemes and have needed to be managed through a CMP.

[4] As the guidance in the PPG notes, "Planning obligations may only constitute a reason for granting planning permission if they meet the tests that they are necessary to make the development acceptable in planning terms". [PPG Paragraph: 002 Reference ID: 23b-002-20190901].

17. If it is required, the Council has been clear about how a CMP should be secured. A legally robust and enforceable mechanism is needed. It is well accepted that a Section 106 Agreement can require an activity to cease on a site owned by a party if an off-site requirement is not complied with. This form of wording is commonplace in Section 106 Agreements entered into by planning authorities. Each case has to be considered on its own merits. There will be occasions where construction impacts will be at the lower end of the scale where a CMP would be required, and the main focus of concern will be on the impacts within the site. But the local guidance is clear. As para 5.16 of the Amenity CPG (2018) states:

> "Planning conditions can only be used to control matters within the boundary of a site. However, as the range of matters typically covered by a Construction Management Plan, particularly in relation to highways, lie outside of the site boundary, a CMP will be secured through S106 legal agreement in most cases."

18. There is one further point that needs addressing regarding the guidance in the PPG on the use of planning obligations. I do not consider that this PPG changes any of the points discussed above, and it is an illustration of the need to take all of the tests into account when considering the use of planning obligations. The Appellants in the No.5 the Hexagon appeal have however placed great store on the change that has been made to the NPPG (in Paragraph: 023 Reference ID: 23b-023-20190901). This is the section where it deals with the question of "Are there any specific circumstances where contributions through planning obligations should not be sought from developers?" (Paragraph: 023 Reference ID: 23b-023-20190901). The Appellant has highlighted the addition that has been made to this para, where it states that

> "Planning obligations should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home."

19. Most of this paragraph 023 discusses the use of obligations to provide affordable housing, and indeed the only related part of the NPPF to which it refers is NPPF para 63. Para 63 only deals with affordable housing. One way to read this addition is that it is a simple confirmation that the requirement for a contribution to affordable housing from the development of a new residential annex or extension to an existing home would not normally meet the tests in CIL reg.122. Whilst it may be related to housing development, it would be difficult to say that a contribution to affordable housing was 'necessary to make the development acceptable in planning terms' or that it was 'fairly

and reasonably related in scale and kind to the development'. Of course, if there is a CIL regime in place, then the Community Infrastructure Levy can be collected from any size of development even if it is small-scale.

20. However, the Appellant has sought to argue that this statement means that no planning obligations should be sought on any development consisting only of the construction of a residential annex or extension to an existing home. They have also referred to a short private email from an official at the MHCLG[5] which suggests that the guidance refers to 'planning obligations' and no longer just specifies affordable housing contributions.

21. I consider that this reads too much into the PPG wording. There has not been any change in policy – it has always been the case that most small-scale residential additions will not need a planning obligation to make them acceptable in planning terms, and that an obligation must be 'fairly and reasonably related in scale and kind to the development'. It would be wrong to suggest that the email from MHCLG goes further than that. As the courts have confirmed, the National Planning Practice Guidance (PPG) is not a definitive statement of government policy, and is a less formal document than the NPPF. It is intended, as its name suggests, to be guidance not policy and it must therefore be considered in that light (*R (oao Solo Retail) v Torridge DC* [2019] EWHC 489 (Admin)). The legal tests in reg.122 have not changed.

Other appeal decisions

22. These policy points have been discussed in several planning appeal decisions. A recent example of this is the appeal decision for the development of a single dwelling at 82 Fortune Green Road (ref: APP/X5210/W/19/3225902; 3 July 2019), where the Inspector accepted that a CMP would be required as:

> "the proposed works would involve the removal and delivery of a significant amount of material and would have impacts beyond the application site in a predominantly residential area the construction impacts will be complicated" (para 20).

In particular, he concluded that:

[5] Para 7.32 and Appendix 5 of the Appellant's Statement of Case. This is an email from CIL@communities.gov.uk> (dated 12 November 2019 at 12:56) to Sarah Ballantyne-Way of HGH Consulting – and it was sent to the Council by her as an attachment to an email dated 18 November 2019 at 10:11.

> "The CMP would require more detail than is normally contained in and controlled by a condition and therefore a planning obligation would provide a better mechanism of control." (para 20).

The CMP and obligations on other matters were all necessary given development plan policies. He concluded that they were directly related to the development proposed and would be fairly and reasonably related to its scale and nature (his para 22).

23. The Appellant in the No.5 Hexagon appeal has referred the inspector to three appeal decisions concerning sites in Camden. No reference has been made to any other appeals in Camden. The Appellant makes much of the research that they have done into the extent that other London Boroughs have used planning conditions, but that ignores the local plan context and the point about how far a condition can control the use of land outside the appeal site.

24. Two of these appeals are old, dating from 2015, and were decided against an old policy background – they predate the current Local Plan (2017), and refer to the Council's Camden Planning Guidance 6 Supplementary Planning Guidance (CPG6). They are therefore of limited relevance. However, they are also confined to their own facts:

a. the appeal regarding 79 Fortess Road, NW5 1AG (ref: APP/X5210/A/14/2221432, 19 May 2015) was for change of use of an existing building from B1(a) offices to C3 dwellings. The Inspector considered that the vehicle movement issues from what were essentially internal alterations could be dealt with satisfactorily by an appropriate condition requiring the details to be submitted to and agreed by the local planning authority (her para 15). The actual condition regarding the Construction Method Statement is limited to considering onsite controls only (see condition 1);

b. the appeal regarding 152 Royal College Street, NW1 0TA (ref: APP/X5210/A/14/2229005; 10 June 2015) was for the erection of a new building comprising 5 apartments and a retail unit. The Inspector's central conclusion on the CMP request was that "given the size and scale of the development I consider it could be dealt with satisfactorily by use of a condition, if the development was acceptable in all other respects" (her para 21). The appeal was dismissed.

25. The other appeal decision the Appellant seeks to rely upon is the one regarding the development of a mansard roof addition at 205 - 207 Queen's Crescent, London NW5 4DP (ref: APP/X5210/W/17/3172668; June 2017). This makes the Council's point for it. It is a good example of "a relatively small scale scheme" (to use the Inspector's description of the mansard roof changes) which would not be unduly lengthy to build. He concluded that it would not be expected to generate significant amounts of construction related traffic and involved a site which did not suffer from particularly poor accessibility (his DL para 16). The specific concerns regarding dust and noise to the adjacent primary school and residential accommodation could be dealt with by a condition (his DL para 17). Ultimately, his conclusion was that, in accordance with the legal and policy tests, a planning obligation "to secure further construction and transport management measures" was not necessary or fairly and reasonably related in scale and kind to the development proposed - taking into consideration its scale and nature.

The arguments on the appeal on No.5 The Hexagon

26. The appeal site is located within the Hexagon, a cul-de-sac of six dwellings which is accessed via Fitzroy Park. This is a private road that runs from Highgate Village and The Grove to Millfield Lane. The development would increase the gross internal area (GIA) of the dwelling at no.5 from about 128m to 200m. The planning application (ref. 2019/0508/P) was made for:

> "*the erection of single storey front extension, two-storey rear extension, and single storey side and rear extension to replace existing garage; replacement of front, rear and side windows and doors and front cladding; installation of 2 x roof lights to main flat roof*"

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27. The Appellant has appealed against the non-determination. There is no outstanding dispute about the planning merits of the proposal. The Council has already resolved to grant permission subject to conditions and to the conclusion of a Section 106 legal agreement. This agreement covers one issue, requiring the developed to agree to the Council's standard CMP pro-forma obligations and the payment of the monitoring fees. It was after the Appellant provided an undertaking to pay the Council's fees in relation

to the preparation of the Section 106 and confirmed that the agreement is acceptable, that the Council issued the engrossments on 13 September 2019.

28. The Appellant's Statement of Case records that:

> "7.2 The appellant has no objection to preparing and implementing a Construction Management Plan as part of the development however it is not considered necessary that this is secured via a s106 Agreement. The proposals comprise a small and uncontroversial householder extension and it is considered that it would be entirely appropriate to secure a CMP via a planning condition in this instance."

29. The Appellant's case is set out in the Appellant's Statement of Case and Costs Application (the appeal was submitted on 20 February 2020). In particular, the Appellant argues that:

a) the imposition of a planning obligation requiring the submission and implementation of a CMP would not meet the tests set out in the CIL Regulations and NPPF; and
b) there is no case requiring the preparation, approval and implementation of a CMP to be dealt with via a s106 agreement;
c) in the circumstances, it is unreasonable for the Council to seek to require a CMP by way of a planning obligation and this has caused the Appellant to incur the costs of the appeal.

30. I would note that the Appellant's objection has been prompted by the refusal of their mortgage company to sign the agreement. I do not consider that this is a good reason in itself to refuse to enter into a section 106 agreement (as discussed above). It is not a point pursued by the Appellant in their costs claim, which deals only with the point of principle about how to secure a CMP.

31. The Council has considered the specific details of this site. The Council's view is that this is a case where the unacceptable impacts cannot be addressed only by a planning condition. The Council has considered that there is a need to control off-site impacts, in this sensitive location, and to monitor it. The request for a construction management plan is one that is necessary to make this development acceptable in planning terms, and is directly related to the development. It is also fairly and reasonably related in scale and kind to the development, which involves a number of substantial extensions to the house.

32. This conclusion is in line with the Local Plan and the relevant Camden Planning Guidance. The Appellant originally agreed to its provision and it has been explained to them that the Council will consider if planning obligations, including CMPs, should be secured depending on the scale, complexity and likely amenity impacts of the construction and that this can apply to all sizes of development (see for instance the correspondence dated 19 November 2019).

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5 THE HEXAGON, FITZROY PARK, LONDON, N6 6HR

B E T W E E N:

RACHEL MUNRO-PEEBLES

APPELLANT

- and -

LONDON BOROUGH OF CAMDEN

LOCAL PLANNING AUTHORITY

RE: THE COUNCIL'S USE OF
SECTION 106 OBLIGATIONS TO SECURE
CONSTRUCTION MANAGEMENT PLANS

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