

**PINS ref: APP/X5210/W/20/3247384**

**Appeal against the non-determination of planning application (ref. 2019/0508/P)  
at 5 the Hexagon, Fitzroy Park, London, N6 6HR.**

**APPLICATION FOR COSTS  
on behalf of the Local Planning Authority**

*The outline of the application*

1. As stated in the Council's correspondence dated 9 June 2020, the Council does wish to make a costs application in relation to the appeal costs.
2. The Council considers that the pursuit of this appeal on the single ground relating to the request for a planning obligation to help control impacts from the construction phase is unreasonable. It has explained its case several times now, and the Appellant has had ample opportunity to reconsider her decision to appeal.
3. The Council has had to unnecessarily incur the costs of dealing with the whole appeal. This is therefore an application for a full award of costs.
4. This is not an appeal where the Appellant has not been aware of the full consequences of the decision to appeal on this ground. The Appellant has been represented professionally throughout the appeal.

*The policy framework.*

5. The unreasonable behaviour in this case relates to the merits of the appeal. National policy on the award of costs is set out in the PPG - the National Planning Practice Guidance. As is well-established, the Secretary of State has identified the circumstances where costs may be awarded. This is where:
  - a party has behaved unreasonably; and

- the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

(Paragraph: 030 Reference ID: 16-030-20140306))

6. Whilst parties to the appeal process are normally expected to bear their own expenses, all parties are expected to act reasonably. One of the aims of the costs regime is to discourage unnecessary appeals. (Paragraph: 028 Reference ID: 16-028-20140306)). An appellant is at risk of an award of costs if the ground of appeal has no reasonable prospect of succeeding. This may occur where it is clearly not in accordance with the development plan, or the appeal follows a recent appeal decision on substantially the same site (Paragraph: 053 Reference ID: 16-053-20140306 – the list is stated not to be exhaustive). An award can be made for the full or partial costs of the appeal.

#### *Documents before the Inspector*

7. In addition to the representations on the substance of the appeal, the Inspector should have copies of:
  - a. The Appellant's Costs application (20 February 2020);
  - b. The Appellant's further comments to PINS (letter of 27 May 2020);
  - c. The Council's response to the Appellant's submission of 27 May (11 June 2020);
  - d. The Council's response to the costs application (dated 15 June, and sent to PINS on 22 June 2020; it enclosed a letter dated 15 June 2020, and an email from the Council's solicitor to the Appellant of 11 October 2019);
  - e. The Appellant's repeat /reinstatement of their costs application (24 June 2020).

#### *The factual background.*

8. The factual background to the appeal is common to both the Appellant's and the Council's applications for costs. The Council has set out the sequence of events in relation to this appeal process in its Statement (at section 5.0) and in the Rebuttal to the Appellant's Costs Application (dated 15 June 2020; at section 2.0), and that is relied upon for this application as well. The Inspector can also see what has been said in the documents listed above.

9. The Appellant has known from an early stage in the consideration of her planning application that the Council considered all the main aspects of the development to be acceptable and made a recommendation of approval. But a CMP and a monitoring fee was considered an essential part of the approval. The problems with access are obvious. The Council understand that this approach is supported by the Fitzroy Park Residents Association, and that they will be writing to the Inspector separately.
  
10. The decision to appeal was an unreasonable one to take. The Council spent considerable time before the appeal was launched in trying to resolve the matter. The Council has set out the sequence of events in section 5.0 of the Council Statement (and in section 2.0 of the 15 June 2020 document), and would emphasise that:
  - a. The Case Officer notified the applicant on 5<sup>th</sup> April 2019 that a CMP would need to be secured via S106 Agreement;
  - b. The Council's Legal team sent the draft S106 Agreement to the agent representing the Appellant at the time on 14 August 2019
  - c. The Council resolved to grant planning permission conditionally subject to the signing of a S106 Agreement to secure a Construction Management Plan on the 6 September 2019;
  - d. The Appellant confirmed their agreement to enter into the proposed S106 Agreement and provided an undertaking to pay the Council's fees associated with preparation and monitoring of the agreement;
  - e. It was only after her mortgagee refused to be part of the agreement that she refused. It is a standard part of any section 106 that the mortgagee would be required to be a party to the agreement. This is not a valid reason not to enter into an agreement, and it is noted that the Appellant does not now rely on it – but it is the reason that was given;
  - f. The Council agreed to allow more time for further negotiations between the Council and the Appellant, and later with the Appellant's new agent, and in December 2019 an extension of time was agreed to by the Council to allow the Appellant time to resolve the issues with its mortgagee;
  - g. The Appellant did not then engage in any further discussions with the Council and the Appellant's agent informed the Council's Legal team on 28 February 2020 that the Appellant had submitted an appeal for non-determination.

11. It is against this background that the Appellant unreasonably chose to appeal, and the costs of the appeal have been incurred. In addition, the Council has continued to engage with the appellant and her agent after the appeal was lodged. It sought specific legal advice from counsel (from William Upton QC from 6 Pump Court Chambers dated 28<sup>th</sup> April 2020 (Appendix J in the main submissions). The summary of the Counsel advice was provided to the Appellant on 15 May 2020 (and we note that the Appellant has forwarded the same to the Planning Inspectorate on 27 May 2020). A final request for the Appellant to withdraw the appeal was made by the Council on 4 June, when the only matter outstanding would have been the legal fees and disbursements that have been incurred in drafting the section 106 that the Appellant agreed in September 2019 (a copy of this email is attached to this application).
12. The appeal has involved far more work than would be normal for an appeal of this scale. This application for costs includes all the correspondence with the Appellant and its agents or representatives from (and including) the date of 28 February 2020, the work carried out in preparation of the Council's appeal statements and the work on the costs applications, including the costs of Counsel advice.

### *Discussion*

13. The legal and policy background are explained in detail in Counsel's opinion, and in the Council's Statement. These type of controls are a necessary and reasonable part of allowing development to proceed on these constrained urban sites. The planning system aims to protect the quality of life of local neighbours and to ensure that new developments do not cause unacceptable harm to amenity. The policies have been discussed in several recent appeal decisions, and support the Council's approach. There are limitations to what a planning condition for a CMP could cover, especially as they are restricted to the site itself, which a planning obligation can overcome to make development acceptable.
14. These policies all support the planning authority's requirement that a CMP is required to mitigate the likely adverse impacts from the construction of this development. Given the constraints and location of this site, no other reasonable conclusion could be drawn. It not only accords with national and local policy, but it is an inevitable planning requirement for a development of this type on this site.

15. The Appellant has acted unreasonably in making the appeal, and choosing to persist in appealing. She has been given several opportunities to reconsider, none of which have been taken. The appeal could have been avoided had she done so.
  
16. The ground of appeal has no reasonable prospect of succeeding. The Appellant has placed too much reliance on the general statements made in national policy (in the PPG). Her approach is not in accordance with the development plan policies that apply in this case, and which are amply explained in the local planning guidance (the CPG). There are also several recent local appeal decisions on substantially the same point for development of this size and type, and several immediate local examples where it has proved to be necessary.
  
17. In the circumstances, an award of costs is fully justified.

William Upton QC

6 Pump Court  
Temple, London

20 July 2020

Counsel for the local planning authority

Enc:

- Email of 4 June 2020 to the Appellant's agent.

**Subject:** RE: 2019/0508/5 The Hexagon - appeal 3247384  
**Date:** Thursday, 4 June 2020 at 09:43:56 British Summer Time  
**From:** Obushenkova, Olga  
**To:** Sarah Ballantyne-Way  
**CC:** English, Rachel  
**Attachments:** image001.png, image002.png, image003.png, image004.jpg

Dear Sarah

Thank you for your email.

Unfortunately you seem to have misunderstood my email of 15 May 2020. The Council suggested to absorb the costs (relating to the appeal only) and not make a costs application, only if the Appellant withdraws the appeal not just its costs application against the Council.

Please note that the costs relating to the Planning Application stage (£769.08 as to our legal fees and £12.00 for Land Registry Charges in relation to the preparation of the s106 agreement) do not relate to the appeal stage and remain payable, irrespective of what happens in the appeal proceedings. I note again that your client has provided an undertaking that these costs will be paid, but is yet to pay these costs or provide evidence of such payment. From your previous correspondence I understood that these fees will be paid.

If the appeal will go ahead, the Council will be submitting its costs application in relation to the appeal costs, not the Planning Application stage costs. The appeal costs will include the costs in relation to all the correspondence with yourself/your client or their representatives from (and including) the date of 28 February 2020, any work carried out in preparation of Council appeal statements, correspondence with PINS and costs application, including the costs of Counsel advice. Accordingly, please advise whether your client will be withdrawing the appeal.

We will go back to PINS separately to clarify the Council's position on the points set out in the Appellant's letter of 28 May 2020.

Regards

Olga Obushenkova  
Lawyer

Telephone: 020 7974 4125



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**From:** Sarah Ballantyne-Way <sballantyneway@hghconsulting.com>  
**Sent:** 26 May 2020 14:08  
**To:** Obushenkova, Olga <Olga.Obushenkova@camden.gov.uk>

Cc: English, Rachel <Rachel.English@camden.gov.uk>  
Subject: Re: 2019/0508/5 The Hexagon - appeal 3247384

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Dear Olga,

Thank you for your email.

Having considered the content and your request, the appellant has agreed to withdraw their costs application and we will be writing to PINS later this week to confirm this position as well as to respond to the comments you have made in your various emails.

We trust that the Council will not be submitting an application for costs once the appeal is validated.

Kind regards

Sarah

On Fri, 15 May 2020 at 16:31, Obushenkova, Olga <[Olga.Obushenkova@camden.gov.uk](mailto:Olga.Obushenkova@camden.gov.uk)> wrote:

Dear Sarah

We have now received counsel advice, which supports the Council's position. I have set out the summary below. Please note that Rachel English is the new case officer (copied in).

#### **The summary of Counsel advice**

The relevant policy background:

- Camden Local Plan 2017 and the Camden Planning Guidance, and in particular the Local Plan examples of where a Construction Management Plan (CMP) may be sought, such as “developments with poor or limited access on site” and “developments that are accessed via narrow residential streets” and the Local Plan's paragraph 6.15 stating that the need for a CMP will be assessed on a case by case basis”.

The use of planning obligations or conditions for a CMP:

- It would be inappropriate to use a condition (such as a standard condition for Construction Method Statement to manage construction impacts within a construction site), as it is a matter of law that a planning condition cannot seek to control matters outside the applicant's control (including the use of the highway). A Grampian style condition would not get around this restriction as the compliance element of the wording would still clearly be outside the scope of what a condition could lawfully secure and would be unenforceable.
- Planning obligations can address more than a planning condition can achieve (eg.

restrict the development or use of land, require sums of money to be paid in order to make the development acceptable in planning terms).

- Most of the development in Camden takes place on constrained sites within heavily built-up areas and as such will generally have off-site impacts on the highways which under Camden's policies need to be managed through a CMP secured under a legal Section 106 Agreement (s106 agreement).
- Camden's s106 CMP wording, which requires an activity to cease on a site owned by a party if an off-site requirement is not complied with, is commonplace in s106 agreements entered into by planning authorities and is in line with Camden's guidance (Amenity CPG).
- The PPG guidance on the use of planning obligations does not change the above, and it is an illustration of the need to take all of the tests into account when considering the use of planning obligations.

Appellant's interpretation of the change that has been made to the National Planning Practice Guidance (PPG) (in Paragraph: 023 Reference ID: 23b-023-20190901):

- Most of the paragraph 023 and the related part of the NPPF deal with affordable housing, so the addition can be read simply as a 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;
- 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 (12 November 2019) from MHCLG goes further than that.
- As courts have confirmed, the 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 a broad statement in national guidance not policy and it must therefore be considered in that light (*R (oao Solo Retail) v Torridge DC* [2019] EWHC 489 (Admin)) and to be applied to local circumstances in the context of the Camden Planning Guidance.

Past appeal decisions:

- In terms of the Appellant's reliance on three appeal decisions in the Camden area, two of these decisions are old and pre-date the current policy (Local Plan 2017) and all three appeals are confined to their own facts.
- There are a large number of more recent appeal decisions which support the Council's position, which have not been considered. One such example of the Planning Inspectorate's (PINS) positive view of the Council's approach to securing CMPs via s106 obligations, is the recent appeal decision for the development of a single dwelling at 82 Fortune Green Road (ref: APP/X5210/W/19/3225902; 3 July 2019). PINS decision noted that the construction would have impacts beyond the application site in a predominantly residential area and 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 (paragraphs 20-22).

Conclusion

- The local plan context and the point about how far a condition can control the use of land outside the appeal site need to be considered in the context of the specific details of the appeal site (eg. cul-de-sac private road location). To The Council's conclusion to require the CMP to be secured by a planning obligation in light of the off-site impacts of the proposed construction and need to monitor it in this sensitive location is in line with the Local Plan and the relevant Camden Planning Guidance.

Costs



Further to previous correspondence, the Council is looking at preparing a costs application against the Appellant. As noted previously, the Council's costs in relation to the original negotiations which have been completed on 12 September 2019 when the Council issued engrossments as per the Appellant's request have not been paid. Furthermore, the Council then had to incur further costs throughout correspondence with the appellant regarding the mortgagee clauses and explaining why the mortgagee should be a party, and later all the correspondence with you and work carried out by officers in providing responses in relation to your comments on the NPPG. Additionally, the Council has incurred further costs in relation to the appeal, including all the additional correspondence with yourself and instructing of counsel.

If the Appellant withdraws the appeal and its costs application against the Council by 25 May 2020, the Council will agree to absorb the costs incurred to date (apart from the £769.08 as to our legal fees and £12.00 for Land Registry Charges in relation to the preparation of the s106 agreement). However, if the appeal will go ahead, the Council will be submitting its costs application when the dates are confirmed by PINS.

Regards

Olga Obushenkova  
Lawyer  
Law and Governance  
London Borough of Camden

Telephone: 020 7974 4125

Web: [camden.gov.uk](http://camden.gov.uk)

9th Floor

5 PANCRAS SQUARE

5 PANCRAS SQUARE

London N1C 4AG

DX 161055 Kings Cross 4

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**Sarah Ballantyne-Way**

Director

Planning &

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45 Welbeck Street, London W1G 8DZ

[020 3409 7755](tel:02034097755) | [07766311513](tel:07766311513)

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