Town and Country Planning Act, s.247

Stopping up of part of footway at the side of 73-75 Avenue Road London NW8 6JD (on Queen's Grove)

LPA ref: ES/I&M/ED/1/22/S247

LEGAL SUBMISSIONS
ON BEHALF OF THE LONDON BOROUGH OF CAMDEN

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1. These are short legal submissions on behalf of the London Borough of Camden ("**the Council**") in relation to a proposed stopping up of part of the footway on Queen's Grove which is at the side of the property at 73-75 Avenue Road London NW8 6JD. They should be read alongside the Council's Statement of Case and Proof of Evidence and form part of the Council's case that will be presented at the stopping up inquiry which opens on 19 November 2024.

2. These submissions are prepared to assist the Inspector in addressing two matters of law which arise in this case. First, the correct approach to the issue of whether the development which has been granted permission is still being carried out. Second, the correct approach to the merits of the proposed stopping up in the light of the grant of planning permission for works which encroach on the footway.

Approach to whether development is still being carried out

3. Section 247 of the Town and Country Planning Act 1990 provides in relevant part:

(2A) The council of a London borough may by order authorise the stopping up or diversion of any highway within the borough, or within another London borough if the council of that borough consents, if it is satisfied that it is necessary to do so in order to enable development to be carried out—
(a) in accordance with planning permission granted under Part III or section 293A, or
(b) by a government department.

4. The meaning of the words "*necessary to do so in order to be enable development to be carried out*" were considered by the Court of Appeal in *Ashby v Secretary of State for the Environment* [1980] 1 WLR 673. That case discussed the predecessor provision to s.247 in the Town and Country Planning Act 1971, which was expressed in materially identical terms. It appears to be common ground that *Ashby* is the leading case on the interpretation of these words (see, for example, para.4.7 of Mr Westwick's Proof of Evidence).

5. In *Ashby* the majority found that there was no jurisdiction to confirm a stopping up order once the development in question was complete and was therefore no longer being carried out. The following principles can be derived from *Ashby* when determining whether development is still being carried out:

    a. First, it is lawful to apply for and make or confirm a stopping up order once development has commenced and where that development obstructs the highway (*Ashby* at 678D-E per Eveleigh LJ, 680G and 681E per Goff LJ and 683A-C per Stephenson LJ).

    b. Second, development is a process which, once begun, continues to be carried out until it is completed. As such, it is possible for an order to be necessary to enable development "*to be carried out*" if development has begun and has not yet been completed (*Ashby* at 683A-C per Stephenson LJ).

    c. Third, it is therefore lawful to apply for and make or confirm a stopping up order until the point that the development has been completed (*Ashby* at 681E-F per Goff LJ) and the power to make or confirm a stopping up order is available until only a minimal or *de minimis* part of the development remains to be carried out (*Ashby* at 680G per Goff LJ and 683B-C per Stephenson LJ). On a close reading of *Ashby*, it is clear that the test adopted by the majority is whether development is "*still being carried out*" other than to a minimal or *de minimis* extent. The reference by Stephenson LJ at 681C to development being "*completed or substantially completed*" must be read in that context.

d. Fourth, when considering whether development is still being carried out, one should have regard to that part of the development on or affecting the highway, rather than the development as a whole which is the subject of planning permission (*Ashby* at 681E and G per Goff LJ, see also *Hall v Secretary of State for the Environment, Transport and the Regions* [1998] JPL 1055, 1059).

Approach to the merits of the stopping up order

6. The leading case on the approach to the merits of the stopping up order is the decision of the Court of Appeal in *Vasiliou v Secretary of State for Transport* (1991) 61 P&CR 507. Again, that concerned the relevant section of the 1971 Act, which as above was expressed in materially identical terms to s.247.

7. Nicholls LJ gave detailed guidance on the material considerations for decision-makers considering stopping up applications at 515. In particular:

a. As a prerequisite for the making of an order under s.247(2A) is the existence of a planning permission, there has already been a determination that there is no sound planning objection to the proposed development. The decision-maker on a stopping up application cannot go behind that determination.

b. On the basis that the planning issues have been resolved in favour of the development being allowed to proceed, a decision-maker for a stopping up application must determine "*whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order*". Those disadvantages or losses might be either to members of the public generally or to persons whose properties adjoin the highway being stopped up or are sufficiently near to it that they would, in the absence of the stopping up order, be able to bring proceedings in respect of the obstruction.

c. Correspondingly, the decision maker must take into account any advantages to members of the public or adjoining occupiers flowing directly from the stopping up order, for example in highway safety terms.

d. The decision maker must also take into account the planning benefits and importance of the development, as found by the planning authority which granted the planning permission.

8. These findings have been applied with approval by the High Court in *R (Network Rail Infrastructure Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 2259 (Admin); [2017] PTSR 1662 at para.49. There Holgate J (as he then was) stated that once the disadvantages of making the order had been weighed against the planning benefits of, and the degree of importance attaching to, the development, the decision maker must decide whether any such disadvantages or losses are of such significance or seriousness that the order should not be made. He went on to emphasise that "*the confirmation procedure for the stopping up order does not provide an opportunity to reopen the merits of the planning authority's decision to grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision*" (at para.49(iv)).

9. A further immaterial consideration was identified by Goff LJ in *Ashby* at 682B-C, namely that the decision maker should disregard the fact that the highway has already been obstructed when determining whether to confirm a stopping up order.

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