

Appeal Decisions

Site visit made on 26 January 2017

by A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 20 March 2017

Appeal A Ref: APP/V5570/W/16/3154751

Land at 269 Caledonian Road, London N1 1EE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 as amended (the Act) against a failure to give notice within the prescribed period of a decision on an application for planning permission.
- The appeal is made by Mr Andrew Panayi against the Council of the London Borough of Islington.
- The application ref P2015/2545/FUL is dated 22 June 2015.
- The development proposed is described in the application form as follows: *'The proposal is for the division of the existing flat into two flats. There will be a two bedroom flat on the Ground and First Floor referred to as Flat A and there will be a two bedroom flat on the Second and Third Floors referred to as Flat B. A first floor single storey extension is also planned and this will accommodate the new staircase which links the two floors of Flat A Work on site has commenced already and the existing maisonette has been divided and the current Flat A only occupies the rear ground floor extension. The flat is occupied, however this new planning application seeks to modify the as-built Ground Floor flat into a two storey unit and improve the standard of accommodation. The First Flat A was completed on about 15 November 2014 but as it is to be modified the work is regarded as incomplete'.*

Summary of Decision: The appeal is allowed, and planning permission granted as set out in the Formal Decision at paragraph 34 below.

Appeal B Ref: APP/V5570/C/16/3154748

Land at 269B Caledonian Road, London N1 1EE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Andrew Panayi against an enforcement notice issued by the Council of the London Borough of Islington.
- The enforcement notice, numbered 50/2016, was issued on 21 June 2016.
- The breach of planning control as alleged in the notice is without planning permission the conversion of the rear ground floor of the premises to a self-contained flat.
- The requirements of the notice are to:
 - (1) Cease the use of the rear ground floor of the property as a self-contained flat.
 - (2) Remove all but one kitchen and bathroom from the property – this should include the removal of the relevant cookers, sinks, toilets, showers, baths [sic] and associated appliances.
 - (3) Remove from the land all materials and debris resulting from the carrying out of steps (1) and (2).
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice upheld as set out in the Formal Decision at paragraph 35 below.

Procedural matters

1. The description of the proposed development given in the planning application form is imprecise. All of the evidence describes the proposal as a *change of use of part of the retail ground floor to form two self-contained flats and the erection of a first floor rear extension*; I shall adopt that label. The application for planning permission was not determined within the statutory timeframe. The Council now indicate that, had it determined the application, it would refuse to grant planning permission. I have identified its reasons in my main issues below. An executed Unilateral Undertaking (UU) pursuant to s106 of the Act has been presented with Appeal A presenting a financial contribution towards the provision of off-site affordable housing (AFH) and car-free development. This is a material consideration, which I will address later.

Appeals A and B – s 78 and ground (a)

2. I undertook a comprehensive accompanied site visit and carried out a full internal inspection to see for myself the flat's arrangement and to gain an impression of the standard of accommodation, and appreciate the surrounding area. The appeal property is located in a row of commercial buildings with accommodation above. A cross-section plan of no. 269 shows a three-storey building and living space in the roof. These plans show a ground floor that comprises retail shop, which fronts Caledonian Road with ancillary floor space. The first, second and third floors are shown as being in residential use accessed from within a rear courtyard and a separate staircase.
3. The site is within the designated Barnsbury Conservation Area (CA). The undisputed evidence is that the proposed development in Appeal A, which includes an extension at first floor level to accommodate a new staircase, as well as the change of use of the ground floor to the rear, preserves the character and appearance of the CA. Additionally, the Council is satisfied with standard of accommodation proposed in the s 78 appeal, effect on living conditions of existing and future residents. I have no reason to disagree.

Main issues

4. In Appeal A, whether the proposed development would result in an unacceptable loss of a retail unit and floor space and undermine the retail provision and appropriate mix and balance of uses in the designated local shopping area. In Appeal B: (1) The effect of the development upon occupiers' living conditions, having particular regard to standard of accommodation, and (2) whether or not the development makes adequate provision for AFH.

Reasons

Appeal A - Unacceptable loss of retail unit and floor space

5. Policy CS14 of Islington's Core Strategy (CS) 2011 sets the strategic context for retail and services. Policy DM4.6, Local Plan Development Management Policies (DMP) 2013, sets out specific measures in relation to local shopping areas. Proposals will only be permitted where an appropriate mix and balance of uses within the local shopping area, which maintains and enhances the retail and service function of the local shopping area, is retained. These local policies are broadly consistent with paragraph 17, 23 and 161 of the National Planning Policy Framework (NPPF).

6. The Council's concern is that the proposal would result in loss of the rear part of the retail floor space at ground floor level and that Mr Panayi fails to demonstrate that the premises have been vacant for a continuous period of at least two years and continuous marketing evidence. Before the unauthorised change of use, the rear ground floor area was probably in ancillary use, but the size of this area is limited. The proposed development would retain the retail unit. Servicing for the shop could take place from the front without compromising the quality of available retail space.
7. On the main issue, I conclude that the proposal would not have an adverse impact upon the provision and appropriate mix and balance of uses in the designated local shopping area since vast majority of retail floor space at ground floor level would be maintained. Accordingly, it complies with the purposes of CS policy CS14 and DMP policy DM4.1 and 4.6.

Appeal B - Effect on living conditions

8. Mr Panayi submits that the studio flat floor area is 37.5 square metres and satisfies policy 3.5 of The London Plan¹ table 3.3, which sets out minimum space standards for new dwellings, including those created because of a change of use. The flat could be occupied by one or two persons. The inclusion of a mezzanine area adds to the gross internal floor area.
9. I consider that the design, shape and layout of the flat significantly reduce the amount of useable floor space. A low ceiling at upper level creates voids and inhibits the practical use of the sleeping accommodation. The perception is one of a contrived layout, because domestic furniture further reduces the amount of space available for free circulation and movement. There is inadequate space to store possessions or undertake normal activities such as socialising. Overall, the design and layout of the flat results in a residential unit that is substandard.
10. I conclude, on this issue, that the lack of adequate useable floor space could have knock-on effects on the health and wellbeing of existing and future occupants. The development is unacceptable in the public interest. Accordingly, the development enforced against conflicts with DMP policy DM2.1, DM3.4 and DM3.5, which are broadly consistent with NPPF paragraphs 17 and 56.

Appeal B - AFH

11. Mr Panayi has presented an executed UU but challenges the Council's request for AFH provision of £50,000. He argues that no contribution is necessary given the number of residential units. Current national policy expressed in Secretary of State's Written Ministerial Statement of 28 November 2014 (WMS) confirms that AFH provision should not be required for this small-scale development. Judgement of The Court of Appeal in *Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council* [2016] EWCA Civ 441 reinstates the WMS.
12. CS policy CS12 details this Borough's housing challenge and seeks to provide high quality, inclusive and affordable homes. Part G seeks to secure AFH provision on sites capable of delivering 10 or more units gross to provide AFH on-site. Schemes below this threshold will be required to provide financial

¹ The London Plan The Spatial Development Strategy for London Consolidated with Alterations since 2011, March 2016.

contribution towards AFH provision elsewhere. The reasons for this approach are explained in the supporting text and in the adopted supplementary planning document (SPD) on AFH small sites contributions 2012, which refers to relevant aspects of policy found in The London Plan². The SPD sets out the requirement for a contribution of £50,000 per new dwelling³ and figures have been tested for viability.

13. The approach in policy CS12 is broadly consistent with national policy found in NPPF paragraph 47 and 50. This requires local planning authorities to meet the full, objectively assessed needs for market and AFH and where they have identified that AFH is needed, set policies for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified. The intention of the WMS is to ensure that financial contributions do not become a disproportionate burden for small scale developers and thus frustrate housing supply. Its mandatory terms are translated into national planning practice guidance (PPG)⁴. There is, therefore, a conflict between the national threshold relating to the provision of AFH in the WMS/ PPG and local thresholds set out in policy CS12, which I have found consistent with the NPPF.
14. Neither the WMS nor the PPG alter the statutory basis for determining proposals in accordance with the development plan unless material considerations indicate otherwise. The WMS/PPG reflects the Government's intentions; both are material considerations of substantial weight. It is the Government's clear intention that the need to encourage new house building should outweigh the contribution that small sites make towards providing AFH. That said, however, it is not clear-cut because, in my assessment, development plan policy, and planning circumstances that led to its creation, need to be balanced against site specific circumstances and the WMS/PPG⁵.
15. The Council says the area has a significant proportion of households that earn less than £20,000 per annum and there is severe need for AFH. Although the SPD will be reviewed periodically, the Council's evidence is that since its adoption house prices and rents have continued to rise considerably. To my mind, this factor alone does not confirm that the figure is still robust. However Mr Panayi provides no relevant evidence of his own to contradict or make less than credible the Council's assertions about current market conditions and trends in its administrative area.
16. The unchallenged evidence presented by the Council shows that, in reality, the Borough is an area of high house prices and demand for residential property and there is a shortage of AFH. It argues that a substantial amount of new housing comes forward through developments of 10 units or less. Its approach to viability testing ensures that contributions would not necessarily burden a small-scale developer. This stance is consistent with the justification behind CS policy CS12 that seeks to boost the supply of housing to meet a range of local needs.
17. In theory and practice, it seems to me that small sites, such as this, play an important role in achieving the Borough's aims in delivering homes for all its

² For instance, policy 3.3 of The London Plan.

³ £60,000 for those areas south of Pentonville Road/City Road where sales prices are higher.

⁴ PPG paragraph 031 reference ID: 23b-031-20161116.

⁵ At final comment stage, Mr Panayi refers to counsel's opinion but that appears to broadly confirm this approach.

citizens and, in particular, meeting the identified need for AFH. That is probably applicable to most London boroughs. In this case, however, the evidence presented appears to show significant reliance upon small sites in delivering much needed AFH. On the basis of the available evidence, I consider that relaxing the requirement in policy CS12 and the SPD has the potential to undermine and adversely affect housing delivery strategies in this Borough.

18. The purpose of the WMS/PPG approach in exempting small sites from the need to provide AFH contributions is to avoid a disproportionate burden of developer contributions on small-scale developers, custom and self-builders. My findings so far in this matter are likely to disappoint Mr Panayi. But sufficient evidence has not been submitted to show that the development is unviable if a contribution has to be made. There is nothing before me of substance to show that an unequal burden would result. In addition, there is nothing to indicate that scheme in Appeal A would not go ahead because of the AFH contribution. My analysis is reinforced and strengthened and the undisputed local and site specific circumstances justify a finding that policy CS12 and SPD is not outweighed by the substantial weight that is normally afforded to the WMS/PPG.
19. On balance, I find the policy justification for AFH contribution in this case very persuasive. On the particular circumstances, therefore, I conclude that Appeal B fails to make adequate provision for AFH and is likely to have a harmful effect on the supply of AFH in the Borough.

Planning obligation & conditions (Appeal A)

20. An executed UU has been presented in consideration of Appeal A. Mr Panayi unilaterally agrees to make an AFH contribution of £50,000. The UU requires 14 days prior notification of development commencing and a payment on or before commencement; it is a breach to start building work before compliance. The UU is required because of the strong local planning policy justification.
21. The CS establishes that developments will be car free, which means no parking provision will be allowed on site and occupiers will not have the ability to obtain parking permits, except for wheelchair accessible parking. Car free policy will apply to any housing units created through new build, change of use, conversion and subdivision of existing residential properties. That strategic aim is reflected in DMP policy DM8.4 and DM8.5, which relate to walking and cycling, and vehicle parking.
22. The circumstances are that this site is highly accessible by public transport, on foot and bicycle. It is located in a controlled parking zone where parking stress is evident. The UU undertakes to make the development car-free by ensuring that it is not used and/or occupied by an occupant who has a permit to park a motor vehicle in a residents' parking bay although it caters for wheelchair users. I consider it to be enforceable.
23. The UU restricts the development or use of the land in a specific way. It is necessary to make the development acceptable in planning terms; it is directly relevant, fairly and reasonably related in scale and kind to the development. It therefore satisfies both statutory and policy tests.
24. In addition to the usual commencement condition and specification of plans illustrating the proposed development rather than existing layout, it is

necessary and reasonable to specify that the building materials used on the external surfaces of the first floor extension match the host building, and details for bicycle storage areas shall be submitted for approval to the Council. I do not consider suggested condition 3) is necessary, because the UU ensures car-free development.

Other matters

25. Mr Panayi indicates that the ground floor flat at the rear of the property, which is subject to enforcement action, is occupied. Indeed, that is what I observed. However, there is no specific detail of individual(s) or personal circumstances. A consequence of my decision to dismiss the ground (a) appeal is eviction of the current tenants, although alternative temporary arrangements could be made while development occurs pursuant to the s 78 appeal proposal. There is potential for disruption to, and interference with, family life and home.
26. That said, however, local and national planning policies seek good design in the public interest to improve the built environment and quality of life via the planning system, whereas the development causes harm to matters of acknowledged importance and this impact cannot be mitigated by planning conditions. There is a need for development management policies to be applied to proposals and this is an appropriate proportional response to that need. It is necessary to consider whether it would be proportionate to refuse planning permission in all the circumstances of this case. I shall consider whether refusal would have a disproportionate effect on the appellant and occupiers of the site in my overall conclusions.

Overall balance of the planning merits for Appeal A and B

27. In Appeal A, the development would not result in an unacceptable loss of retail floor space. CS policy CS12 and the SPD exhort the need for AFH provision arising from this kind of development. In this instance, while the WMS/PPG has substantial weight it does not outweigh relevant development plan policies referred to above. Consequently, a requirement for provision of AFH contribution arises in both Appeals; it has been provided in the form of a deed in Appeal A only.
28. In Appeal B, I attach significant weight to my finding that the development has a detrimental effect on the living conditions of existing and future residents. On the other side of the scales, I recognise that the accommodation would provide much needed housing in the area and the site is sustainably located. There are social and economic benefits. However, these matters do not outweigh my finding on the effect upon living conditions and so the environmental dimension of sustainable development is not met.
29. Any interference must be balanced against the public interest in upholding planning policy to protect the environment. In the light of the same factors that have informed my considerations above, I am of the firm view that dismissal of the appeal would be a proportionate response and would not lead to an unacceptable violation of any of the appellant or occupier's Human Rights, which thus carry only limited weight. I shall consider extending the period of compliance later in Appeal B ground (g).

Appeal B - ground (f)

30. Mr Panayi needs to show that the steps specified in the notice exceed what is required to remedy the breach of planning control or, as the case may be, any injury to amenity caused by the breach. The argument is that the notice should be varied to require the flat to be extended and enlarged within specific timeframe, but that is beyond the lawful scope of this notice. It would result in vague requirements and cause significant interpretational problems. That is unacceptable given the potential liability that comes with a failure to comply with the notice. Apart from assertion that the steps required to comply with the notice are unreasonable, I am afraid Mr Panayi has advanced no lesser steps that can remedy the breach of planning control. I find that the remedial purpose behind the notice's terms requires full compliance. Consequently, the appeal on ground (f) must fail.

Ground (g)

31. It is necessary to consider whether the specified compliance period, three months, falls short of what should reasonably be allowed. I understand tenancy/tenancies would need to be terminated but in my experience three months is reasonable timeframe. Three months from the date of my decision is sufficient time for occupiers to find suitable affordable alternative accommodation. Given the nature of work required by the notice, I am of the firm opinion three months is reasonable and appropriate. This is a just and proportionate response to the particular circumstances presented, and strikes a fair balance between the competing interests of the wider public and individuals involved in this case. Therefore, ground (g) fails.

Appeals A and B - Overall conclusions

32. Having regard to all other matters, I conclude that Appeal A should succeed and planning permission should be granted subject to conditions. In Appeal B, ground (a) fails and I refuse to grant planning permission on the deemed application. I further conclude that Appeal A grounds (f) and (g) fail.
33. To the extent that the planning permission granted by virtue of the s78 (Appeal A) is inconsistent with the terms of the notice, s 180 of the Act⁶ will ensure that the former prevails.

Formal decisions

Appeal A Ref: APP/V5570/W/16/3154751

34. The appeal is allowed and planning permission is granted for change of use of part of the retail ground floor to form two self-contained flats and the erection of a first floor rear extension at land at 269 Caledonian Road, London N1 1EE in accordance with the terms of the application, P2015/2545/FUL, dated 22 June 2015, subject to the following conditions:
- 1) The development hereby permitted shall begin not later than 3 years from the date of this decision.

⁶ Where a planning permission is subsequently granted for the same development, or for some part of it, the permission overrides the notice to the extent that its requirements are inconsistent with the planning permission, but the notice does not cease to have effect altogether.

- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: Drawing number 6015/06 same prefix ending with 07, 08, 10, 11 dated 22 June 2015, and site location plan A4.
- 3) The materials to be used in the construction of the external surfaces of the first floor extension hereby permitted, shall match those used in the existing building.
- 4) No flat shall be occupied until space has been laid out within the site in accordance with details first submitted to, and approved in writing by, the local planning authority, for bicycles to be parked and that space shall thereafter be kept available for the parking of bicycles.

Appeal B Ref: APP/V5570/C/16/3154748

35. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

A U Ghafoor

Inspector