
Appeal Decision

Site visit made on 27 March 2017

by Richard Schofield BA(Hons) MA MRTPI

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

Decision date: 04 April 2017

Appeal Ref: APP/Q5300/W/17/3166629

Waverley Court, 44-54 Windmill Hill, Enfield EN2 7AU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Robert Nicholas against the decision of the Council of the London Borough of Enfield.
 - The application Ref 16/05069/VAR, dated 21 October 2016, was refused by notice dated 16 December 2016.
 - The application sought planning permission for formation of third floor to each of the three blocks to provide a total of 6 flats (2 x 1-bed flat to each block) without complying with a condition attached to planning permission Ref P12-00869PLA, dated 17 May 2013.
 - The condition in dispute is No 12 which states that: *Evidence confirming that the development achieves a Code for Sustainable Homes rating of no less than 'Code Level 3' shall be submitted to and approved in writing by the Local planning Authority. The evidence required shall be provided in the following formats and at the following times: a) a design stage assessment, conducted by an accredited Code Assessor and supported by relevant BRE interim certificate, shall be submitted at preconstruction stage prior to the commencement of superstructure works on site; and, b) a post construction assessment, conducted by and accredited Code Assessor and supported by relevant BRE accreditation certificate, shall be submitted following the practical completion of the development and prior to the first occupation. The development shall be carried out strictly in accordance with the details so approved, shall be maintained as such thereafter and no change there from shall take place without the prior approval of the Local Planning Authority.*
 - The reason given for the condition is: *In the interests of addressing climate change and to secure sustainable development in accordance with the strategic objectives of the Council.*
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Decision

1. The appeal is dismissed.

Main Issue

2. The main issue is whether the disputed condition is reasonable and necessary in the interests of addressing climate change.

Reasons

3. The condition in dispute makes reference to the Code for Sustainable Homes (CSH), requiring that the development meets Code Level 3. CSH was
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withdrawn by the government in 2015 and replaced with new national technical standards, the application of which can be required by planning condition.

4. A Written Ministerial Statement (WMS) was published on 27 March 2015, which, among other things, made it very clear that although the government had withdrawn the code, it was still applicable to the management of so-called legacy cases. The appellant's sole reason for seeking to have the disputed condition removed is the allegation that the original planning permission is not a legacy case.
5. Government advice (the Advice) published at the time of the withdrawal of CSH stated that:

Legacy cases are those where residential developments are legally contracted to apply a code policy ... or where planning permission has been granted subject to a condition stipulating discharge of a code level, and developers are not appealing the condition or seeking to have it removed or varied. In these instances it is possible to continue to conduct code assessments.

6. This is confirmed in a recent email before me from the relevant government department, confirming that legacy cases are those where planning permission has been granted before 26 March 2016 subject to a condition stipulating discharge of a CSH level.
7. The appellant argues that because they are appealing the condition in question, and seeking to have it removed, it is not a legacy case. This is, in my judgment, fallacious. The Advice was issued in April 2015. The application the subject of this appeal was submitted well over a year later in October 2016. The Advice was seeking to make it clear that unless conditions relating to CSH were being appealed *at that point in time*, it was still possible to continue code assessments. It was not an open invitation for speculative appeals against CSH conditions that had previously been undisputed, solely on the basis of CSH's withdrawal.
8. Thus, in my judgment, the appeal scheme, which was granted planning permission in 2013, with a condition requiring compliance with 'no less than' Code Level 3, is, by definition, a so-called 'legacy case'. There is no in principle reason why the disputed condition should be removed solely on the basis of the *post hoc* withdrawal of CSH.
9. Even if this were not the case, the appellant may still appeal the condition. One would expect, however, that an argument as to why its requirements could not be achieved would be advanced. There is absolutely no evidence before me to suggest that compliance with the condition is suddenly unachievable for reasons of practicality or viability. Indeed, it is not disputed that the development is well underway, which would suggest that neither of these factors is an issue. Rather, the appellant states very clearly that they are, '*merely seeking to benefit from the changes in government policy since the original permission was issued*'. The achievement of self-benefit is not, in my judgement, a sound basis on which to remove a planning condition.
10. My attention has been drawn to advice in the Planning Practice Guidance in relation to the imposition of planning conditions. It may well be that the disputed condition would be unreasonable were it to be applied to a planning

permission that was granted now, as relevant development plan policies referencing CSH would not allow for anything more than a requirement for a water efficiency standard equivalent to the new national technical standard or, in the case of energy, a standard consistent with new government policy concerning energy performance. But this is not the case. As noted above, the original planning permission is quite clearly a legacy case and it is perfectly reasonable to manage it as such, in line with government advice, past and current, and the WMS.

11. It is suggested that the clear thrust of the abolition of CSH and the WMS is that planning permissions should not be granted requiring compliance with a specific code level. This could be so, but this would apply only to planning permissions being granted after the withdrawal of CSH. Even then, the starting point for consideration of planning applications remains, in law, the development plan. Such a plan may, as here, contain policy that references CSH. Thus, the WMS, rather than supplanting development plan policy, would be a significant material consideration to be weighed in a planning balance.

Conclusion

12. Addressing climate change remains a central tenet of government planning policy. The means of doing so, insofar as the construction of new dwellings is concerned, may have changed since the grant of the original planning permission, but that does not negate the validity of the disputed condition, the development plan policy basis for it or what it seeks to achieve.
13. For the reasons given above, and taking all other matters into consideration, I conclude, therefore, that the disputed condition is reasonable and necessary in the interests of addressing climate change. The appeal is dismissed.

Richard Schofield

INSPECTOR