
Appeal Decision

Site visit made on 28 August 2019

by Matthew Woodward BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4th November 2019

Appeal Ref: APP/V5570/W/19/3227138

63-67 Rosoman Street, Islington, London EC1R 0HY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 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 Christian Papa against the Council of the London Borough of Islington.
 - The application Ref P2019/0186/FUL, is dated 14 January 2019.
 - The development proposed is described as 'self build a rooftop extension to accommodate a two bedroom dwelling on top of the existing building plus associated private amenity space and extension of the fire escape. (Resubmission of refused application P2017/4487)'.
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Decision

1. The appeal is dismissed and planning permission is refused.

Procedural Matters and Background

2. The appeal results from the Council's failure to determine the planning application within the prescribed period. There is no formal decision on the application, as jurisdiction over that was taken away when the appeal was lodged. The Council have submitted an appeal statement which gives the reasons why planning permission would have been refused had the Council been empowered to do so. The appellant has also submitted an appeal statement and there are copies of correspondence between the main parties over the planning merits of the proposal. I have also taken into account the representations received from a number of interested parties. I have drawn on this, together with other evidence before me, to inform the main issue in this appeal.
3. The appeal site was the subject of a recent proposal which was dismissed on appeal¹ (the previous appeal). The main issue in that case was whether or not an affordable housing contribution was required having regard to local policy and viability. The Inspector concluded that an affordable housing contribution was required and providing it would not render the scheme unviable. The appeal was dismissed on the basis that no provision for affordable housing had been made.
4. The current appeal scheme is almost identical to the scheme proposed under the previous appeal. The main difference is that the current appeal has been

¹ See appeal reference - APP/V5570/W/18/3202022

accompanied by three different versions of a planning obligation², submitted as a unilateral undertaking (UU), which are identical in content, except for the timing of payments proposed. Each of the UUs seek to provide a contribution towards affordable housing and restrict the possession of parking permits for future occupiers in order to ensure a 'car free' development. The Council have had an opportunity to comment on the UUs and I am satisfied that interested parties have not been prejudiced by the late submission of evidence.

5. I hereafter refer to 'planning obligation' as a collective term to mean each of the three UUs which have been submitted for my consideration.

Main Issue

6. Having regard to the foregoing, the main issue in this appeal is whether or not the planning obligation proposed by the appellant would be enforceable and effective in order to make the development acceptable.

Reasons

7. According to the evidence before me, Policy CS12 of Islington's Core Strategy 2011 taken alongside the Council's Affordable Housing Small Sites Contributions Supplementary Planning Document 2012 (SPD) requires that any additional residential units in this part of the borough provide a commuted sum of £60,000 per unit. This payment should be directed towards the costs of providing affordable housing units on other sites within the borough. I agree with the previous appeal Inspector that the proposal would be required to make the necessary contribution to affordable housing in this case. The appellant has agreed to provide an affordable housing contribution and it is included in the planning obligation submitted with this appeal.
8. The submitted planning obligation also includes a restriction on car parking permits (car free development) for future occupiers of the proposed dwelling. It relies upon the provisions of section 16 of the Greater London Council (General Powers) Act 1974 and therefore is an effective mechanism to secure car-free development. This is because the wider wording of section 16 does not require a restriction on land, but only that an undertaking or agreement has a 'connection' with the land/property. As such, given the evidence before me and what I observed in the environs of the appeal site, the restriction of parking for future occupiers of the development would be necessary and reasonably related in scale and kind to the needs generated by the proposed development.
9. Section 106(3) of the Town and Country Planning Act 1990 provides that a planning obligation is enforceable by the Council against the person entering into the obligation and any person deriving title from that person. Therefore, a planning obligation will not be enforceable against successors in title of those who were not party to it.
10. The planning obligation which accompanies this appeal has been entered into by the appellant as leaseholder, but it excludes the freeholder's agreement and signature. Therefore, the planning obligation fails to fully bind all the parties with interests in the land. I am satisfied that the freeholder has a clear underlying interest in the land, but it is not clear to me why the freeholder would be unwilling to enter into the planning obligation.

² See Section 106 of the Town and Country Planning Act 1990

11. However, in support of their planning obligation, the appellant sought independent legal advice, a copy of which has been sent to me. Within the advice it is accepted that the appellant's leasehold interest of the appeal site could end by surrender, forfeiture or merger in order to facilitate an avoidance strategy. However, it is put to me that this possibility would be remote partly due to the relatively small amount of affordable housing contribution due as a commuted sum, in comparison with the sizeable cost and complexity of the lease which has already been entered into, which would have to be 'scrapped'. Furthermore, I have also been told that the appellant intends to live in the proposed dwelling, thus it is put to me that any necessary enforcement action for non-compliance with the terms of the planning obligation could be easily taken against him as leaseholder as he would be residing on the appeal site.
12. Even though it is put to me that the appellant is a law-abiding, hardworking and dependable member of the local community with historic ties to it, I have no evidence of the current financial circumstances of the appellant, or their creditworthiness. In any event, there would be a clear financial incentive if the required affordable housing payment was avoided, and as not all parties have entered into the planning obligation, the risk of avoidance in terms of non-compliance with the requirements of it would be unacceptably increased. Furthermore, there is no guarantee that just because the appellant has applied for planning permission for a new dwelling, that he would live in it.
13. Despite the appellant's contention that there would be much less incentive to avoid implementing the car free development requirements of the proposed planning obligation, there is nothing in the evidence before me to indicate that the effectiveness of enforcement in the event of non-compliance would not also be unreasonably compromised, as not all those with an interest in the land are party to the planning obligation.
14. The submitted versions of the UU include different payment dates, including that payment of the affordable housing contribution could be provided on or before either the practical completion of development or the commencement of development, or within 14 days of planning permission being granted. However, none of these options would ensure that the planning obligation would be properly enforceable in case of non-compliance, thus it would not be legally sound.
15. Therefore, granting planning permission for this proposal without a legally sound planning obligation would represent an undue risk that the affordable housing contribution and car free development proposals would not be provided. As all those with current interests in the land, including leaseholders and freeholders, are not party to the deed, there is insufficient assurance that the planning mitigation embodied would be delivered and if not, could be enforced properly.
16. Consequently, I am not satisfied that the planning obligation would be capable of being enforced, thus it would unacceptably undermine the effectiveness of it in order to make the development acceptable.

Other Matters

17. I have been provided with evidence of several other cases where planning permission has been granted for new dwellings by the Council on sites that have some similarities with the one before me. However, from the information provided, there is nothing to suggest that each of the relevant planning obligations were not entered into by all those with an interest in the land, unlike the proposal before me. Therefore, I am not satisfied that the circumstances of these cases are sufficiently similar to the appeal scheme such that it would warrant me reaching a different conclusion on the main issue. I have determined the appeal case on its own merits, whilst having regard to the evidence submitted.
18. I am aware that the Council's SPD is not specifically worded to include that a freeholder of the land must be bound to a planning obligation. It is also put to me by the appellant that the form accompanying the planning application, where the appellant agreed in principle to sign a planning obligation, did not require the freeholder's signature. Be that as it may, I have found that all those with an interest in the land would need to be party to the deed in order to make it properly enforceable, and to avoid unacceptable risk of it not being implemented.
19. The proposal for self-build housing would make a contribution to the housing mix and local housing targets and I note that the Council considers that it would be an appropriate design which would not harm the significance of the Rosebery Avenue Conservation Area. However, it is also important that affordable housing is provided in this area, and that developments promote sustainable travel methods. The proposed planning obligation as it is drafted would represent an unacceptable risk of these requirements not being met.
20. I have considered the potential for the development to impact on the living conditions of the nearest occupiers, particularly no. 1 Northampton Row. However, the Council do not find any unacceptable harm to the living conditions of the occupiers of this property in relation to outlook, privacy or daylight and from the evidence before me and the observations I carried out on my site visit, I have no reason to take a different view. In any event, as I am dismissing the appeal for the reasons given, I have no reason to consider this matter further.
21. I note the appellant's point about the Council's lack of clarity concerning the requirements of a planning obligation during the course of the planning application. However, these matters are between the main parties and do not carry any weight in the determination of this appeal.
22. There may be other methods of ensuring that the necessary affordable housing contribution would be provided, but they are not before me as part of this appeal, which I have considered on its own merits.

Conclusion

23. For the reasons given above I conclude that the appeal is dismissed.

Matthew Woodward

INSPECTOR