



Appeal Decision

Inquiry Held on 15 and 16 June 2021

Site visit made on 1 July 2021

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH

an Inspector appointed by the Secretary of State

Decision date: 13th August 2021

Appeal Ref: APP/C3620/C/20/3260682

Land lying to the South East of Upper Fairfield Road, Leatherhead, Surrey KT22 7HJ (Formerly known as Fairfield Works)

- 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 4MA Limited against an enforcement notice issued by Mole Valley District Council.
 - The enforcement notice, Ref. 2019/0026/ENF, was issued on 9 September 2020.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised demolition of the former Fairfield Works building and the erection of a new building to provide 10 No. flats with associated parking and landscaping.
 - The requirements of the notice are to:
 - (1) Demolish the unauthorised building accommodating ten flats and associated parking and landscaping areas; and
 - (2) Remove from the land all building materials and rubble arising from compliance with requirement (1).
 - The period for compliance with the requirements is 9 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) (b) (c) and (f) of the Town and Country Planning Act 1990 as amended (the Act). Since an appeal on ground (a) has been made, the application for planning permission deemed to have been made under section 177(5) of the Act falls to be considered.
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Decision

1. 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.

Applications for costs

2. Applications for costs were made by 4MA Limited against Mole Valley District Council, and by Mole Valley District Council against 4MA Limited. These applications are the subject of separate Decisions.

Procedural matters

3. At the inquiry, the appellant's sole witness giving evidence (Mr Alsop, expert planning witness and planning agent) conceded in cross-examination that every ground of appeal should fail. I do not accept what was said in the appellant's closing (under the subject of human rights) that the Council's cross-examination was in any way trickery or otherwise improper. Mr Alsop provided answers to straight-forward questions put to him.
4. Further, I do not accept that the inquiry did not constitute a fair hearing under Article 6 of the Human Rights Act 1998 due to the length of notice given to the

appellant's advocate on case law raised by the Council (of which he said he was familiar, in any event). At the inquiry, I addressed this specific matter and provided all the time the appellant's advocate said he needed to consider the case law before proceeding.

Ground (b)

5. For an appeal to succeed under this ground, the appellant must satisfy me on the balance of probabilities that the matters stated in the notice have not occurred as a matter of fact.
6. The appellant says that the former Fairfields Works building has not been demolished as alleged by the notice, but rather that building operations have occurred as part and parcel of the process of conversion of an old commercial building into a substantially altered block of residential apartments, as authorised by planning permission MO/2017/0394 on 4 August 2017 (the planning permission granted).
7. There is common ground between the parties that there is at least some part of the original building that has been incorporated into the appeal development, notwithstanding a dispute as to the extent. The inquiry was shown a photograph¹, said by the Council to demonstrate that the original building had been demolished. Based on my appreciation of it, the photograph shows the retention of some vertical pillars extending from the slab/foundations (which Mr Alsop said in his oral evidence was very deep, with drainage incorporated).
8. Mr Alsop agreed with the Council during cross-examination that, as a matter of straight-forward language, the building that was previously located on the site could fairly and reasonably be said to have been demolished. The appellant directs my attention to the House of Lords *Shimizu* judgement², which I have considered. However, and notwithstanding it being a listed building matter, the judgement makes plain that whether works constitute "alteration" or "demolition" is a question of fact and degree for the decision-maker. This is consistent with other case law which establishes that whether or not works comprise demolition and new build or the conversion of an existing building is a matter of planning judgement for the Inspector, and that it is not necessary for every part of the old building to have been removed from the site³. Notably, in *Oates* it was held that the Inspector was entitled to uphold a notice alleging the construction of 'new buildings' although the structures incorporated parts of existing buildings. In *Arnold*, only part of one wall was left standing of the original dwelling. Whether the structure was a new or remodelled dwellinghouse was a question of fact. The Inspector was entitled to find that what remained, given the scale of demolition and intervention, was a new building.
9. Based on these above principles it seems to me that the works in the appeal before me, as a matter of fact and degree, go far beyond what could reasonably be described as conversion or alteration of the original building. The roof has been removed, the internal floors have been removed, the external and internal walls have been removed along with all windows, doors, fixtures and fittings. My conclusion therefore is that the works have been so

¹ Neill Whittaker proof of evidence, appendix 10

² *Shimizu (UK) Ltd v Westminster City Council* [1997] WLR 168

³ *Oates v SSCLG & Canterbury CC* [2018] EWCA Civ 2229; *Arnold v SSCLG* [2015] EWHC 1197 (Admin)

substantial as to constitute the replacement of one building with another, and that this has occurred through demolition as stated in the notice.

10. Accordingly, the appeal under ground (b) fails.

Ground (c)

11. For an appeal to succeed under this ground, the appellant must satisfy me on the balance of probabilities that the matters stated in the notice do not constitute a breach of planning control. It seeks to do this on the basis that the development is said to be in accordance with the planning permission granted.
12. The planning permission authorised the conversion of the existing building, the construction of extensions and the addition of a new 2nd storey on top of the building. It did not authorise the demolition of the building, which I have found as a matter of fact occurred under consideration of ground (b), and it is not possible to 'convert' a demolished building.
13. Further, the fact that the planning permission did not include a condition restricting or limiting demolition (which I acknowledge to be a building operation under section 55(1A) of the Act) is not relevant. The operative part of the permission sets out what is permitted (in this case, conversion and extension) whereas conditions identify "what cannot be done—what is forbidden"⁴. The conditions did not need to limit the amount of demolition because the operative part of the permission did not authorise the demolition of the building.
14. Further, it was not so authorised by condition 11⁵ requiring an approved Construction Method Statement before development (including ahead of any works of demolition) as a reasonable reader applying common-sense would understand that the condition's purpose was to control harm when undertaking building operations rather than giving consent to the demolition of the building.
15. Condition 2 of the planning permission granted said:

"The development hereby permitted shall be carried out and completed in all respects strictly in accordance with the submitted documents and plan numbers: 2000 REV A, 2001 REV B, 2002 REV A, 2003 REVA, 2004 REVA, 2005 REVA, 2100 REVA, 2101 REVA, 2102 REVB, 2103 REVA, 2110 REVA, 2111 REVA, 2112 REVA, 2113 REVA contained within the application and no variations shall take place."
16. The appellant says that this condition was unreasonable for the purposes of the Planning Practice Guidance and should not have been imposed. However, the appellant could have made that argument on an appeal against the condition following its imposition and it is not a matter for me to determine in consideration of the enforcement appeal. However, the condition is clear in its requirements.
17. Mr Alsop told the inquiry that he was aware that the development was not "strictly in accordance" with the plans (which is what the condition requires) and shifted position while giving his oral evidence from the differences being

⁴ Cotswold Grange County Park LLP v Secretary of State for Communities and Local Government [2014] EWHC 1138 (Admin), [2014] JPL 981 per Hickinbottom J at [15]

⁵ No development shall take place, including any works of demolition, until a Construction Method Statement has been submitted to, and approved in writing by, the Local Planning Authority

de minimis to requiring (unobtained) permission from the Council as non-material amendments. On the latter basis, he agreed with the Council's advocate that ground (c) must fail.

18. Having considered all the evidence, and informed by my site visit, I find that the departures from the approved plans are widespread and material:

- Window and door positionings have changed on each elevation with windows and doors removed and added. For instance, based on plans submitted by Mr Alsop to the Council to show amendments⁶, the north-western (front) elevation has had 14 separate changes with regards to the location and sizes of the windows and doors.
- The internal layout of the building is significantly different from as approved, as marked on Mr Alsop's amended floor plans. As a result, the 10 flats approved have changed from 9no. 2 bed & 1no. 3 bed flats to 6no. 3bed flats and 4no. 2 bed flats because 5 of the flats as built (2 on the ground floor, 2 on the first floor and 1 on the second floor) include an additional 'study room' likely in practice to serve as a further bedroom.
- The outside terrace areas for Flat 10 are materially extended and different to as approved.

19. It is well-established law that if a building operation is not carried out, both internally and externally, fully in accordance with the planning permission, the whole operation is unlawful⁷. Further, the appellant makes the point that the building is not substantially completed but it is not necessary for a building to be substantially completed for an enforcement notice to be issued and upheld.

20. For the reasons given above, I find on the balance of probabilities that the appeal development is not the same development, and is materially different from, that which was approved by planning permission MO/2017/0394 and does not benefit from planning permission. It is therefore unlawful and a breach of planning control, and accordingly the appeal on ground (c) does not succeed.

Ground (a) and the deemed planning application (DPA)

Main issues

21. The main issues in this ground of appeal are:

- Whether the appeal development makes adequate provision for affordable housing.
- The effect of the appeal development on potential flooding.
- The effect of the appeal development on the living conditions of neighbouring occupiers, as regards overlooking.
- The effect of the appeal development on the living conditions of occupiers of the flats, as regards space.

⁶ Neill Whittaker proof of evidence, appendix 11

⁷ Sage v SSETR & Maidstone BC [2003] UKHL 22

Reasons

Affordable housing

22. For the avoidance of doubt, whether or not the appellant has paid the Community Infrastructure Levy as regards MO/2017/0394 has no bearing on this issue, or on any issue in relation to this deemed planning application for a different development. Similarly, the fact that the Council did not require affordable housing provision or contribution under that permission is not relevant to the merits of the deemed planning application before me which must be determined in the current context of the development plan and material considerations. In particular, I note that the Council has updated its Affordable Housing Supplementary Planning Document (SPD) and Addendum in 2018 and 2019 respectively.
23. I have seen no evidence that the appeal scheme will provide any units of affordable housing and the appellant's position in principle is that no provision, or any agreement to provide an affordable housing contribution, is necessary.
24. Policy CS4 The Mole Valley Core Strategy (2009) (CS) requires the appeal scheme to provide 3 affordable housing units, unless a reduced number can be justified by viability evidence. As conceded by Mr Alsop under cross-examination, the appellant has not provided me with a current viability analysis amongst the appeal submissions and I am therefore not in a position to reach a view that departure from the policy requirement for 3 units is justified. (Appendices 1 and 2 of Mr Alsop's proof of evidence are statements from Mr Ferrier and Mr Shapland respectively which refer to viability information but none has been adduced. The statements allude to difficulties working with the Council on this issue, but it is upon the appellant to provide information and evidence to support the deemed planning application before me). Accordingly, the development is in conflict with Policy CS4 of the CS, supported by the SPD, which seeks to provide affordable housing. It is also in conflict with the Affordable Housing objectives in Chapter 5 of the National Planning Policy Framework (the Framework).

Flooding

25. The enforcement notice was issued in part due to what it said was unavailable surface water drainage details. However, both main parties are now in agreement that the scheme can be made acceptable in this respect by a suitable condition being imposed requiring approval of submitted details were I to grant permission. I have seen or heard nothing during the appeal which would cause me to disagree. Accordingly, I am satisfied that an appropriately conditioned scheme would not cause potential flooding and would not be in conflict with Policy CS20 of the CS which deals with flood risk management. It would also not be in conflict with the Framework in this respect.

Overlooking

26. The north-east elevation of the appeal development faces residential properties on Middle Road (nos 21 to 35 in particular). The main parties are in agreement that there would be no unacceptable overlooking from the appeal building's windows subject to conditions discussed at the inquiry relating to obscure glazing, window fixation and louvres. I agree that such measures would make the development acceptable on this issue. While the 2nd floor terraces of Flat 10

are larger than as previously approved, I am satisfied from my site visit that the significantly sized planted areas prevent users of the terrace from causing harm to the privacy of occupiers of Middle Road from overlooking effects. Accordingly, a suitably conditioned appeal development would not be in conflict in this respect with saved Policy ENV22 of the Mole Valley Local Plan (2000) (LP) which seeks to protect amenity.

Living conditions of future occupiers – space

27. At the inquiry Mr Alsop gave oral evidence that he didn't challenge the Council in its submissions⁸ that 2 of the flats did not meet minimum internal floor space requirements set out in the nationally described space standard⁹.
28. However, the Written Ministerial Statement of 25 March 2015 makes it clear that such standards can only be applied where there is a current local plan policy. In this case, the Council has not drawn my attention to the existence of a relevant current policy and consequently, this is not a matter which carries any significant weight against the proposal.

Planning balance and conclusion on ground (a) and the DPA

29. The Council and the appellant agree that the housing supply policies of the development plan are out-of-date when considered against the Framework, since the Council cannot demonstrate a 5-year housing land supply. The main parties agree that the Council can demonstrate a 3-year supply of deliverable housing sites.
30. The appeal scheme would not have an impact on protected areas or assets listed in footnote 7 of the Framework, and I have no reason to disagree with the common view of the main parties that it would not cause harm to the setting of Leatherhead Conservation Area. Therefore, the tilted balance in Paragraph 11d) is engaged as an important material consideration. This states that planning permission should be granted unless the adverse impacts of the development would significantly and demonstrably outweigh its benefits when assessed against the policies in the Framework taken as a whole.
31. The delivery of 10 homes on previously developed land in a highly sustainable built-up area (towards which the Council's policies¹⁰ direct development) would be benefits of the appeal scheme given the Framework's aim to make a more efficient use of land and significantly boost the supply of housing, which the Council are currently not doing due to the significant housing supply deficit. These benefits are strengthened by an identified need for 2 and 3 bedroomed units in the District¹¹. The proposal would also increase footfall to local shops and other outlets and would make a positive contribution towards the vitality of Leatherhead town centre. Overall, the benefits are matters of significant weight in favour of the development.
32. Of serious concern, however, is the unjustified lack of provision for affordable housing where it has been identified as necessary. According to the SPD:

"Mole Valley is amongst the least affordable places to live in the UK and a lack of affordable housing is having a significant social and economic impact on

⁸ Neill Whittaker proof of evidence, 5.31 (p14)

⁹ Technical housing standards – nationally described space standard (DCLG, March 2015)

¹⁰ Policies CS1 and CS2 of the CS

¹¹ As reflected in Policy CS3 of the CS

communities throughout the District. Within Mole Valley there are a number¹² of low and average income households who, because of the present relationship between house prices and incomes, are unable to find suitable housing to rent or buy in the private market. This includes many essential workers whose employment is of particular importance to the local community."

"Successive housing needs surveys reflect this growing trend and identify an increasing need for affordable homes within the District."

The considerable adverse impact of making no affordable housing provision within this context of identified need is in conflict with Chapter 5 of the Framework and weighs heavily against the grant of planning permission.

33. Consequently, even given the extent of the housing supply shortfall, the adverse impacts of the appeal scheme would significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework taken as a whole. As a result, the application of Paragraph 11 does not indicate that permission should be granted.
34. The development does not accord with the development plan as a whole due to the fundamental conflict with a policy central to the residential scheme and there are no other considerations which outweigh this finding. Therefore, for the reasons given the ground (a) appeal fails and I shall not grant planning permission.

Ground (f)

35. For an appeal to succeed under this ground, I must be satisfied that the steps required by the notice to be taken exceed what is necessary to achieve the purpose of the notice.
36. It is clear from the way the notice has been drafted that its purpose is to remedy the breach of planning control. It does this by requiring the demolition of the unauthorised new building on the land, together with its associated parking and landscaping areas, and the removal of resultant building material and rubble. These steps are not excessive in achieving that purpose.
37. I note what the appellant has said about *Tapecrow*¹³ but the steps are remedial in that they lawfully seek to remedy the breach of control: they do not go beyond that and are not punitive. For the same reasons, they are neither *Wednesbury* unreasonable or disproportionate in the circumstances and would not result in a violation of the appellant's rights under Articles 1 and 8 of the Human Rights Act 1998.
38. Even were the purpose of the notice to remedy any injury to amenity caused by the breach, the appellant has not put forward any alternatives which would overcome planning difficulties and there are none which are otherwise obvious to me (*Tapecrow* refers). In particular, the appellant has not put forward any alternative steps which would overcome the failure to provide affordable housing within the residential development contrary to policy requirements.

¹² 40.3% of working households in Mole Valley cannot afford to purchase a 2 bedroom property (East Surrey Strategic Housing Market Assessment (SHMA) (2008))

¹³ *Tapecrow Ltd v FSS & Vale of White Horse DC* [2006] EWCA Civ 1744

39. For these reasons, the ground (f) appeal does not succeed.

Conclusion

40. For the reasons given above I conclude that the appeal should not succeed.

I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Andrew Walker

INSPECTOR

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY: Robert Walton QC (Landmark Chambers)

He called:

Neill Whittaker (Ivy
Legal)

FOR THE APPELLANT: Martin Edwards (Cornerstone Chambers)

He called:

Malcolm Alsop (Director
of Alsop Verill Ltd,
Planning Agent)

INTERESTED PERSONS: None who gave evidence

DOCUMENTS accepted at the inquiry

- 1 Affordable Housing Strategy Progress Report 2020 to 2025
(08/06/21)