
Appeal Decision

Site visit made on 9 November 2021

by D.R McCreery MA BA (Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 07 DECEMBER 2021

Appeal Ref: APP/U5360/W/21/3273269

18 Ellingfort Road, Hackney, London E8 3PA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Avtone Property Ltd against the decision of the Council of the London Borough of Hackney.
 - The application Ref 2020/3373, dated 6 November 2020, was refused by notice dated 16 March 2021.
 - The development proposed is change of use of first floor to provide three flats.
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Decision

1. The appeal is allowed and planning permission is granted for change of use of first floor to provide three flats at 18 Ellingfort Road, Hackney, London, E8 3PA in accordance with the terms of the application Ref 2020/3373, dated 6 November 2020 and subject to the following conditions.
 1. The development hereby permitted must be begun not later than three years after the date of this permission.
 2. The development hereby permitted shall only be carried out and completed strictly in accordance with the submitted plans hereby approved and any subsequent approval of details.
 3. Prior to first occupation of the residential units approved a cycle parking plan shall be submitted to and approved in writing by the Local Planning Authority. The plan shall include details of numbers of cycle parking, layout, foundation, stand type and spacing. The development shall be carried out in accordance with the approved plan prior to occupation and shall remain so in perpetuity, and any storage spaces and stands must be kept in good working condition.
 4. Prior to first occupation of the residential units arrangements shall have been made to secure the development as a car-free development in accordance with a detailed scheme or agreement which shall have been approved in writing by the Local Planning Authority.

(Condition 4, continued). The approved scheme or agreement shall ensure that: no occupiers of the approved development shall apply for, obtain or hold an on-street parking permit to park a vehicle on the public highway within the administrative district of the Local Planning Authority (other than a disabled person's badge issued pursuant to section 21 of the Chronically Sick and Disabled Persons Act 1970 or similar legislation); and any occupiers of the approved development shall surrender any such permit wrongly issued or held. Such scheme or agreement shall be implemented prior to the occupation of the development hereby permitted and shall be retained and operated for so long as the use hereby permitted continues.

Procedural Matters

2. Planning law requires that applications for planning permission be determined in accordance with the development plan for the area, unless material considerations indicate otherwise. In this case, the development plan comprises the Hackney Local Plan (Local Plan) and the London Plan. The National Planning Policy Framework (the Framework) is a material consideration.
3. A unilateral undertaking was submitted under section 106 of the Town and Country Planning Act 1990 (s106). The s106 aims to make obligations relating to affordable housing and car free development. Following review of the s106 the Council identified concerns relating to confirmation of the Appellant's interest in the land and inconsistencies within the undertaking.
4. Notwithstanding the signed s106 being submitted at a late stage in the Appeal, the Appellant was given an opportunity to resolve these issues. This included submission of proof of legal interest in the land. The evidence relating to the Appellant's interest in the land shows a discrepancy between the land identified as the property to which the s106 relates (as indicated in the first schedule) and the extent of ownership shown on the title plan. As such, I do not have satisfactory evidence relating to the Appellant's interest in the land to conclude that the s106 would take effect in the manner intended. I am therefore unable to take the s106 into account in reaching a conclusion on this appeal.

Main Issues

5. The main issues are whether the proposal would:
 - result in the loss of office space that should remain available for that use;
 - satisfactorily accord with policy requirements relating to the provision of affordable housing.

Reasons

Loss of office space

6. The site is located within a Priority Office Area (POA) as defined by the Local Plan. The net loss of office floorspace would therefore be in conflict with Policy LP27(H). This conflict is not a matter in significant dispute between the Council and the Appellant. The Appellant, however, advances a number of considerations which are said to be material.
7. In relation to marketing, Policy LP27 makes no specific exception for marketing in relation to loss of office space in a POA. However, considering Paragraph 120 of the Framework around supporting the development of underutilised land and buildings, I am content that the outcome of a marketing exercise has the potential to be a relevant consideration.
8. Appendix A of the Local Plan provides an appropriate general basis on which to conduct such an exercise. However, I acknowledge that the bar for successful demonstration should be high given the clear position set out in Policy LP27(H).
9. Carefully considering the Appellant's site specific marketing evidence, including the two reports by different agents, I note that it was prepared having regard to the requirements of the Council's now superseded Development Management Plan. Notwithstanding this, the Council does not directly dispute the Appellant's claim that Appendix A of the Local Plan replicates the requirements of the old plan in respect of marketing.
10. The Council have not provided evidence to dispute much of the detail of the marketing evidence. I also have no reason not to accept the methodology adopted by the Appellant as being credible.
11. In relation to the extent of marketing, it is noted that the site has not been marketed for B2 (General Industry) or B8 (Storage and Distribution). Such uses would, in themselves, require an application for planning permission. They are managed under Policy LP28, as such their relevance in terms of policy relating to the POA is not clearly established in the evidence provided, other than forming part of a general mix of uses that might be regarded as 'employment led'.
12. The evidence provided does not demonstrate how the requirement to consider marketing for such uses would be reasonable under the terms of Appendix A. Further, given the upper floor location and general surroundings, the site specific evidence does not indicate to me that the site would be obviously suitable for such uses.
13. Carefully considering all the marketing evidence as a whole, I am satisfied that it is comprehensive and demonstrates a lack of demand for the site in its current use. Notwithstanding the location within a POA, I have some sympathy with the conclusion that the location of the site within a street that predominantly includes residential uses and is away

from clusters of other similar uses, is a contributing factor towards the absence of demand. Whilst the Covid pandemic may also have played its part, it is noted that some attempts to market the property also predate the pandemic.

14. I appreciate that the site is subject to an Article 4 Direction. This conveys greater control over changes of use by requiring a specific application for planning permission. Each proposal must then be assessed on its own merits. The existence of a Direction does not automatically mean that any proposal to change away from a use covered by it will be unacceptable in principle.
15. Overall, the evidence demonstrates a lack of demand for the site in its current use. This is a relevant consideration that should be given weight in this decision. Notwithstanding this, there is a degree of conflict with the development plan for the area arising from the lack of compliance with the requirements of Policy LP27 of the Local Plan due to the net loss of office floorspace and, by association, Policy LP26 which requires new development in designated employment areas to maximise employment floorspace in line with Policy LP27, and related policy in E1 of the London Plan.
16. As a more strategic and general policy, conflict with Policy GG5 of the London Plan is not fully demonstrated by the evidence.

Affordable housing

17. Policy LP13 of the Local Plan requires a payment in lieu of affordable housing for a development of the scale proposed. This requirement is subject to viability. Policy H4 of the London Plan says that Boroughs can require affordable housing contributions for minor housing development in accordance with Policy H2 on small sites. This is notwithstanding the position at paragraph 64 of the Framework that provision of affordable housing should not be sought for developments that are not major developments.
18. For the reasons explained elsewhere in this decision, I am unable to take account of the Appellant's s106 that includes obligations relating to affordable housing.
19. I have paid regard to the Appellant's viability evidence, prepared in support of the planning application's original position that no affordable housing contribution can viably be made. The Council have not submitted more detailed evidence to support their position that the scheme is capable of delivering a more policy compliant offer than proposed.

20. I am satisfied that the Appellant's evidence is in line with the approach set out in national guidance and have no reason to dispute its findings. Carefully considering this matter, the evidence provided successfully demonstrates that the proposal cannot viably make a contribution towards affordable housing.
21. As such, the proposal would satisfactorily accord with policy requirements relating to the provision of affordable housing. Consequently there is no conflict with policies H2 and H4 of the London Plan and Policy LP13 of the Local Plan which requires a payment in lieu of affordable housing for a development of the scale proposed, subject to viability.

Other Matters

22. Comments from Other Interested Parties that have been made both in support and objection to the proposed development are noted and have been considered, some are addressed elsewhere in this decision.
23. Highways impacts in terms of parking stress would be appropriately managed through a car free development condition, which can be the subject of an appropriately worded condition in this instance as discussed below. The proposal would be otherwise acceptable in relation to its effects on the highway.
24. The proposal would give rise to an additional element of mutual overlooking between the site and properties on the other side of the road. However, given the separation distances, urban nature of the area, scale of the development, and degree of mutual overlooking that already exists, any increase in the degree of overlooking (including from the small balconies) would be marginal and acceptable.
25. Due to the scale and nature of the proposed use and the urban nature of the surroundings, in normal anticipated use the proposal would not give rise to noise, light or other types of disturbance that would impact negatively on the living conditions of those occupying properties nearby.
26. Other matters raised have been considered but do not affect my conclusions on the main issues.

Conclusions

27. The proposed development would result in conflict with the development plan for the area arising, in particular Policy LP27(H) of the Local Plan relating to the net loss of office floorspace.
28. Whilst I acknowledge that LP27(H) sets a high bar due to the lack of specific exceptions built into the policy, the evidence presented is of sufficient depth to successfully demonstrate a lack of demand for the site in its current use. This is a material consideration.

29. Added to this are the benefits in terms of housing delivery. Whilst the contribution would be modest, it is important to acknowledge the addition that small and medium sized sites can make to meeting the housing requirement of an area. It is noteworthy that Policy H2 of the London Plan aims to significantly increase the contribution of small sites to meeting London's housing needs. The proposal would assist in meeting this objective.
30. Further, as the evidence indicates that the land is currently underutilised and that there is the potential to make more efficient use of it, the proposal would meet the ambitions of paragraph 120 of the Framework, including helping to meet identified needs for housing.
31. Weighing these matters, the material considerations attract sufficient weight to outweigh the degree of conflict with development plan policy. As such, for the above reasons and having regard to all other matters, I conclude that the appeal should be allowed.

Conditions

32. I will consider conditions by reference to the numbering in the attached schedule.
33. (2) is necessary in the interests of certainty. (3) is needed in order to promote more sustainable transport choices.
34. (4) is necessary in the interests of managing parking stress and responds to comments from third parties. I have considered the advice in national guidance on the use of such conditions¹. I am satisfied that exceptional circumstances exist for the condition. In particular, not using it would result in an unnecessary delay in the delivery of development over a matter of relatively low controversy. Such an outcome would be contrary to the proper planning of the area.
35. I have not included the Council's suggested condition relating to CHP and boilers. The evidence provided by the Council does not give sufficient justification for this condition, including interaction with other regulatory regimes.
36. Where used, I have amended the wording of the conditions suggested by the Council, as appropriate, in the interests of clarity and effectiveness.

D.R. McCreery

INSPECTOR

¹ Use of planning conditions - Paragraph: 010 Reference ID: 21a-010-20190723