



Appeal Decisions

Hearing held on 22 February 2022

Site visit made on 21 February 2022

by David Cliff BA Hons MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11/04/2022

Appeal A Ref: APP/M9584/W/20/3258321

55-69 Rothbury Road, London, E9 5HA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Goldcrest Land against the decision of London Legacy Development Corporation.
 - The application Ref 19/00537/OUT, dated 22 November 2019, was refused by notice dated 29 July 2020.
 - The development proposed is the demolition of the existing buildings and redevelopment for a development with a part basement/part 6/part 7 storey mixed use building to provide for 252.3m² B1 class and 28 residential units.
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Appeal B Ref: APP/M9584/W/20/3258322

55-69 Rothbury Road, London, E9 5HA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant outline planning permission.
 - The appeal is made by Goldcrest Land against the decision of London Legacy Development Corporation.
 - The application Ref 19/00538/OUT, dated 22 November 2019, was refused by notice dated 29 July 2020.
 - The development proposed is the demolition of the existing buildings and redevelopment for a development with a part basement/part 6 storey mixed use building to provide for 252.3m² B1 class and 25 residential units.
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Decision

1. Both Appeal A and Appeal B are dismissed.

Preliminary Matters

2. Both applications are in outline with matters of access, appearance, layout and scale being considered in the detail and with landscaping reserved for future consideration.
3. The descriptions used in the banner headings above are taken from the relevant planning application forms which are also repeated in the Statement of Common Ground. Prompted by discussion at the hearing, the main parties subsequently agreed and suggested revised descriptions for both schemes, though this has no bearing on the consideration of the main issue.
4. Completed and signed S106 unilateral undertakings for both schemes were submitted at the hearing. They include obligations relating to affordable housing, employment and training, transport and highways, sustainability, heritage fund, public realm and play space and design monitoring. Shortly

before the hearing, both main parties submitted statements setting out their respective positions on the content of the undertakings. I return to consider the undertakings in 'Other Matters' below.

5. I made an unaccompanied site inspection on the day before the hearing. In the light of the main issue under consideration for both appeals and the opportunity for me to already see the site and its surrounds on an unaccompanied basis, it was agreed with the main parties that in this case a further accompanied site inspection was not necessary following the hearing.
6. An agreed Statement of Common Ground was submitted on 17th February 2022 in advance of the hearing. Noting that some considerable time has elapsed from the Council's determination of the applications and the submission of the appeals, this sets out the current position of both parties, including those areas of viability where there remained disagreement. These areas of disagreement formed the basis of the discussion on viability at the hearing.

Main Issues

7. At the hearing, the London Legacy Development Corporation (LLDC) confirmed that its objection relates to the overall proportion of affordable housing proposed rather than the proposed mix of tenures.
8. The main issue for both Appeals A and B is therefore whether the proposed development would make satisfactory provision for affordable housing, taking account of the viability for each scheme.

Reasons

Background

9. Policy H5 of the London Plan 2021 ('the London Plan') and Policy SP2 of the LLDC Local Plan 2020 to 2036 ('the Local Plan') seek to maximise affordable housing delivery through a minimum 35% target. The Mayor of London's Affordable Housing and Viability Supplementary Planning Guidance 2017 ('the SPG') sets out a 'Viability Tested Route', including a standardised approach, for schemes that do not meet the 35% threshold.
10. The updated proposals for affordable housing provision have been confirmed as follows. For Appeal A (28 dwellings scheme) not less than seven units (25%) are proposed for affordable housing as shared ownership units. For Appeal B (25 dwelling scheme) not less than three units (12%) are proposed for affordable housing, also as shared ownership units.

Benchmark land value

11. The SPG states¹ that 'Existing Use Value plus' ('EUV+') is usually the most appropriate approach for planning purposes and that an alternative approach will only be considered in exceptional circumstances which must be robustly justified by the applicant. It goes on to say that where there is no existing implementable permission (as is now the case with both appeals) the approach should only be used if the alternative use would fully comply with development plan policies, and if it can be demonstrated that the alternative use could be implemented on the site in question and there is market demand for that use.

¹ Paragraphs 3.47 & 3.48

The applicant should also explain why the alternative use has not been pursued.

12. The Government's Planning Practice Guidance (PPG), which post-dates the SPG, also expresses a preference for the use of EUV+. It states that alternative use value (AUV) may be informative in establishing benchmark land value and that such alternative uses should be limited to those uses which would fully comply with up to date development plan policies.
13. There is agreement between the main parties that the commercial scheme used by the appellant to establish the AUV would be policy compliant. However, the commercial AUV takes the value of the land very significantly above both the Existing Use Value and an AUV based on a policy compliant mixed use scheme. Such a mixed use AUV is a helpful check for these appeals as it would generally accord with the outline planning permission for the wider Masterplan area. For both appeals this results in a positive residual land value and in both cases it leads to a significant uplift over and above the EUV. From the evidence before me it appears that the use of an alternative mixed use scheme in the assessment of benchmark land value would still provide a reasonable incentive for the developments to proceed.
14. Even if a scheme is policy compliant this does not necessarily mean that there is a reasonable likelihood of it being implemented. The appellant is primarily a residential developer and does not have an interest in implementing the wholly commercial scheme. Consequently, there is considerable doubt as to the likelihood of the alternative commercial scheme being implemented if the appeals are dismissed. The lack of a reasonable indication that a fully commercial scheme would be implemented on the site limits the weight I give to the argument that a landowner would not accept a valuation for the site that is lower than that derived from a fully commercial scheme.
15. The appellant has not provided an assessment of BLV using the EUV+ approach, rather its viability assessment is provided solely on the basis of an alternative commercial AUV approach. This is contrary to the approach set out in the PPG which says that EUV is the first component of calculating BLV.
16. There is a significant difference between the value of the site using the commercial AUV and its value using the EUV. It is also relevant that the value using the commercial AUV appears to be considerably higher than its value using a mixed use AUV. Although the PPG states that the AUV of the land may be informative in establishing the BLV, this does not necessarily mean that it should then automatically be used as the BLV in every case without further consideration, particularly having regard to the SPG that it will only be considered in exceptional circumstances. It is informative but it is not necessarily determinative.
17. Using EUV+ with a 30% premium has been reasonably demonstrated as capable of delivering a policy compliant amount of affordable housing. A 30% premium for these appeals on this site appears to be appropriate for context of this assessment and taking account of other developments. It falls at the top end of the 10%-30% range set out in the SPG². At this level it would follow the PPG which advises that the premium should provide a reasonable incentive for

² Paragraph 3.46

a landowner to bring forward land while allowing a sufficient contribution to fully comply with policy contributions.

18. Bearing in mind the preference for the use of EUV+ and guidance in the PPG that the use of AUV may be informative, there is not an overriding policy requirement in testing viability for the appellant's commercial highest value AUV scheme to be finally determinative in assessing BLV. In this case, I have given significant weight to the LLDS's suggested approach using EUV+ with a 30% premium and also its alternative mixed-use AUV approach, both of which could lead to greater proportions of affordable housing being able to be provided for both Appeal A and Appeal B. Considering all these matters, there is a reasonable potential that both schemes could provide further affordable housing than proposed helping to provide for a suitable number and range of homes to meet the needs of present and future generations, whilst still being viable to develop including a competitive return to the developer.
19. Although one the examples (Bombay Street) provided by the LLDC to support is EUV+ position is in a different Local Authority area, the schemes considered as a whole appear to be broadly comparable, whilst not benefiting from detailed extant consents. Notwithstanding the appellant's concern regarding a circular argument, the cross checks provided by the Council cast further doubt on the reasonableness of the appellant's AUV approach in these case.
20. I acknowledge that there are other schemes where the AUV has been used to determine the benchmark land value, including at the proposed development at Marshgate Business Centre, Stratford that was dismissed at appeal in 2020³. Each case needs to be considered on its merits and in that case the AUV was on the basis of open storage land and there was an extant scheme with a negative land value. Bearing in mind the guidance in the PPG that AUV may be informative, I do not consider it follows that its use on one site in the same Local Planning Authority area necessarily means that it can be used on another site with different circumstances. This example does not therefore change my conclusions on this matters for the current appeals.
21. Whilst I have had regard to the appellant's AUV position, the factors set out above considerably reduce the weight I have given to the appellant's approach in assessing viability, with particular regard to the assessment of benchmark land value.

Profit on market housing

22. The Local Plan viability assessment used a profit margin on market housing of 20% on Gross Development Value. The PPG states that a viability assessment submitted with a planning application should be based upon and refer back to the viability assessment that informed the plan. It goes on to say that the decision maker should have regard to all the circumstances in the case, including whether the plan and viability evidence underpinning the plan is up to date, and site circumstances including any changes since the plan was brought into force. The Local Plan viability study⁴ also acknowledged that individual schemes may require lower or higher profits, depending on site circumstances.
23. There is evidence from the LLDC of a range of schemes across London which have used profit margins of less than 20%, the majority being 17.5%. The

³ APP/M9584/W/20/3247968

⁴ Paragraph 4.36 of the LLDC Revised Local Plan Viability Study October 2018

verification of these schemes including details and outcomes is limited, although there are a good variety of developments included. They are all recent schemes (later than the Local Plan viability assessment), and are most likely to have been subject to similar considerations regarding uncertainty as the appeal proposals, including any uncertainty associated with Brexit. Reference is also made to an appraisal (by BNP Paribas) in July 2020 that did adopt a 20% figure for developer's profit noting the uncertainty and potential risks associated with Brexit and the pandemic.

24. Whilst both proposals include a basement, which is a fairly common feature of similar developments, the schemes do not seem to be of any exceptional risk that would justify a higher than normal profit figure. The Local Plan viability study acknowledged at the time that there was a degree of uncertainty about the future trajectory of house prices and therefore adopted a profit margin of 20% for testing purposes. Nevertheless, the evidence before me does not suggest that Brexit or the pandemic have had or are going to have such a significant effect on residential sales and values that would now justify the use of a higher profit figure for market housing in the assessment.
25. Consequently, for the proposed scheme I consider that a profit on market housing figure of 18% is more reasonable for the appeal assessments than the higher 20% figure. Given the circumstances of these cases, there is sufficient justification to differ from the Local Plan viability assessment which is three to four years old and at a higher level than the site specific assessment now required.
26. The implications for this are that Appeal A, using a 18% profit margin would appear to be capable of achieving a considerably increased level of affordable housing, although it would not make such a significant difference to the opportunity for affordable housing in Appeal B.

Professional fees

27. The appellant's figure of 12% of gross development value is based, and indeed reduced, from its own cost consultant's assessment of 13.5%. The Council's evidence includes several other developments in London that have used a lower 10% figure. These schemes are larger, though not particularly so, in three of the five cases, and provide a useful cross check to the appeal proposals.
28. The Local Plan viability assessment incorporates a 10-12% allowance for professional fees, which is at the middle to higher end of the scale for most schemes.
29. For the appeal cases, the development schemes are not particularly complex ones that might justify higher end professional fees. They relate to a single site with no significant off-matters such as highway arrangements to be considered. The Council has also shown that 10% fees have been used elsewhere. I acknowledge that much larger schemes might be ones where fees could be reduced given the overall value of such schemes and economies of scale, although they might also be sites which contain more complexities requiring additional professional input. Overall I give more weight to the Council's position that 10% fees would be appropriate for this scheme, though this in itself does not detract significantly from the weight to be given to the appellant's overall viability assessment for either scheme.

Conclusions on viability

30. The commercial AUV scheme results in a high benchmark land value that leads to a constrained affordable housing provision for both appeal schemes. The Council has demonstrated that an alternative mixed use scheme that generally accord with Masterplan outline permission would be capable of providing a greater proportion of affordable housing for both schemes. It has also reasonably demonstrated that the use of EUV+ with a premium of 30% would also be capable of providing a greater proportion of affordable housing.
31. From the evidence, in spite of the policy compliance, it is not certain whether the fully commercial scheme would be delivered, and it does not appear that the appellant seeks to do so. As a primarily residential developer, the appellant clearly has an interest in a residential led scheme. However, taking a balanced approach on viability, considering the great need for affordable housing and reflecting the relevant guidance, it appears from the evidence that the proposed schemes could be viably delivered with a greater proportion of affordable housing than currently proposed for both schemes and that there would still be reasonable incentive for the landowner to bring the land forward for development.
32. Furthermore, in the case of the Appeal A, given my conclusion on market housing profits, it appears to be possible for a policy compliant percentage of affordable housing to be provided even using the appellants AUV approach.
33. I therefore conclude that, for both Appeals A and B, the weight to be given to the appellant's viability assessment should be limited. Neither scheme proposes a policy compliant level of affordable housing. The PPG makes clear that viability should help to strike a balance between the aspirations of developers and landowners, in terms of returns against risk, and the aims of the planning system to secure maximum benefits in the public interest through the grant of planning permission. In this case it appears that both schemes are capable of providing greater affordable housing in the public interest whilst still being able to reasonably provide for the aspirations of the landowner/developer.
34. Both Appeals A and B would therefore be contrary to the aims, including to maximise the provision of affordable housing and to promote the creation of mixed and inclusive communities, of Policy H5 of the London Plan, SP2, H1 and H2 of the Local Plan, the SPG and the National Planning Policy Framework.

Other Matters

Planning obligations

35. As referred to above, unilateral undertakings have been submitted for both schemes. They would include provision for the delivery of affordable housing via the terms set out in the undertakings (notwithstanding my conclusions on viability above). They would also provide for matters relating to employment and training (including affordable workspace), transport and highways (including highways and bus service contributions), sustainability, heritage fund, public realm and play space and design monitoring.
36. The main parties disagreed on the proposed trigger for early review of viability. Although in outline, only landscaping is a reserved matter for both appeals which appears capable of relatively easy resolution given the limited opportunity for landscaping for this scheme. Furthermore, the proposals do not

appear to be particularly complex development schemes and are unlikely to require untypically difficult or complex matters needing to be resolved by the suggested conditions. Furthermore, the SPG notes that such mechanisms recognise the need to maximise the affordable housing provision and address the economic uncertainties which may arise over the lifetime of a development proposal. It is possible that a longer review trigger point would miss an opportunity for affordable housing to be maximised. Even with some uncertainty on matters such as supply chains or labour shortages, there is no such significant justification in this case to differ from the two year trigger point generally advocated by the SPG. I note the appeal decision⁵ at Westcliffe-on-Sea in 2019 but it is not clear that the circumstances in that case were the same or similar to those before me.

37. With regard to the proposed contributions in lieu, the LLDC has confirmed that it accepts the principle of an affordable housing contribution in lieu for Appeal A but not Appeal B on the basis of there being only three affordable housing units proposed. Policy H4 of the London Plan states that affordable housing should be provided on site and that it should only be provided as cash in lieu in exceptional circumstances. Whilst on-site provision would therefore need to be considered as the first and preferred option, the provision of a cascade mechanism is reasonable in the event that it is not possible for a Registered Provider to take on the affordable units. I do not have such information before me to consider the likelihood of this being an issue in this case.
38. Given my concerns regarding the appellant's viability assessments, the period between the completion of the undertakings six months following commencement of development along with potential changes in market conditions, it would be reasonable for an in lieu contribution to be determined by an independent expert.
39. With reference to the other provisions within the Undertakings, there are some where, whilst need in principle for a relevant contributions have been reasonably made out, it is not clear as to how certain contributions have been calculated. Several contributions, in spite of the lack of detail on how they have been formulated, are based pro-rata on the contribution secured in the Hackney Wick Master Plan, this being the case for the highways, bus service, heritage, local play area and youth play area contributions. In the case of the carbon offset contributions, relevant formula is provided in the Carbon Offset Supplementary Planning Document.
40. Whilst the cumulative impact of construction from different schemes would lead to justification for some mitigation it is not apparent how the figure of £10,000 for either scheme has been established. For employment and training, it is not apparent from the evidence how the figure of £16 per square foot has been calculated and therefore it is not clear that this figure is fair and reasonable.
41. Such gaps in the information before me, on the formulae for several of the relevant contributions and the figure for affordable floorspace, mean that it is not possible to properly consider whether they are fairly and reasonably related in scale and kind to the development. Nevertheless, given my overall conclusions on the appeal, this matter does not need to be taken further as part of these appeals.

⁵ APP/D1590/W/18/3196078

Benefits arising from the proposed schemes

42. Both proposals would make a notable contribution towards the supply of housing, including a good proportion of family sized units. This would include affordable housing, albeit not of the quantum sought by the development plan.
43. The 2021 Housing Delivery Test (HDT) results show a HDT measurement of 106%. This is an improvement over the 2020 HDT result (98%) and a very significant improvement over the 2018 result (52%). The forecast delivery against the adopted Local Plan housing target (5 years from monitoring year 2020/21) shows a shortfall up to and including 2022/23, although with subsequent significant surpluses in 2023/24 and 2024/25. The Framework also seeks to boost the supply of housing. In this context, the delivery of housing carries considerable weight in support of either proposal, although the policy breach with regards to affordable housing is itself significant taking account of the very considerable need for affordable housing. Although scheme A would provide for more affordable housing than scheme B, the shortfall is still significant and unjustified in both cases and represents a breach of the development plan to which I attached significant weight in both cases in the context of the great need for affordable housing.
44. The schemes would both provide an area of ground floor commercial workspace including affordable workspace that would lead to modest economic benefits. Further, albeit fairly limited economic benefits from either scheme would arise from council tax revenue and the new homes bonus. The proposals would also contribute to the wider regeneration of the masterplan area, including the provision of the open public 'yard' area as part of the schemes facilitating pedestrian access from Rothbury Road to White Post Lane. It is also likely that either scheme could be built out and occupied within a reasonably quick time frame.

Planning Balance

45. The delivery of appropriate levels of affordable housing is an important requirement in order to meet the demand for affordable housing and to create and sustain balanced communities. Given the shortfall of affordable housing below policy requirements and the limited weight I have given to the appellant's viability assessments, I consider that the developments would be contrary to the development plan when considered as a whole. Whilst the scheme would lead to several benefits, overall the benefits of the appeal proposals in either case would be outweighed by the significant harm that would arise from the conflict with the development plan.

Conclusion

46. Both the schemes proposed by appeal A and appeal B would be contrary to the development plan and there are no material considerations that indicate that the decisions should be taken other than in accordance with the development plan.

David Cliff

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Kevin Goodwin	KG Creative Consultancy
Nick Bignall	Turner Morum LLP
Alex Ground	Russell Cooke Solicitors

FOR THE LOCAL PLANNING AUTHORITY

Isabella Tafur of Counsel	Francis Taylor Building
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Anthony Lee	BNP Paribas
Sacha Winfield-Ferreira	BNP Paribas

DOCUMENTS SUBMITTED AT THE HEARING

1. LLDC Annual Monitoring Report (2020/2021) July 2021
2. Planning Practice Guidance extract on Viability
3. London Plan policy extracts
4. Local Plan policy extracts
5. LPA's erratum sheet to Statement of Case for 25 dwelling scheme
6. LPA's erratum sheet to Statement of Case for 28 dwelling scheme
7. LLDC Housing Delivery Test Results for 2018, 2020 and 2021
8. LPA's conclusions on viability and affordable housing matters
9. S106 planning obligation (3258321)
10. S106 planning obligation (3258322)

DOCUMENTS SUBMITTED AFTER THE HEARING

1. Updated agreed list of suggested planning conditions and description of development