
Appeal Decision

Site visit made on 21 July 2022

by Philip Major BA(Hons) DipTP MRTPI

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

Decision date: 29 July 2022

Appeal Ref: APP/D5120/W/21/3280060

Lord Kitchener Public House, Wrotham Road, Welling DA16 1LS

- 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 Lord Kitch Ltd against the Council of the London Borough of Bexley.
 - The application Ref: 21/00724/FULM, is dated 5 March 2021.
 - The development proposed is the change of use of the ground floor of the existing public house (sui generis) to retail (Class E) conversion of the existing first and second floor and the erection of a two storey (with accommodation in the roof) rear extension to form 19 apartments comprising of 10 x 2 bed and 9 x 1 bed apartments with associated car and cycle parking.
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Preliminary Matter

1. The above proposal is described as a resubmission of application reference 19/01997/FULM, which was approved in February 2021. This permitted development has been commenced and at the time I visited the site appeared to be nearing completion. The permitted scheme is bound by an Agreement pursuant to S106 of the 1990 Act which, amongst other things, requires the provision of 8 affordable housing units. The Appellant has now submitted information with the proposal before me which asserts that it is not possible to provide 8 affordable housing units as this would make the scheme unviable. Furthermore there is no interest from Registered Providers (RP) of affordable housing for 8 units at a price which could be acceptable. As an alternative the Appellant now indicates that only 2 affordable units could be viably provided on this site, and again no RP would entertain such a small number. Hence it is now proposed to offer an off-site contribution towards affordable housing, secured by a Unilateral Undertaking (UU) pursuant to S106 of the 1990 Act. No other provisions are included in the UU.
2. The premises are described as a public house, but that use has ceased. The building has been 'locally listed' as being of architectural and historic interest, though the approved scheme permitted the demolition of the rear section of the building. One of the reasons for permitting the changes was that the scheme would provide 8 much needed affordable homes. In the absence of the affordable element in the quantum agreed the Council is now less amenable to the loss of the rear extension. However this is now a moot point as the extension has been demolished and replaced with part of the permitted scheme.

Decision

3. The appeal is dismissed and planning permission for the change of use of the ground floor of the existing public house (sui generis) to retail (Class E) conversion of the existing first and second floor and the erection of a two storey (with accommodation in the roof) rear extension to form 19 apartments comprising of 10 x 2 bed and 9 x 1 bed apartments with associated car and cycle parking is refused.

Main Issue

4. The main issue in the appeal is;
Whether the proposed development would be acceptable with a lower quantum of affordable housing and whether the submitted Unilateral Undertaking is sufficient to address affordable housing and other provisions.

Reasons

5. It is worth pointing out here that the application made and now subject to this appeal is a stand-alone application and not an application to vary the previous permission. The proposal falls to be determined in the context of the London Plan, adopted in March 2021. The starting point for major housing development is that there is an objective to provide 50% on-site affordable housing. In the permitted and implemented scheme 42% of the units would be affordable. It seems to me that the Appellant must have taken the decision to proceed with that scheme in the knowledge that a change to the amount of affordable housing to be provided might not be forthcoming in the second, albeit otherwise the same, scheme.
6. I recognise that the viability exercises carried out for the Appellant and Council agree in most respects, but note that the Appellant has used a benchmark land value based on a scheme below the major housing development threshold. This seems to me to be an unusual step since it is clear that the intention was always to build out a larger scheme, as has happened. Nevertheless I have some sympathy with the Appellant in that it is clearly proving difficult to find interest from RPs who would take on the affordable housing required by the S106 Agreement.
7. I am informed that Policy H4 of the London Plan makes provision for off-site provision of affordable housing only in exceptional circumstances. I am not aware of what might be deemed to be exceptional circumstances, but accept that it could, in some cases, include the lack of viability of a particular scheme. But in this case a S106 Agreement was willingly entered into and the scheme has been implemented and largely completed.
8. The offered Unilateral Undertaking before me provides for a contribution to off-site affordable housing. It does not, as has been pointed out by the Council, make any other provisions. Be that as it may it seems to me that it would, in reality, be difficult to implement the scheme the subject of this appeal since the first, permitted, scheme is now so far advanced. Taking a reasonable and logical approach it is my judgement that the first scheme has been implemented to the extent that the S106 Agreement running with it must by now have taken effect. The terms of that Agreement are bound up with the development which has been implemented.

9. It seems to me that if I were to allow this appeal it would be difficult for the Appellant to argue that the first scheme had not been implemented, and that the development the subject of this appeal could now be implemented. That would be tantamount to giving retrospective planning permission. If the permitted scheme had been unviable with the requirements of its attendant S106 Agreement it begs the question as to why the development has been undertaken.
10. In any event, even if the appeal scheme was permitted and implemented, on the balance of probabilities I am not persuaded that the offered Unilateral Undertaking is sufficient in addressing the requirement for affordable housing on this site. There are no demonstrated exceptional circumstances which would justify an off-site contribution in this case. In addition, the Undertaking does not make the same provision for a carbon offset payment as required by policy, and as set out in the Council's appeal statement. The Appellant has not responded to the Council's concern in this respect. The Undertaking therefore fails to include measures which would make the development acceptable.
11. In summary, it is my judgement that the permitted scheme, which has been implemented, requires the provision of 42% affordable housing in accordance with its associated S106 Agreement. Given the fact that the scheme has reached an advanced stage of development it seems to me that the scheme before me could not reasonably be implemented. In any event it is my judgement that the offered Unilateral Undertaking is insufficient in its terms to make this proposal acceptable.
12. For the reasons given above I conclude that the appeal should be dismissed.

Philip Major

INSPECTOR