



Appeal Decision

Site visit made on 14 November 2022

by J Symmons BSc (Hons) CEng MICE

an Inspector appointed by the Secretary of State

Decision date: 13 March 2023

Appeal Ref: APP/Q5300/W/22/3294731 397 Cockfosters Road, Enfield EN4 0JS

- 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 under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Georgiou of 397 Cockfosters Homes Ltd against London Borough of Enfield.
 - The application Ref 21/00813 -VAR, is dated 3 March 2021.
 - The application sought planning permission for the redevelopment of the site and erection of part 2, part 3 storey building with lower ground level (basement) to provide 11 self contained flats with solar panels, terraces and balconies and associated landscaping and parking without complying with a condition attached to the planning permission granted by 20/00353/FUL, dated 24 February 2021.
 - The condition in dispute is No 2 which states that: Unless required by any other condition attached to this Decision, the development hereby permitted be carried out in accordance with the following approved plans and documents: PA01 Existing Site Plan; PA02 Site Photographs; PA03 Site Survey; PA04 Existing Floor Plans; PA05 Existing Elevations; PA06 Existing Street Scene; PA09 Combined Proposed Plans; PA10A Proposed Lower Ground Floor Plan; PA11A Proposed Ground Floor Plan; PA12 Proposed First Floor Plan; PA13 Proposed Second Floor Plan; PA14 Roof Plan; PA20 Proposed Front Elevation (East); PA21A Proposed Side Elevation (North); PA22A Proposed Rear Elevation (West); PA23A Proposed Side Elevation (South); PA24 Proposed Detail (Front); PA25 Proposed Detail (Rear); PA30A Proposed Sections; PA40A Proposed Street Elevations and Precedents; Design and Access Statement; Daylight Report; Ecology Report; Basement Impact Assessment; Construction Traffic Management Plan; Bat Survey Demolition Statement; SUDs Strategy; Borehole Log report; Site Waste Management Plan; Arboricultural Impact Assessment; Arboricultural Method Statement; 0987.001A Tree Planting Strategy; Planning Statement; Energy Statement; Transport Statement and TRICs Data.
 - The reason given for the condition is: In the interest of proper planning and for the avoidance of doubt.
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Decision

1. The appeal is allowed and planning permission is granted for redevelopment of the site and erection of part 2, part 3 storey building with lower ground level (basement) to provide 11 self contained flats with solar panels, terraces and balconies and associated landscaping and parking at 397 Cockfosters Road, Enfield, EN4 0JS in accordance with the application, Ref 21/00813 -VAR, dated 3 March 2021, without compliance with condition 2 set out in planning permission Ref 20/00353/FUL, dated 24 February 2021 subject to the conditions set out in the attached Schedule.

Applications for costs

2. An application for costs was made by Mr Georgiou of 397 Cockfosters Homes Ltd against London Borough of Enfield, which is the subject of a separate Decision.

Preliminary matters

3. I noted on my site visit that the development, including the proposed internal changes, had already commenced and this appeared to be in accordance with the submitted revised drawings. I have considered the appeal based on these revised drawings.

Background and main issue

4. The appeal site has planning permission, reference 20/00353/FUL, for 11 residential flats. This was subject to a planning agreement under section 106 of the Town and Country Planning Act 1990 (TCPA) (section 106) which provided an affordable housing contribution. This contribution was agreed by the parties through a viability assessment.
5. The appeal relates to amendments to the above previously approved scheme. The amendments consist of a modest enlarging of the rear internal sections of Flats 1 and 2 on the lower ground level (basement). The changes are within the underground section of the flats and do not affect the number of beds/occupancy, living conditions or appearance of the property. The application seeks to revise condition 2 by replacing the approved floor layout drawings PA09 'Combined Proposed Plan' and PA10A 'Proposed Lower Ground Floor Plan' with drawings 2012-100-001 'Proposed Combined Proposed Plans' and 2012-100-100 'Proposed Lower Ground Floor'.
6. The Planning Practice Guidance (PPG) states that a section 73 can be used to vary or remove conditions associated with a planning permission. It indicates that one of the uses of this is to seek a minor material amendment, where there is a relevant condition that can be varied.
7. There is no statutory definition of a 'minor material amendment', but the PPG advises that it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from that which has been approved.
8. The section 73 was accompanied by two signed section 106 Unilateral Undertakings (UUs) for a revised affordable housing contribution. The revised contribution is based on a viability assessment using updated cost data. The Council has reviewed the UUs and confirmed that should I allow this appeal the UUs would be acceptable subject to it seeing updated title documents. Updated title documents were issued to the Council and no adverse comments have been received. I am satisfied that the UUs would be sufficient and appropriate subject to the consideration of the main issue set out below.
9. Within a section 73 the Council must only consider the question of the conditions. However, the PPG states that if the original permission was subject to a planning obligation, then this may need to be the subject of a deed of variation. Further to this, through the High Court judgement, *Norfolk Homes Limited v North Norfolk District Council & another* [2020] EWHC 2265 (QB) (Norfolk Homes Case), where relevant and applicable a fresh, or indeed the

application of an existing planning obligation, could accompany a section 73. The judgement also found that both the section 73 and the need for any planning obligation and its terms, should be considered at the date of the permission.

10. While the Council considers that the Norfolk Homes Case makes no difference to the points being raised in this appeal, it provides little detail or substantive evidence of why this should be the case and why the section 106 cannot be revisited if there are changes related to the section 73. Within this decision I have therefore considered the submitted revised section 106.
11. The proposed change to the development would be a minor material amendment which would necessitate the drawings listed under condition 2 of the consented scheme to be amended. As such the application fulfils the requirements of a section 73 and is therefore appropriate. Furthermore, it is necessary to provide a planning obligation, and in accordance with the PPG and the Norfolk Homes Case, this can be revisited.
12. Further to the Council questioning the suitability of the section 73 for the proposed condition 2 change, it also contends that the financial quantum of the new section 106 affordable housing contribution is not appropriate. Consequently, the main issue is whether or not varying condition 2 would provide an appropriate affordable housing contribution.

Reasons

13. In terms of the appropriateness of an obligation, paragraph 55 of the National Planning Policy Framework 2021 (the Framework) states that planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition. In addition, Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (CIL Regulation) advises that planning obligations must only be sought where they meet all of the following tests: a) necessary to make the development acceptable in planning terms; b) directly related to the development; and c) fairly and reasonably related in scale and kind to the development.
14. In relation to the consented scheme, an affordable housing contribution in accordance with Policy CP3 of the Enfield Plan Core Strategy 2010-2025 (CS) and Policy DMD1 of the Enfield Development Management Document 2014 (DMD) was applicable. A standard viability methodology, based on the Homes and Communities Agency (HCA) Economic Assessment Toolkit and appraised using ARGUS software, was used to calculate the contribution (Ref: Review of 'Affordable Housing Viability Assessment' 397 Cockfosters Road, Barnet, EN4 0JS Draft Report dated November 2021) and this was used in part to agree a contribution of £450,750 by the parties. It is noted that the viability assessment was based on incomplete information in relation to the site value benchmark.
15. In broad terms the viability methodology considers the difference between the total development value and total costs, and this is used to define the available affordable housing contribution. As such any change in cost or value of the development would potentially change the contribution calculation. This therefore establishes a cost link between development changes and the affordable housing contribution.

16. In accordance with the affordable housing policies, the PPG and the High Court judgement, should the condition be varied, an affordable housing contribution would be necessary. Furthermore, its quantum could be revisited and be based on up-to-date cost data. The Council's viability assessor, BNP Paribas Real Estate has, using the same methodology as the consented scheme, confirmed a revised contribution (Ref: Review of 'Affordable Housing Viability Assessment' 397 Cockfosters Road, Barnet, EN4 0JS Final Report dated February 2022). This concluded that the affordable housing contribution would be £13,838.
17. In revisiting the viability assessment the Council questions the appellant's reasoning for the amendments to the flats and disputes some of the new costs as not being directly linked to the proposed change. However, little evidence is provided showing why these costs are not applicable. Moreover, the Council has not raised any concerns regarding the suitability of using the same viability methodology as the consented scheme or that the level of contribution is contrary to the affordable housing policies. Furthermore, its viability assessor has not raised any concerns regarding the updated costs. There is therefore no evidence that the methodology, costs or contribution applied to the section 106 are not applicable or appropriate. On this basis I see no reason to question the viability assessment or the revised affordable housing contribution.
18. The Council contend that it placed significant weight on the affordable housing contribution when weighing up the planning balance of the development in making its original decision. However, little substantive evidence that it did identify any other harm resulting from the proposal that should have necessitated a planning balance in which the amount of affordable housing contribution would be weighed against any such harm has been provided. Similarly, little substantive evidence to demonstrate that the revised obligation is not in accordance with the affordable housing policies has been submitted.
19. It is understood that a separate planning application for the development with the changes identified in the section 73 has been submitted. This was subsequently refused based on the lower affordable housing contribution which was attributed to increased cost associated with the basement size change. However, the basis of this decision has not been provided and I therefore give it little weight in my decision which I have determined on its own merits.
20. In conclusion, I find no reason why the new section 106 affordable housing contribution should not be applied to the section 73. Furthermore, having had regard to the revised viability assessment, the proposed change to condition 2 would deliver an affordable housing contribution which would be in accordance with Policy CP3 of the CS and Policy DMD1 of the DMD.
21. On the above basis, I am satisfied that the UUs provided are complete and in accordance with the tests for planning obligations set out in CIL Regulations in that they are necessary to make the development acceptable in planning terms, are directly related to the development and are fairly and reasonably related in scale and kind to the development.

Other Matters

22. Interested party representations raised concerns regarding the effect of the changes on existing and future occupant's living conditions and the level of traffic. However, the consented scheme was found to be acceptable in terms of space standards and the changes proposed increase space at the rear of Flats 1

and 2. Furthermore, as the changes also do not affect occupancy of the flats, there is no evidence of likely change to vehicle, cycle or pedestrian numbers from the original decision which I have no substantive basis to find differently on. As such, there is no reason why I should conclude any differently from the previous decision in these regards.

Conditions

23. The guidance in the PPG makes clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. As the original development has started, there is no need to impose a time limit condition. I have therefore renumbered the subsequent conditions accordingly. I have included the new condition 1 with the revised drawing references. I have removed the tailpiece clauses on condition 2, 15 and 24 as any changes to the units, water consumption or obscured glass should follow the proper planning process. A minor text change to Condition 28 is included for certainty of implementation.
24. Furthermore, as the Council has not confirmed which conditions have been discharged, I cannot be sure about the status of the conditions imposed on the original planning permission. I have therefore imposed all that I consider remain relevant. I have included a strict timetable for compliance on renumbered conditions 3, 5, 6, 8, 10, 13, 14, 15, 16, 17, 27 and 28 because this permission is being granted retrospectively and to ensure that the required details are submitted for approval and then accordingly implemented so as to make the development acceptable in planning terms. In the event that the conditions have in fact been discharged or parts of the development occupied, this is a matter which can be addressed by the parties.

Conclusion

25. For the reasons given above the appeal should succeed. I will grant a new planning permission without the disputed condition 2 but substituting it with a new revised drawing condition 1 and subject to the revised conditions set out in the attached schedule.

J Symmons

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) Unless required by any other condition attached to this Decision, the development hereby permitted be carried out in accordance with the following approved plans and documents:
 - PA01 Existing Site Plan
 - PA02 Site Photographs
 - PA03 Site Survey
 - PA04 Existing Floor Plans
 - PA05 Existing Elevations
 - PA06 Existing Street Scene
 - 2012-100-001 Proposed Combined Proposed Plans
 - 2012-100-100 Proposed Lower Ground Floor
 - PA11A Proposed Ground Floor Plan
 - PA12 Proposed First Floor Plan
 - PA13 Proposed Second Floor Plan
 - PA14 Roof Plan
 - PA20 Proposed Front Elevation (East)
 - PA21A Proposed Side Elevation (North)
 - PA22A Proposed Rear Elevation (West)
 - PA23A Proposed Side Elevation (South)
 - PA24 Proposed Detail (Front)
 - PA25 Proposed Detail (Rear)
 - PA30A Proposed Sections
 - PA40A Proposed Street Elevations and Precedents
 - Design and Access Statement
 - Daylight Report
 - Ecology Report
 - Basement Impact Assessment
 - Construction Traffic Management Plan
 - Bat Survey
 - Demolition Statement
 - SUDs Strategy
 - Borehole Log report
 - Site Waste Management Plan
 - Arboricultural Impact Assessment
 - Arboricultural Method Statement
 - 0987.001A Tree Planting Strategy
 - Planning Statement
 - Energy Statement
 - Transport Statement and TRICs Data
- 2) The development hereby approved shall only be laid out as 11 flats (2 x 1-bed, 7x 2-bed and 2 x 3-bed) as shown on Drawing Nos. 2012-100-001, PA11, PA12 and PA13. There shall be no deviation from the number, size or mix of units from that approved.
- 3) Within 3 months of the date of this decision details of the external finishing materials to be used shall be submitted in writing to the Local Planning Authority for approval. A schedule of materials and their use in the approved scheme is required and samples made available on site. A photograph showing all samples to be inspected must be submitted. The development shall be constructed in accordance with the approved details.

- 4) Details of any external lighting to be provided including the design, height and siting shall be submitted to the Local Planning Authority prior to installation. In addition, details regarding how the external lighting scheme has been designed to minimise light spillage and its impact on wildlife shall be submitted to and approved in writing by the Local Planning Authority. The external lighting shall be provided prior to the occupation of the first residential unit and maintained at all times thereafter.
- 5) Within 3 months of the date of this decision the surfacing materials to be used within the development including footpaths, access roads and parking areas and road markings shall be submitted in writing to the Local Planning Authority for approval. The surfacing shall be carried out in accordance with the approved detail before the development is occupied or use commences.
- 6) Within 3 months of the date of this decision plans detailing the existing and proposed ground levels including the levels of any proposed buildings, roads and/or hard surfaced areas shall be submitted in writing to the Local Planning Authority for approval. The development shall be carried out in accordance with the approved details.
- 7) The site shall be enclosed in accordance with details to be submitted to and approved in writing by the Local Planning Authority. The means of enclosure shall be erected in accordance with the approved detail before the development is occupied.
- 8) Within 3 months of the date of this decision details and design of the secure and fully enclosed cycle parking identified on drawing PA11 shall be submitted in writing to the Local Planning Authority for approval. The development shall be carried out in accordance with the approved details before it is occupied, and the facility retained for the life of the building.
- 9) Prior to occupation of the development the electric vehicle charging points identified on drawing PA11 shall be installed and thereafter permanently maintained for the lifetime of the development.
- 10) Within 3 months of the date of this decision details (inclusive of elevational treatment) of the refuse storage / recycling facilities shall be submitted to the Local Planning Authority for approval in writing. The facilities shall be constructed in accordance with the approved detail prior to first occupation.
- 11) The development shall be carried out in accordance with the energy saving measures identified in the submitted energy statement (dated June 2018).
- 12) The development shall be carried out in accordance with the submitted Sustainable Drainage Strategy (revision C) dated July 2018.
- 13) Having regard to condition 12, within 3 months of the date of this decision, detailed designs, including cross sections and specifications, of the proposed SUDs measures to be incorporated in the development as identified in the approved SUDs Strategy and which shall include source

control SuDS measures used upstream of the detention basin shall be submitted in writing to the Local Planning Authority for approval. The development shall be carried out in accordance with the approved details.

- 14) Within 3 months of the date of this decision details of the internal consumption of potable water shall be submitted in writing to the Local Planning Authority for approval. Submitted details will demonstrate reduced water consumption through the use of water efficient fittings, appliances and recycling systems to show consumption equal to or less than 105 litres per person per day. The development shall be carried out strictly in accordance with the details so approved and maintained as such thereafter.
- 15) Within 3 months of the date of this decision full details of the landscape proposals (including the size and specification of a minimum of 5 new trees to be planted as indicated on drawing PA11) shall be submitted in writing to the Local Planning Authority for approval.
Details shall include:
- a. Planting plans;
 - b. Written specifications (including cultivation and other operations associated with plant and grass establishment);
 - c. Schedules of plants and trees, to include native, wildlife friendly species and large canopy trees in appropriate locations (noting species, planting sizes and proposed numbers/densities);
 - d. Implementation timetables;
 - e. Wildlife friendly plants and trees of local or national provenance; and
 - f. How the landscaping conforms with the Drainage Strategy.
- All landscaping in accordance with the approved scheme shall be completed/planted during the first planting season following practical completion of the development hereby approved. The landscaping and tree planting detail shall set out a plan for the continued management and maintenance of the site. Any planting which dies, becomes severely damaged or diseased within five years of completion of the development shall be replaced with new planting in accordance with the approved details or an approved alternative and to the satisfaction of the Local Planning Authority.
- 16) Within 3 months of the date of this decision a demolition works method statement agreed between an appropriately qualified ecologist and demolition contractor shall be submitted in writing to the Local Planning Authority for approval. Demolition works shall be undertaken under the supervision of an appropriately qualified ecologist [full member of IEEM and or a Natural England Bat licence holder with experience of supervising demolitions where there is a risk of bats being present] following the approved method statement which shall include the careful removal of tiles by hand, and the procedure to follow should bats or signs of bats be found. If evidence of a bat roost is found works shall cease until a licence from the Statutory Nature Conservation Organisation for development works affecting bats has been obtained and a copy submitted to and approved in writing by the Council.
- 17) Within 3 months of the date of this decision details of the siting and number of bat bricks/tiles and bird bricks/tubes/boxes designed into and around the new building and trees, under the supervision of a suitably

qualified ecologist, shall be submitted in writing to the Local Planning Authority for approval. Confirmation of installation, prior to first occupation, together with accompanying photographic evidence shall be submitted to the Local Planning Authority.

- 18) All areas of trees, hedges, scrub or similar vegetation where birds may nest which are to be removed as part of the development, are to be cleared outside the bird-nesting season (March - August inclusive) or if clearance during the bird-nesting season cannot reasonably be avoided, a suitably qualified ecologist will check the areas to be removed immediately prior to clearance and advise whether nesting birds are present. If active nests are recorded, no vegetation clearance or other works that may disturb active nests shall proceed until all young have fledged the nest.
- 19) The development shall be carried out in accordance with the submitted Site Waste Management Plan (Ref: 19180BR/swmp-001/RS/WM) dated February 2020.
- 20) Prior to the occupation of the development, details for the provision of a communal television system/satellite dish shall have been submitted to and approved in writing by the Local Planning Authority. The development shall be undertaken in accordance with the approved detail.
- 21) Prior to the occupation of the development, and notwithstanding the privacy screen details indicated on the submitted plans, full details of the proposed privacy screens for all the flats shall be submitted to and approved in writing by the Local Planning Authority. For the ground floor terraces this shall include details of the height of the screens relative to neighbouring land levels and boundary treatments.
- 22) Prior to the occupation of the development, a communal garden management and maintenance plan shall be submitted to and approved in writing by the Local Planning Authority. The requirements of the management and maintenance plan shall be implemented following occupation of the development and shall continue to operate for the lifetime of the development.
- 23) The glazing serving the flank elevations of the development hereby permitted shall be fixed shut and in obscured glass with an equivalent obscuration as level 3 on the Pilkington Obscuration Range unless 1.7m above internal floor level.
- 24) The area annotated as 'permeable paving - maintenance access only' on drawing PA11 and PA22A shall only be used for the identified purpose and at no time shall it be used for general access or for amenity purposes.
- 25) The parking area(s) forming part of the development shall only be used for the parking of private motor vehicles and shall not be used for any other purpose.
- 26) The development hereby approved shall be carried out fully in accordance with the submitted Construction Traffic Management Plan.

- 27) The development shall be constructed so as to provide sufficient air-borne and structure-borne sound insulation against externally generated noise and vibration. This sound insulation shall ensure that the level of noise generated from external sources shall be no higher than 35 dB(A) from 7am - 11pm in bedrooms, living rooms and dining rooms and 30 dB(A) in bedrooms from 11pm - 7am measured as a LAeq,T. The LAF Max shall not exceed 45dB in bedrooms 11pm - 7am more than 10 times during the night time period. Within 3 months of the date of this decision a scheme for mitigation measures shall be submitted in writing to the Local Planning Authority for approval. The scheme of mitigation shall include mechanical ventilation where the internal noise levels exceed those stated in BS8233: 2014 with the windows open. The approved mitigation scheme shall be implemented in its entirety before any of the units are occupied/the use commences.
- 28) Within 3 months of the date of this decision a Construction Management Plan, written in accordance with the Mayor of London's supplementary planning guidance 'The Control of Dust and Emissions During Construction and Demolition' detailing how dust and emissions will be managed during demolition and construction work shall be submitted to the Local Planning Authority for approval. The approved Construction Management Plan shall be fully implemented for the duration of any demolition and construction works.
- 29) All Non-Road Mobile Machinery (NRMM) of net power of 37kW and up to and including 560kW used during the course of the demolition, site preparation and construction phases shall comply with the emission standards set out in chapter 7 of the GLA's supplementary planning guidance "Control of Dust and Emissions During Construction and Demolition" dated July 2014 (SPG), or subsequent guidance. Unless it complies with the standards set out in the SPG, no NRMM shall be on site, at anytime, whether in use or not, without the prior written consent of the Local Planning Authority. The developer shall keep an up to date list of all NRMM used during the demolition, site preparation and construction phases of the development on the online register at <https://nrmm.london/>.