

Appeal Decision

Site visit made on 13 February 2023

by A Parkin BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 March 2023

Appeal Ref: APP/U5360/W/20/3259190

51A Kenninghall Road, Hackney, London E5 8BS

- 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 Mr Chris Wallace against the Council of the London Borough of Hackney.
 - The application Ref 2020/1467 is dated 15 May 2020.
 - The development proposed is described as the erection of one 4 storey building over lower ground, upper ground, first and second floor levels and one 2 storey building over ground and first floor levels providing a total of five residential units (one 4-beds, one 3-beds and three 2-bed) (Use Class C3); erection of a single-storey building at ground floor level in front (southwest) part of site to provide employment space (Use Class B1); associated external works including excavation of lightwells, provision of refuse, recyclables and bicycle storage, landscaping and boundary treatments; and reinstatement of vehicle crossover.
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Decision

1. The appeal is dismissed.

Applications for costs

2. An application for costs was made by Mr Chris Wallace against the Council of the London Borough of Hackney. This application is the subject of a separate Decision.

Preliminary Matters

3. The Council of the London Borough of Hackney was subject to a cyber-attack in 2020, which, amongst other things, resulted in the loss of many documents associated with the application that was subject to this appeal. After a significant period of time and following considerable communication between the Planning Inspectorate and the main parties, the appeal was validated and commenced.

Main Issues

4. The main issues are the effect of the proposed development on:
 - The character and appearance of the area;
 - The living conditions of nearby occupiers with particular regard to natural light and outlook;
 - Affordable housing provision; and,

- Transport and carbon emissions.

Reasons

Character and appearance

5. The Appeal site is on the northern side of Kenninghall Road and is currently occupied by a commercial garage that undertakes vehicle servicing and repairs. The site is predominantly hard-surfaced land used for the storage of vehicles and associated equipment, with a chain link fence by the front boundary.
6. There are two buildings, a single storey building with a shallow, mono-pitched roof next to the boundary with 51 Kenninghall Road, and a larger scale, rendered building with a shallow, dual-pitched roof, towards the rear of the site. This building was being used as a workshop at the time of my visit and attached to its rear was a smaller scale brick extension, providing access to an alleyway leading to Brooke Road.
7. The alleyway is positioned to the rear of the traditional terraced houses on Nightingale Road, to the west of the appeal site, and next to the landscaped grounds to the rear of a 4-storey block of flats. At the time of my visit the alleyway was being used as a vehicle parking area, with rubbish and materials also stored on the ground near to the appeal site.
8. Kenninghall Road contains a mix of building types and sizes; to the east of the appeal site are 3-storey buildings, which are described as Victorian villas by the Council and are said to be locally listed. The third storey is a Mansard roof, and the properties also include basement rooms and have small front and somewhat larger rear gardens.
9. To the rear of these buildings is a short terrace of contemporary 2-storey brick dwellings, to the east of the existing rear workshop building, and backing onto the aforementioned landscaped grounds of the block of flats.
10. On the southern side of Kenninghall Road are somewhat larger scale 3-storey terraced buildings, one of which is used as a school. There are mature trees in the front garden areas of these terraced properties.
11. The appeal proposal seeks to replace the existing garage use with a mixed-use development comprising office and residential space. The proposed office building would be a single storey brick structure, with an irregular dual-pitched roof, located at the front of the appeal site near to the rear gardens of the dwellings on Nightingale Road. It would have separate access, refuse and bicycle storage to the residential accommodation, albeit the residential bicycle store would be accessed from the pathway to the office building.
12. There would be two residential buildings, the largest of which would also be at the front of the appeal site, and would be three storeys in height, including a lower ground floor, and with a set-back, flat-topped standing seam roof providing further accommodation space. This would be of a similar height to the next door Victorian villas.
- ~~13.~~ Between this building and 51 Kenninghall Road would be a passageway providing access to the rear of the site where a smaller scale 2-storey building would be

located, in a generally similar position to the existing workshop building, with single storey elements at the front and rear.

14. This is a predominantly residential area and the existing garage use is somewhat incongruous in the streetscene. I note the planning history of the site and the similarities with the appeal proposal and the previously refused scheme¹, together with the revisions that were made in seeking to address the Council's concerns.
15. Some aspects of the appeal proposal that the Council has objected to, in particular the design, scale, massing and position of the rear building are unchanged from those contained in the previous scheme and which the Council did not previously object to. Whilst the development plan and national planning policy have changed in the interim, it is not immediately clear why this would cause such a significant change in position from the Council.
16. I also note the advice the Council has provided to the appellant prior to the appeal being made, in which the design of the proposal was said to be acceptable. Whilst such advice is not binding upon the Council, it is not helpful for the Council to have changed its position at appeal and not to have explained the reasons for the change.
17. In any event, I am satisfied that the design, scale, massing and layout of the proposed development would be an improvement on the existing garage use and would respond positively to this constrained infill site.
18. The design of the proposed office building provides some visual interest to this part of the street. It would be seen in the context of both the existing rear outriggers and the proposed residential building, and its scale, design and materials would relate to both.
19. There is a clear physical separation between the proposed front residential building and the next door building at 51 Kenninghall Road, both of which would be of a similar scale. The design and set-back position of the proposed roof has regard to the design and position of the Mansard roofs on the Victorian villas to the east.
20. Whilst the proposed roof would be set back a greater distance from the western elevation than the east, and so would not be symmetrical, this would only be noticeable in views from directly opposite the building.
21. In such views, the proposed residential building would be seen together with the smaller scaled and differently designed office building, as well as the rear of the buildings on Nightingale Road and the Victorian villas on Kenninghall Road. The proposed buildings would not be symmetrical or balanced additions to the streetscene but would respond to neighbouring buildings and the site. Given this, the limited degree of asymmetry at roof level on the proposed residential building would not be significant.
22. The rear building would be visually acceptable and its design, scale and massing would complement the existing short terrace of contemporary dwellings located to the east.
23. The proposed bicycle and refuse stores would be visible from Kenninghall Road behind the 1.2 metre high boundary wall. The appellant has provided only limited

¹ LPA Ref. 2019/1986

information regarding the appearance of these stores, and the proposed office bicycle store and the proposed residential refuse store are not shown on the elevation drawing, or the computer generated images. These are visually prominent features and it is unclear why the appellant has omitted to show them. Nevertheless, I am satisfied that requiring the approval of details of all refuse and bicycle stores, by a condition attached to any grant of planning permission, would address this matter, were the appeal to be allowed.

24. For these reasons, the proposed development would have an acceptable effect on the character and appearance of the area. It would, therefore, accord with Policies LP1 (design quality and local character), LP14 (meeting housing needs and locations for new homes), LP17 (housing design) and LP42 (walking and cycling) of the Hackney Local Plan 2033 (the HLP); with Policies D3 (optimising site capacity through the design-led approach), D4 (delivering good design), and D6 (housing quality and standards) of the London Plan 2021², and with chapter 12 (achieving well-designed places) of the National Planning Policy Framework 2021 (the Framework), in this regard.

Living conditions of nearby occupiers - natural light and outlook

25. The appellant has submitted a Daylight Sunlight Assessment (DSA) to assess the effects of the proposal on the living conditions of nearby occupiers. There is acknowledged to be a minor error in the modelling upon which the DSA is based, which is said to increase the amount of shading from the proposed development but does not alter the conclusion of this part of the DSA that the proposal would not meet the BRE guidance level by a small amount. This has not been disputed by the Council.
26. I note the revisions to the appeal scheme from the previous scheme, to reduce the effects of overshadowing on neighbouring gardens, particularly the rear garden at 68 Nightingale Road.
27. Whilst the proposal would increase shading in the gardens of 68 Nightingale Road and 51 Kenninghall Road in particular, and in other nearby gardens to a lesser extent, the effects will vary with the seasons.
28. This is a constrained infill site, where redevelopment would almost certainly lead to some level of natural light disruption. Paragraph 125 c) of the Framework advises that a flexible approach to the application of policies or guidance relating to daylight and sunlight should be taken, where they would otherwise inhibit making efficient use of a site. In this case, I do not consider the increased shading of gardens to be so significant as to warrant a refusal of planning permission.
29. The Council is concerned that the scale and massing of the rear residential building would result in an overbearing appearance when seen from the rear of the properties on Kenninghall Road.
30. The design, scale, massing and position of the rear building are unchanged from the previous proposal, which the Council did not object to. Whilst the scale and massing of the rear residential building would be slightly greater than that of the individual properties in the nearby short terrace, this would be a marginal difference. Together with the distance and position of the proposed rear building

² Spatial Development Strategy for Greater London 2021

from the Victorian villas on Kenninghall Road, this would not cause harm to nearby occupiers.

31. On balance, I am satisfied the proposed development would have an acceptable impact on the living conditions of nearby occupiers, with particular regard to natural light and outlook. Consequently, it would accord with Policies LP1, LP2 (development and amenity), LP14, and LP17 of the HLP; with Policies D3, D4, and D6 of the London Plan 2021, and with chapter 12 of the Framework, in this regard.

Affordable housing provision

32. The Council refers to Policy LP13 (affordable housing) of the HLP, which seeks to maximise opportunities for the supply of genuinely affordable housing, subject to viability and site context. Policy LP13 requires proposals that are not major developments³, such as the appeal proposal, to provide on-site provision or payments in lieu up to the equivalent of 50% of housing delivered as affordable housing, subject to viability.
33. However, Policy LP13 conflicts with Paragraph 64 of the Framework, which states that the provision of affordable housing should not be sought for residential developments that are not major developments, other than in designated rural areas.
34. With reference to Paragraph 219 of the Framework, due weight should be given to development plan policies according to their consistency with the Framework, the greater the consistency, the greater the weight. There is a substantial inconsistency between the Framework and Policy LP13, which would, all things being equal, mean that the weight afforded to the policy would be very limited.
35. Nevertheless, the wording of Paragraph 63 of the previous 2019 and 2018 versions of the Framework, is substantively the same as Paragraph 64 of the current Framework, and so it is very likely that this inconsistency was considered in the preparation and examination of the HLP.
36. The supporting text to Policy LP13, and Section 2 of the s106 Planning Contributions Supplementary Planning Document July 2020 (s106SPD) briefly set out why the provision of affordable housing is particularly important in Hackney. Median house prices were more than 15 times median incomes in 2017 and there is said to be a need for 26,250 new homes over the plan period, with around 92% of this need being for affordable housing.
37. The s106SPD states that the HLP includes a 50% affordable housing target, based on viability testing that could potentially deliver 9,975 units, substantially less than the identified affordable housing need. However, the Council considers the HLP must balance the need for affordable housing against ensuring housing development remains viable; a higher affordable housing target could prevent new development from coming forward.
38. I note the Council considers these circumstances justify its approach of maximising affordable housing delivery from all sources, including from non-major development schemes, which in 2017 provided around half of new housing in the borough.

³ Article 2(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015, as amended

39. I am not familiar with the examination or adoption of the HLP or the report of the Examining Inspector. Nevertheless, I note that with this substantial inconsistency between Policy LP13 and the 2019 Framework, the HLP was adopted in July 2020 as part of the statutory development plan for Hackney. I am not aware of any outstanding legal challenge to any part of it. Given this, and despite the substantial inconsistency, I do not consider the policy to be out of date and I give it very significant weight in my determination.
40. The appellant states that the Council only sought affordable housing/contributions for major development schemes up to the adoption of the HLP. Reference is made to the refusal of the previous (non-major development) scheme at the appeal site⁴, and the granting of planning permission for a (non-major development) scheme at 307 Seven Sisters Road⁵, prior to the adoption of the HLP.
41. Whilst I am not fully familiar with either of these schemes, I note that the Council's Officer report did not consider affordable housing provision in refusing planning permission for the previous scheme at the appeal site. Furthermore, for the scheme at 307 Seven Sisters Road, it is unclear from the Council's Officer report why affordable housing provision was not considered more fully here.
42. Paragraph 48 of the Framework⁶ provides guidance as to the weight to be given to relevant policies in emerging plans. Policy LP13 of the draft HLP is referenced in the Officer report for the scheme at 307 Seven Sisters Road, but there is no reference to it in the Officer report for the previous scheme at the appeal site.
43. The HLP was adopted on 22 July 2020, one day after the scheme at 307 Seven Sisters Road was granted planning permission. There is, therefore, unlikely to have been any difference between the draft and adopted versions of Policy LP13 around the time of the determination of this application. Whilst the previous scheme at the appeal site was refused planning permission in February 2020, this is still at a late stage in the HLP preparation process.
44. In my view, from the limited evidence before me, the Council's approach to affordable housing provision in both of these earlier cases was flawed. Given the stated importance of affordable housing to Hackney, at the very least an explanation for why affordable housing was not required should have been provided, together with acknowledging the existence of the emerging HLP in one decision and the reasons for the weight afforded to the emerging HLP policy in the other.
45. However, two schemes is very limited evidence and does not demonstrate this was the Council's approach to all such schemes prior to the adoption of the HLP. Even if this were the Council's approach to affordable housing provision for non-major development schemes, it would not alter my approach or the weight that I have afforded to Policy LP13 in determining this appeal, as set out above.
46. I note the comments of the appellant regarding potential future changes to the thresholds for affordable housing provision, the efforts made since 2017 to

⁴ LPA Ref. 2019/1986

⁵ LPA Ref. 2020/0962

⁶ The 2019 and 2021 versions of the Framework are identical with reference to paragraph 48.

produce an acceptable scheme, and their reasons for not providing a viability assessment. They do not cause me to reach a different conclusion with regard to this matter.

47. Despite the email from the appellant's architect to the Council dated 6 August 2020, in which they state that a Consultancy was ready to undertake a viability assessment of the proposal, no such assessment has been provided. There is no substantive evidence that a policy compliant level of on-site affordable housing provision, or in-lieu payments, would not be viable. The submitted s106 planning obligation does not include in-lieu payments for affordable housing.
48. For these reasons, the appeal proposal would adversely affect affordable housing provision in the area. It would, therefore, conflict with Policy LP13 of the HLP and with Section 2 of the s106SPD in this regard. Despite the substantial inconsistency between Policy LP13 and the Framework, I attach very significant weight to this conflict.

Transport and carbon emissions

49. The Council is generally satisfied with the proposal in terms of the effects on Transport. The site is said to be within a controlled parking zone, where the introduction of additional residential units could result in parking stress in the surrounding streets. The Council has sought to make the appeal proposal a 'car-free' development and the appellant has addressed this in their submitted s106 planning obligation⁷.
50. The proposed development would also result in a crossover being made redundant. The Council has sought to secure works to reinstate the footway at the appellant's expense and this is also addressed in the submitted s106 planning obligation.
51. Whilst the previous scheme at the appeal site was not refused on sustainability grounds, the appellant recognises that the policy context has changed, with HLP Policy LP55 (mitigating climate change) requiring all new developments to actively seek to mitigate the impact of climate change; all new residential developments should meet a zero carbon emissions target emission rate. Where it can be shown it is not possible to reduce carbon emissions on-site by the specified levels, carbon off-setting payments will be required.
52. Further guidance on this is contained in section 8 of the s106SPD, including the requirements for flats and other dwellings for non-major developments where an energy statement has not been provided⁸. The appellant has noted these requirements for the appeal scheme in their Statement of Case, which would amount to a carbon offset contribution of £6500 - 2 x flats (2 x £1000) and 3 x duplexes (3 x £1500).
53. The Council considers the carbon offset contribution would need to be secured in the submitted s106 planning obligation. However, the submitted s106 planning obligation includes a carbon offset contribution of £6000, which is less than the specified amount required to offset carbon from the proposal.

⁷ Including through powers under s16 of the Greater London Council (General Powers) Act 1974

⁸ Table 8.1 - 3.

54. I am satisfied that in this case, a planning obligation would be 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 development⁹.
55. However, the carbon offset payment contained in the submitted s106 planning obligation is not policy compliant and so is not sufficient to be acceptable for the appeal development.
56. Furthermore, Paragraph N.5.1 of Annexe N: Planning Obligations of the Procedural Guide¹⁰ states that 'Normally all persons with an interest in land affected by a planning obligation – including freeholder(s), leaseholder(s), holders of any estate contract(s) and any mortgagees – must sign the obligation. Where there are different ownerships it may be necessary to define them by reference to a plan.'
57. The Owner with freehold absolute of the majority of the Property as defined on the submitted s106 planning obligation has the same name and address as the appellant. However, the detailed extent of their *majority* ownership is not clear, nor is it clear who owns or may have an interest in the remainder of the Property, or what the implications of this would be for the planning obligation or proposal.
58. Moreover, Paragraph N.5.2 of the Procedural Guide states that 'The planning obligation must give details of each person's title to the land...In written representations cases...the applicant or appellant will need to provide evidence of title to the Inspector. Normally this is in the form of an up to date copy entry or entries from the Land Registry.' There is no evidence of title alongside or within the signed planning obligation.
59. Consequently, with reference to Government Guidance on Planning Appeals, I am not satisfied that the submitted planning obligation is legally sound or complete and thereby effective. It therefore carries no weight in my determination.
60. For these reasons, the proposed development would adversely affect transport and carbon emissions. It would, therefore, conflict with Policies LP55, LP43 (transport and development) and LP45 (parking and car free development) of the HLP and with guidance contained in sections 7 and 8 of the s106SPD, in this regard.

Conclusion

61. Whilst the proposed development would have an acceptable impact upon the character and appearance of the area and on the living conditions of nearby occupiers, the harm that would be caused to affordable housing provision, transport and carbon emissions would outweigh this.
62. For the reasons given above, I conclude the appeal is dismissed.

Andrew Parkin

INSPECTOR

⁹ Paragraph 57 of the National Planning Policy Framework 2021 (the Framework) and Regulation 122(2) of the Community Infrastructure Levy Regulations 2010.

¹⁰ [Procedural Guide: Planning Appeals – England \(updated 21 December 2022\)](#)