



Appeal Decision

Site visit made on 31 August 2022

by K L Robbie BA (Hons) DipTP MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 June 2023

Appeal Ref: APP/H5390/W/22/3295244

1B Cortayne Road, London SW6 3QA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval under section 73 of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous prior approval was granted.
- The appeal is made by Mr Graham Chappell against the decision of London Borough of Hammersmith and Fulham.
- The application Ref 2022/00220/VAR, dated 26 January 2022, was refused by notice dated 16 March 2022.
- The application sought permission for the change of use of rear part of the ground floor from retail (Class A1) into a self-contained studio flat (Class C3) without complying with conditions attached to prior approval Ref 2018/02108/PD56, dated 27 June 2018.
- The conditions in dispute are Nos 3 and 4 which state that:
Condition 3: No occupiers of the new dwelling hereby permitted, with the exception of disabled persons who are blue badge holders, shall apply to the Council for a parking permit or retain such a permit, and if such a permit is issued it shall be surrendered to the Council within seven days of written demand.
Condition 4: The new dwelling hereby permitted shall not be occupied until such time as a scheme has been submitted to and approved in writing by the local planning authority to ensure that all occupiers, other than those with disabilities who are blue badge holders, have no entitlement to parking permits from the Council and to ensure that occupiers are informed, prior to occupation, of such restriction. The new dwellings shall not be occupied otherwise than in accordance with the approved scheme unless prior written agreement is issued by the Council.
- The reasons given for the conditions are:
Condition 3: In order to ensure that the development does not harm the existing amenities of the occupiers of neighbouring residential properties by adding to the already high level of on-street car parking stress in the area, in accordance with Policy T1, T3 and T4 of the Local Plan (2018).
Condition 4: In order that the prospective occupiers of the dwelling concerned are made aware of the fact that they will not be entitled to an on-street car parking permit, in the interests of the proper management of parking, and to ensure that the development does not harm the existing amenities of the occupiers of neighbouring residential properties by adding to the already high level of on-street car parking stress in the area, in accordance with Policies T1, T3 and T4 of the Local Plan (2018).

Decision

1. The appeal is allowed in part, and planning permission is granted for the change of use of part ground floor from retail (Class A1) into a self-contained studio flat (Class C3) at 1B Cortayne Road, London SW6 3QA in accordance with the application (ref: 2022/0220/VAR) dated 26 January 2022, without compliance with condition 3 of the previously imposed on prior approval reference 2018/02108/PD56 dated 27 June 2018, but subject to the conditions set out in the attached schedule.

Preliminary Matters

2. As noted above, this appeal is pursuant to an application made under s73 of the Town and Country Planning Act 1990 (hereafter, the Act). S73 allows for applications to be made for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
3. In this case, the previous planning permission was granted for development consisting of – in short- the change of use of a building from retail to a use as a dwellinghouse under Schedule 2, Part 3, Class M of the Town and Country Planning (General Permitted Development) (England) Order 2015 (hereafter the Order) subject to limitations and conditions. Condition M.(2)(1) required that before beginning development, the developer must apply to the local planning authority (LPA) for a determination as to whether their prior approval would be required as to specified matters.
4. A 'prior approval application' (ref:2018/02108/PD56) was made to the LPA for the change of use of part of the ground floor of the appeal building from retail use as a self-contained studio flat. The Council granted prior approval on 17 June 2018, subject to eight 'bespoke' conditions to supplement those imposed by the order itself. Upon the grant on prior approval, the planning permission granted by the Order was 'crystallised' and the pre-commencement condition M.(2)(1) had been discharged.
5. The appellant seeks to carry out the approved change of use without complying with conditions 3 and 4 imposed on the '2018 prior approval'. To be clear, any success in this appeal would not mean that the 2018 prior approval is somehow varied. It would rather mean that a full planning permission is granted under s73 of the Act for the change of use of part of the ground floor of the building from retail to use as self-contained flat subject to fewer or varied conditions which were previously imposed.
6. The planning permission which crystallised upon the grant of prior approval was also subject to condition M.(3) set out in the Order, which required that the development be completed within a period of three years starting with – in this case – 17 June 2018. On the date of my visit, the appeal building was boarded up and appeared to not be in residential use. However, the appellant clarified in correspondence that the change of use did occur following the grant of the 2018 prior approval, but the residential use then had to cease whilst other works were being carried out. The Council have not indicated otherwise.
7. Finally, I note that the 2018 prior approval was granted in respect of a property then described as 301 New Kings Road. I am satisfied that this is the appeal property because the 2018 and current plans show the same building on the ground, and I saw that it has a frontage to Cortayne Road.

Main Issue

8. With regard to the policy tests for conditions as set out in the National Planning Policy Framework (the Framework) and the Planning Practice Guidance (PPG), I consider that the main issue is whether the disputed conditions are necessary, relevant to planning and reasonable.

Reasons

9. At the time of the 2018 prior approval, the matters set out under paragraph M.2(1) of the Order included the transport and highways impacts of the development, and contamination and flooding risks in relation to the building. They did not include the 'amenities' or living conditions of neighbouring occupiers as mentioned in the reasons for conditions 3 and 4. The prior approval matters also did not include the impact of the development on air quality as discussed in the Council's reasons for refusing the s73 application.
10. The PPG is clear that LPAs cannot consider any matters beyond those specified in the Order when determining prior approval application. However, since the disputed conditions are now for consideration in the context of a s73 appeal, and I therefore need to decide whether full planning permission for the change of use without compliance with conditions 3 and/or 4, it follows that I must consider the appeal on its merits, with regard to the development plan. I am not bound to consider the disputed conditions strictly in terms of the 'prior approval matters' set out under M.2(1); indeed, I have no authority to decide the appeal as though it concerned an application for prior approval.
11. Policy T1 of the Hammersmith and Fulham Local Plan 2018 (Local Plan) seeks to improve transportation provision, accessibility and air quality in the borough by, amongst other things, promoting and supporting initiatives to encourage modal shift away from private vehicles. Local Plan Policy T4 requires that all proposed development is car parking permit free, unless evidence is provided to show that there is significant lack of public transport available.
12. The appeal property is in an area with a Public Transport Accessibility Level (PTAL) rating of 4 which indicates that occupiers of the studio flat would have good access to public transport. I also consider, with regard to the objection from the Highways Authority, that there is significant risk of parking stress in this area. A local resident has objected that it is increasingly difficult for them to find a parking space near their home.
13. Cortayne Road is a narrow street with parking bays which limit the carriageway to single width and Controlled Parking Zone (CPZ) restrictions in place. I saw that this street and others off New Kings Road (A308) were heavily parked up during a working day. I also saw that New Kings Road itself to be a busy main road that is subject to parking and waiting restrictions. I can understand why the Council seeks to ensure that new residences do not cause an increase in parking stress which could compromise highway safety, air quality and living conditions in nearby properties.
14. Condition 3 expressly seeks to prevent any occupier of the studio flat, apart from blue badge holders, from applying for a parking permit. Condition 4 is a negatively worded condition which prohibits occupation of the studio flat until a scheme has been submitted to and approved by the Council to ensure that occupiers, again except blue badge holders, have no entitlement to a permit. The appellant suggests that, because conditions run with the land, they cannot be imposed to restrict what individuals may do with their property.
15. However, it is well-established that conditions may restrict the activities of occupiers so long as there is also a clear connection to the land and justification in terms of land use. For example, if the use of a building as a restaurant is permitted subject to an 'opening hours' condition, that will run with the land

yet also serve as a restriction on what the restaurateur may do. It is perfectly possible to use planning conditions to ensure that new housing is car-free. In my view, condition 4 is connected to the use of the land and it is necessary for the development to comply with Local Plan Policies T1 and T4.

16. The PPG advises that negatively worded conditions which require a developer to enter into a planning obligation or other agreement before (parts of) the development commence are unlikely to be appropriate unless there are exceptional circumstances. It is true that planning obligations may be and often are, certainly in larger schemes, the mechanism used to ensure that housing is car-free. However, condition 4 does not require that any agreement is entered in to, and it prevents occupation rather than commencement of development.
17. I do see difficulty however with condition 3. The Framework and PPG are clear that conditions must be relevant to planning, meaning that they cannot duplicated or purport to enforce other legislation. It is not possible to impose a condition to prevent occupiers from applying for a parking permit because permits are the responsibility of the local highway authorities and subject to Traffic Regulation Orders. Conditions 3, therefore, is not relevant to planning.
18. I also consider that condition 3 is unnecessary because condition 2 imposed on the 2018 prior approval required that the studio flat is not occupied until the Council has been notified in writing of its full postal address. The appellant does not object to this condition, but it was imposed so the Council can ensure that parking permits are not issued to occupiers. I consider that the Council's objective to ensure that the studio flat is car-free will be achieved by conditions 2 and 4 together and condition 3 is superfluous in any event.
19. I conclude that the disputed condition 3 is not relevant to planning or necessary to ensure that the appeal flat does not cause unacceptable parking stress or associated harm to highway safety, air quality or the living conditions of nearby occupiers. However, for the same reasons, I find that conditions 4 is necessary and reasonable in the terms described by the Framework and PPG.
20. Condition 4 but not 3, is necessary for the development to comply with Local Plan Policies T1 and T4, with London Plan Policy T6 and with Key Principle TR3 set out in the Council's Planning Guidance Supplementary Planning Document. They expect that development in areas well connected by public transport is car free for all except disabled people.
21. I have also had regard to Local Plan Policy HO2, but I find it irrelevant because this appeal does not concern a change of use to 'two or more dwellings'. With no evidence to the contrary, I can expect that making the flat car-free via conditions 2 and 4 should suffice to ensure the development is 'air quality' neutral in accordance with Local Plan Policy CC10.

Other Matters

22. The appellant has made representations about 'the legality of the conditions'. Whilst I have addressed the points raised in substance, I will also state for the avoidance of doubt that 'legality' is a matter outside of my remit. Since this is a s73 appeal, I can only have regard to the planning merits of the case with regard to policy tests for conditions set out in the Framework and PPG. Without prejudice, if the appellant wishes to ascertain whether it would be lawful for

him to carry out the development without complying with conditions 3 and/or 4, he should apply for a lawful development certificate under s191 of the Act.

23. The appellant submitted another appeal decision where the Inspector concluded that similar conditions did not pass the tests set out in the Framework or fall under the matters which were reasonably related to the subject matter of the Prior Approval¹. However, the Inspector in that case found 'little specific evidence' of parking stress, and for that reason alone, I can distinguish the case before me².
24. The appellant referred in their statement of case to other appeal decisions, but he did not provide sufficient detail to show to what extent the planning conditions or circumstances are comparable. I find the same in respect of the appeal decision referred to by the Council, where the Inspector upheld similar conditions to those under dispute in this case. I have determined this appeal on the evidence before me.

Conditions

25. Where planning permission is granted under s73, it is not automatically subject to the conditions which were attached to the original permission (or, as in this case, to the prior approval). The PPG therefore advises that the conditions which continue to have effect should be restated in the interests of clarity.
26. Condition 1 imposed on the 2018 prior approval requires that the change of use shall not take place until the other conditions are complied with. However, it is not possible for the appellant to comply with at least some of the conditions until the change of use has occurred. Condition 1 is unreasonable. The use has begun in any event and so it is unnecessary to impose the standard condition requiring commencement within three years.
27. However, in my view conditions 2, 4, 5, 6, 7, and 8 as imposed on the 2018 prior approval are reasonable and necessary, subject to minor wording changes for precision. It is possible for me to impose new conditions on the planning permission to be granted and I find that it would be reasonable and necessary to impose a 'plans' condition in the interests of certainty.

Conclusion

28. For the reasons given above, I conclude that the appeal should be allowed in part. I shall grant planning permission for the change of use of rear part of the ground floor from retail (Class A1) into a self-contained studio flat (Class C3) without complying with condition 3 attached to the 2018 prior approval but subject to other conditions as set out in the Decision above and Schedule of Conditions below.

K L Robbie

INSPECTOR

¹ Appeal decision: APP/H5390/W/21/3284933

² As set out at the start of this decision letter, where an appeal is made under s73, I would respectfully disagree with my colleague that consideration can only be given to the prior approval matters.

SCHEDULE OF CONDITIONS

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans: 101(P); 104 (P).
- 2) The new dwelling hereby permitted shall not be occupied until the Council has been notified in writing (and has acknowledged such notification) of the full postal address of the dwelling. Such notification shall be to the Council's Head of Development Management and shall quote prior approval reference 2018/02108/PD56 and appeal reference APP/H5390/W/22/3295244.
- 3) The new dwelling hereby permitted shall not be occupied until such time as a scheme has been submitted to and approved in writing by the local planning authority to ensure that all occupiers, other than those with disabilities who are blue badge holders, have no entitlement to parking permits from the Council and to ensure that occupiers are informed, prior to occupation, of such restriction. The new dwellings shall not be occupied otherwise than in accordance with the approved scheme unless prior written agreement is issued by the Council.
- 4) Prior to the occupation of the development hereby approved, details (including detailed drawings) of 1 safe and secure cycle parking space shall be submitted to and approved in writing by the Council. The development shall not be occupied until the approved space has been implemented in accordance with the approved details, which shall be retained in accordance with the approved details for the lifetime of the development thereafter.
- 5) Prior to the occupation of the development hereby permitted, details of refuse and recycling stores shall be submitted to and approved in writing by the Council. The development shall not be occupied until the approved refuse and recycling storage has been implemented in accordance with the approved details. The storage facility shall be retained in accordance with the approved details for the lifetime of the development thereafter.
- 6) All refuse generated by the development hereby approved shall be stored internally or in the approved refused store and shall only be brought to the front of the premises of the day of collection.
- 7) The development hereby permitted shall be implemented in accordance with the recommended flood mitigation and water efficiency measures as proposed in the submitted Flood Risk Assessment. The recommended mitigation measures shall be permanently retained for the lifetime of the development thereafter.

End of Schedule