



Appeal Decision

Site visit made on 23 May 2023

by Nick Davies BSc(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20th June 2023

Appeal Ref: APP/H5390/W/22/3310507

52-70 Fitz-George Avenue, London W14 0SW

- 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 Michael Wrenall (St Luke's Properties (UK) Ltd) against London Borough of Hammersmith and Fulham.
 - The application Ref 2021/03549/VAR is dated 1 November 2021.
 - The application sought planning permission for *creation of three self-contained flats (2x1 bed and 1 X 2 beds) at rear lower ground floor level through change of use of the existing basement storage area and excavating and enlarging the existing basement level, creation of new lightwells and associated installation of new windows and doors, and erection of a bike store* without complying with conditions attached to planning permission Ref 2016/04789/FUL, dated 12 June 2017.
 - The conditions in dispute are Nos 2 and 5 which state that:
"2) *The development shall be carried out and completed only in accordance with the approved drawings*".
"5) *None of the flats hereby approved shall be occupied until the cycle and bin storage as indicated in drawing 2081-04M Rev M:30/03/2017 has been provided. The cycle spaces and bin storage shall be retained in perpetuity*".
 - The reasons given for the conditions are, respectively:
"To ensure a satisfactory external appearance, to provide a satisfactory quality residential unit and to prevent harm to the street scene, in accordance with Policy BE1 of the Core Strategy (2011) and Policies DM A1, DM A2, DM A3, DM A4, DM A9, DM G3 and DM G7 of the Development Management Local Plan (2013)".
"To ensure the satisfactory provision of cycle parking and refuse storage, in accordance with Policies DM J5 and DM H5 of the Development Management Local Plan (2013), Core Strategy Borough Wide Strategic Policy CC3".
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Decision

1. The appeal is allowed and planning permission is granted for creation of three self-contained flats (2x1 bed and 1 X 2 beds) at rear lower ground floor level through change of use of the existing basement storage area and excavating and enlarging the existing basement level, creation of new lightwells and associated installation of new windows and doors, and erection of a bike store without complying with conditions attached to planning permission Ref 2016/04789/FUL, dated 12 June 2017 at 52-70 Fitz-George Avenue, London W14 0SW in accordance with the terms of the application, Ref 2021/03549/VAR, dated 1 November 2021, and the plans submitted with it, subject to the conditions in the attached schedule.

Application for costs

2. An application for costs was made by Mr Michael Wrenall (St Luke's Properties (UK) Ltd) against London Borough of Hammersmith and Fulham. This application is the subject of a separate Decision.

Preliminary Matters

3. The application was accompanied by drawings numbered 211029-2081-03T (Proposed floor plans) and 211029-2081-04S (Proposed elevation drawings). The proposed layout drawing involved a change to the description of the original planning permission, so, in accordance with established case law¹ would have been outside the scope of a Section 73 application. The Council accepted amended layout plans that overcame this issue. Subsequently, a series of revisions to the layout were submitted to address other matters. The most recent layout drawing numbered 2081-03ZB was submitted to the Council on 20 June 2022. It is not clear from the evidence whether this drawing was the subject of public consultation, however the Council received it more than four months before the appeal against non-determination was made, and it is not fundamentally different to the previously submitted proposals. I have therefore made my decision on the basis of this drawing.
4. As part of the appeal documentation, the appellant submitted a "Planning Fire Strategy for Planning Application" dated October 2022 (the Fire Strategy). Whilst the Council had not previously seen this document, it has had the opportunity to address any issues it raised in its statement of case. As it does not significantly alter the proposals, or affect the external appearance of the development, I can consider it without prejudice to any other party.

Background and Main Issues

5. The planning permission that gives rise to the disputed conditions allowed the creation of three flats in the basement area of an existing residential apartment block. It is not disputed that the development was lawfully commenced in accordance with Condition 1 of the planning permission. Condition 2 requires development to be carried out in accordance with the approved plans, and Condition 5 requires cycle and bin storage to be provided in accordance with the details shown on one of the drawings prior to occupation of the flats.
6. The application to vary the conditions proposed the substitution of the approved plans with a new set of plans showing an internal reconfiguration of the layout of the flats, covering a reduced floor area, which resulted in some changes to the external appearance of the development. The proposals also included the relocation of the proposed bin and cycle storage area.
7. The appeal arises from the Council's failure to make a decision on the application. The Council has submitted a report setting out how it would have determined the application. Based on this report and all the evidence before me, I consider that the main issues are:
 - a) Whether the proposal would provide suitable living conditions for future occupants with regard to internal living space, light, outlook, and outdoor amenity space;

¹ Finney v Welsh Ministers [2019] EWCA Civ 1868

- b) Whether sufficient cycle parking space would be provided; and,
- c) Whether the occupants of the proposed and existing accommodation would be safe from the risk of fire.

Reasons

Living conditions

8. The revised layout that is proposed would result in a reduction in the overall floorspace from 197.5 square metres to 161.6 square metres. Consequently, each of the flats would be smaller than previously approved. This is not a reason, in itself, to resist the proposal, but it is necessary to ensure that the accommodation would still provide satisfactory internal living space for future occupants.
9. The most recently adopted part of the development plan for the area is the London Plan (2021). Policy D6 sets minimum internal space standards for new dwellings, which are aligned with those in the government's "Technical housing standards – nationally described space standard" published 27 March 2015 (the NDSS). Policies HO4 and HO11 of the Hammersmith & Fulham Local Plan (2018) (the Local Plan) also require new housing to meet these standards, as does Key Principle HS2 of the Hammersmith & Fulham Planning Guidance Supplementary Planning Document (2018) (the SPD).
10. The Council states that Flat 3 would not meet the London Plan/NDSS space standard for a 1-bed 2-person dwelling. However, drawing 2081-03ZB shows that the flat has a Gross Internal Area (GIA) of 50 square metres, which meets the minimum standard. As it is common ground that the other two flats meet the overall London Plan/NDSS space standard, all of the flats would provide satisfactory internal space in this regard.
11. Policy D6 of the London Plan and the NDSS also set minimum floor areas for individual rooms. In this respect the Council contends that the bedrooms in Flat 2 are below standard. However, drawing 2081-03ZB shows Bedroom 1 to be 11.5 square metres and Bedroom 2 to be 7.6 square metres. I have not been provided with any evidence to demonstrate that these measurements are incorrect. Consequently, I conclude that they meet the minimum space standards for a double and single bedroom respectively. There is no dispute regarding any of the other room sizes.
12. The London Plan/NDSS standards also require built-in storage to be provided, which counts towards the GIA and bedroom floor area requirements. The Council argues that none of the flats would have built-in storage. However, drawing 2081-03ZB shows a range of built-in cupboards in each of the flats. Whilst their volumes are not included on the plans, I have not been provided with evidence to show that they do not meet the 1.5 cubic metre standard for a 1-bed 2-person flat or the 2 cubic metre requirement for a 2-bed 3-person flat. I am therefore satisfied that all three flats meet all of the requirements of Policy D6 of the London Plan, Policies HO4 and HO11 of the Local Plan, Key Principle HS2 of the SPD, and the guidance in the NDSS.
13. As well as ensuring sufficient space, the policies of the London Plan and the Local Plan also seek to provide a high-quality residential environment, which includes adequate daylight and satisfactory outlook for occupants. The application was accompanied by an Assessment for the Provision of Daylight

and Sunlight within the Development dated 24 November 2021 (the Light Assessment). It was carried out in accordance with the assessment criteria in the Building Research Establishment's "Site Layout Planning for Daylight and Sunlight – A Guide to Good Practice" (the BRE Guidelines). Using detailed numerical modelling applications, the Light Assessment concludes that the habitable rooms within the flats would meet or exceed the minimum required threshold in the BRE Guidelines.

14. The Council contends that the Light Assessment does not refer to the staircase, which would reduce outlook from the window in the living/dining/kitchen room of Flat 3, or the dividing wall between the amenity areas serving Flats 2 and 3. However, it is clear from the Graphical Model Outputs in Appendix A.2 of the Light Assessment (particularly drawing no 604_01) that the staircase and screen wall were factored into the calculations. Consequently, there is no evidence that casts doubt on the Light Report's conclusion that the habitable spaces would be well-lit.
15. The flats would be located below ground level, so occupants would not be expected to enjoy an expansive outlook. However, the original planning permission already provides for three basement flats with a similarly restricted outlook. Notwithstanding this, the Light Report shows that, in Flats 2 and 3, well over 80% of the working plane of the habitable accommodation would have a clear sky view. Consequently, occupants would not be subject to an unduly confined or oppressive internal environment. Flat 1 remains largely unchanged from the originally approved scheme in this respect.
16. Policy D6 of the London Plan says that, where there are no higher local standards, a minimum of 5 square metres of private outdoor space should be provided for 1-2 person units, with an extra one square metre for each additional occupant. Furthermore, a minimum width of 1.5 metres should be achieved. All three flats would have a dedicated area of outdoor amenity space which would comfortably exceed these minimum requirements. I have not been directed to any higher local standards. It has been suggested to me that, as these areas would also serve as the access routes to the entrance doors of the flats, their utility for outdoor relaxation would be compromised. However, even if the circulation areas were to be excluded, the remainder would still exceed minimum requirements and would provide sufficient private space for the day-to-day outdoor needs of the small households proposed.
17. For these reasons, I conclude that the proposed substitute layout plan would provide suitable living conditions for future occupants with regard to internal living space, light, outlook, and outdoor amenity space. The development would, therefore, accord with Policy D6 of the London Plan, Policies HO4 and HO11 of the Local Plan, and Key Principle HS2 of the SPD. Taken together these policies seek to ensure that new housing achieves appropriate space and qualitative standards.

Cycle parking

18. Policy T5 of the London Plan says that development proposals should help remove barriers to cycling and create a healthy environment in which people choose to cycle. It seeks to achieve this by securing the provision of cycle parking at least in accordance with identified minimum standards. The Council says in its putative reason for refusal that the development should provide four spaces to comply with these minimum standards. However, applying the

standard set out in Table 10.2 of 1.5 spaces per 1-bed 2-person dwelling, and two spaces for all other dwellings, gives an overall requirement for five cycle spaces. The proposed substitute layout plans show secure storage for three bicycles.

19. The existing planning permission also provides for three cycle spaces. It is common ground that this permission has been lawfully commenced, so it is capable of implementation. It is, therefore, a material consideration in my decision. If I were to dismiss the appeal, it is more than a theoretical possibility that the permitted scheme would continue to completion. This would result in the provision of three larger flats, with the same level of cycle parking. Consequently, the amended proposal would not result in a shortfall in cycle parking when compared to the implementable fallback position.
20. In the particular circumstances of this case, therefore, there are material considerations that justify a level of cycle parking that is below that set out in Table 10.2. The proposal would, however, secure a cycle parking space for each flat, and no additional off-street car-parking is proposed. Consequently, there would not be a significant conflict with the aims of Policy T5 of the London Plan to encourage bicycle use.

Risk of fire

21. Policy D12 of the London Plan says that, to ensure the safety of all building users, all development proposals must achieve the highest standards of fire safety. Key Principle DA14 of the SPD has a similar aim, and identifies that how the development will function in terms of fire, emergency evacuation, and the safety of all users, should be considered at the outset. However, the requirement under Policy D12 for an independent Fire Statement, produced by a suitably qualified expert, is limited to major development proposals.
22. The Fire Strategy submitted with the appeal identifies that fire appliances can access the front or the rear of the site from Fitz-George Avenue, and that a fire assembly point will be identified on Fitz-George Avenue. It also confirms that all works will comply with the Building Regulations with regards to fire spread and means of escape, and smoke and heat detectors will be installed in each new dwelling to aid early fire detection and notification. Furthermore, each flat would be provided with a Home Fire Safety Pack - comprising a 2kg dry powder fire extinguisher and a British Standard hard case fire blanket.
23. The appeal timetable has allowed the Council the opportunity to comment on the Fire Strategy and no evidence has been submitted to identify any shortcomings in the appellant's proposals. Moreover, there is no evidence before me to indicate that the substitute layout now proposed would be any more hazardous to existing or proposed occupants than the partially implemented planning permission for three larger flats, which could continue to completion, regardless of the outcome of this appeal.
24. I am therefore satisfied that the measures identified, together with the requirements of Part B of the Building Regulations, will ensure that the occupants of the proposed and existing accommodation would be safe from the risk of fire. The development would, therefore, accord with Policy D12 of the London Plan and Key Principle DA14 of the SPD.

Other Matters

25. Representations received during the application and appeal raise concerns regarding noise and vibration during construction, flooding, the means by which the flats will be heated, and the impact on car parking. However, the proposal was made under section 73 to allow development without compliance with conditions subject to which the original permission was granted. Section 73(2) requires only consideration of the question of what conditions a grant of planning permission should be subject to. The original permission remains extant and unaltered. The amended layout of the flats would not give rise to any significantly different impacts regarding the matters raised by third parties.

Conditions

26. The Planning Practice Guidance says that, to assist with clarity, decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged. In this case, the appellant has submitted evidence to demonstrate that many of the conditions have been discharged, and this has not been disputed by the Council. I have therefore amended the wording of the relevant conditions to require compliance with the details that have already been approved, rather than requiring them to be submitted again. The wording of Condition 9 has been amended to refer to the Flood Risk Assessment submitted with the original application.
27. As the development is already well underway, it is unnecessary to reimpose Condition 1 of the original permission, which required commencement within a set timescale.
28. I have amended Condition 2 that requires compliance with the approved drawings, to include the amended layout plans and the Fire Strategy submitted with the appeal. The amended condition also requires compliance with the details that have been submitted to discharge some of the conditions of the original permission. I have amended Condition 5 (now numbered 4) to include the amended drawing number.
29. Conditions 6, 7 and 8 of the original planning permission seek to ensure that the flats are occupied on a permit free basis. However, in removing the rights of occupiers to apply for a parking permit, Conditions 7 and 8 restrict the actions of an individual. A planning permission, and any conditions it is subject to, runs with the land or building, and not the individual. These conditions therefore fail to meet the test of reasonableness, so I have not reimposed them. Condition 6 requires the postal address of the residential units to be submitted to the Council prior to their occupation. This condition is not relevant to planning because it is not directly related to the use of land and buildings. There are other mechanisms available for street naming and numbering. It would not, in any event, prevent the Council from issuing parking permits. In the absence of Conditions 7 and 8 it has no purpose, so I have not reimposed it.
30. The preliminary risk assessment and site investigations required under Conditions 13, 14, 15 and 16 have been approved, so these conditions have been discharged. They did not identify any requirements for a verification report or onward long-term monitoring. Consequently, I have not reimposed Conditions 17 and 18.

31. As a result of these various amendments, the numbering of the conditions in the schedule does not correspond with those in the original planning permission.

Conclusion

32. For the reasons given above, I conclude that the appeal should be allowed.

Nick Davies

INSPECTOR

Schedule of Conditions

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans:
 - 2081-04S - Proposed Basement Sections & Elevations.
 - 2081-03ZB Proposed Basement Layout Plan.
 - "Planning Fire Strategy for Planning Application" dated October 2022.
 - Phase 1 – Desk Study; 52-70 Fitz George Avenue, London W14 0SW Pam Brown Associates ref: 1761-17 Rev.1 – December 2017. Approved by the Council under reference 2017/04100/DET on 31 January 2018.
 - Phase 1 - Desk Study by Pam Brown Associates Ref: 1761-17 Rev.1 dated December 2017. Approved by the Council under reference 2018/01203/DET on 30 April 2018.
- 2) Any alterations to the elevations of the existing building shall be carried out in the same materials as the existing elevation to which the alterations relate.
- 3) The windows and doors in the development hereby approved shall be of timber construction and painted white, in keeping with existing windows and doors.
- 4) None of the flats hereby approved shall be occupied until the cycle and bin storage has been provided in accordance with the details shown on drawing 2081-03ZB. The cycle spaces and bin storage shall thereafter be permanently retained.
- 5) Development shall be carried out throughout the construction period in accordance with the Methodology for construction of lower ground floor flats 1, 2 & 3, John W Lee Associates, dated July 2017 and approved by the local planning authority under reference 2017/03251/DET on 28 March 2018.
- 6) Development shall be carried out throughout the construction period in accordance with the Construction Logistics Plan, Location plan and swept path drawing, 1794-MP-27 approved by the local planning authority under reference 2017/03251/DET on 28 March 2018.

- 7) The new railings hereby approved shall be black painted metal, and so be maintained.
- 8) Development shall proceed in accordance with the J0358_R02_Planning Condition 12 Discharge Report prepared by ALN Acoustic Design Ltd dated 13 September 2017 and approved by the local planning authority under reference 2017/03592/DET on 4 January 2018. The approved measures shall be implemented prior to occupation of the development and thereafter shall be permanently retained.
- 9) The development hereby approved shall not be occupied until the flood risk measures identified in the Flood Risk Assessment Report (FRA) approved under planning permission Ref 2016/04789/FUL, dated 12 June 2017 have been carried out. The scheme shall be permanently maintained as such thereafter.
- 10) Development shall proceed in accordance with the Secure by Design Statement prepared by Simon Smith and Michael Brooke, dated 25 June 2016 and approved by the local planning authority under reference 2017/03251/DET on 28 March 2018. The approved measures shall be implemented prior to occupation of the development and thereafter shall be permanently retained.
- 11) Development shall proceed in accordance with the sound insulation measures contained in the Letter from Maddox Planning Consultants dated 25 September 2017 and approved by the local planning authority under reference 2017/03767/DET on 9 November 2017. The approved measures shall be implemented prior to occupation of the development and thereafter shall be permanently retained.
- 12) Development shall proceed in accordance with the mechanical ventilation details and anti-vibration measures contained in J0358_R01_Planning Conditions 22 & 23 Discharge Report prepared by ALN Acoustic Design Ltd dated 13 September 2017 and approved by the local planning authority under reference 2017/03592/DET on 4 January 2018. A post installation noise assessment shall be carried out where required to confirm compliance with the sound criteria and additional steps to mitigate noise shall be taken, as necessary. The approved details shall be implemented prior to occupation of the development and thereafter shall be permanently retained.
- 13) Development shall proceed in accordance with the Drainage System prepared by Maddox Planning Consultants dated October 2017 and approved by the local planning authority under reference 2017/04100/DET on 31 January 2018. The approved system shall be installed in accordance with the approved details prior to occupation of the development and thereafter shall be permanently retained.
- 14) Other than their location, which shall accord with approved Drawing No 2081-03ZB, the waste and recycling arrangements shall be carried out in accordance with the Maddox Planning Consultant Refuse and Recycling Statement dated January 2018; 2081-03S Rev.S Revised on 9/1/18; 2081-04R Rev.R Revised on 9/1/18; 2081-05H Rev.H Revised on 9/1/18 - approved by the Council under reference 2017/03251/DET on 28 March 2018.

END OF SCHEDULE