



Appeal Decision

Hearing held on 6 June 2023

Site visit made on 6 June 2023

by Mr R Walker BA HONS DIPTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 30 June 2023

Appeal Ref: APP/M4510/W/23/3318223

The Bruce Building, 101-115 Percy Street, Newcastle upon Tyne NE1 7RP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant 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 Michigan Investments Limited against the decision of Newcastle Upon Tyne City Council.
 - The application Ref 2013/1430/09/RVC, dated 25 November 2021, was refused by notice dated 9 November 2022.
 - The application sought planning permission for "Minor Material Amendment (Variation of condition 2 - new exposed fire escape staircase in lieu of an enclosed glazed staircase, amendments to the residential access staircase and lift and a revised roof form over block B, reduction in the number of bedrooms from 60-57) to planning decision 2013/1430/01/DET dated 30.4.14: Change of use of 105/111 Percy Street from (Class A1) retail to (Class A3) restaurant: basement and ground floor of 115 Percy Street from (Class D1) education use to (Class A3) restaurant use: and first floor from (Class D1) education use to (Class B1) office use; conversion of first, second and third floors of 101 to 115 Percy Street to create 60 self-contained student studio apartments, including alteration to roof of 103-111 Percy Street to include rear dormer window extensions and six roof lights to front: erection of 1 x 3 storey and 1 x 4 storey stairwell, extract flue, ventilation grills, single storey entrance foyer and ramp to rear and insertion of oriel window to second floor front elevation" without complying with a condition attached to planning permission Ref 2013/1430/02/RVC, dated 11 February 2015.
 - The condition in dispute is No 14 which states that: Notwithstanding the provisions of the Town and Country Planning (Use Classes) Order 1987 (or any other re-enacting or revoking Order with or without modification), the premises shall only be used as Student housing within Use Classes C3, C4 and Sui Generis and for no other purpose.
 - The reason given for the condition is: In the interests of residential amenity, in accordance with the National Planning Policy Framework and saved Policy H2 of the Unitary Development Plan.
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Decision

1. The appeal is allowed and planning permission is granted for the Minor Material Amendment (Variation of condition 2 - new exposed fire escape staircase in lieu of an enclosed glazed staircase, amendments to the residential access staircase and lift and a revised roof form over block B, reduction in the number of bedrooms from 60-57) to planning decision 2013/1430/01/DET dated 30.4.14: Change of use of 105/111 Percy Street from (Class A1) retail to (Class A3) restaurant: basement and ground floor of 115 Percy Street from (Class D1) education use to (Class A3) restaurant use: and first floor from (Class D1) education use to (Class B1) office use; conversion of first, second and third floors of 101 to 115 Percy Street to create 60 self-contained student studio apartments, including alteration to roof of 103-111 Percy Street to include rear

dormer window extensions and six roof lights to front: erection of 1 x 3 storey and 1 x 4 storey stairwell, extract flue, ventilation grills, single storey entrance foyer and ramp to rear and insertion of oriel window to second floor front elevation" at The Bruce Building, 101-115 Percy Street, Newcastle upon Tyne NE1 7RP in accordance with application Ref 2013/1430/09/RVC without compliance with condition numbers 1, 14 and 17 previously imposed on planning permission Ref 2013/1430/02/RVC, dated 11 February 2015 but subject to the conditions in the attached schedule.

Application for Costs

2. An application for costs was made at the hearing by Michigan Investments Limited against Newcastle Upon Tyne City Council. This application is the subject of a separate decision.

Preliminary Matters

3. The proposal seeks to remove condition 14 attached to planning permission Ref 2013/1430/02/RVC (the planning permission). I have used the address from the planning permission in the banner heading above, rather than that given in the Council's decision notice, so that it is consistent with the planning permission.
4. The contested condition requires that the premises shall only be used as 'Student housing'. Insofar as it relates to this appeal, the description from the planning permission included 'self-contained student studio apartments'. During the hearing the Council raised, and subsequently discussed, the possibility of a conflict with this description from the removal of condition 14, as without the condition the premises could be occupied by any person or persons.
5. However, I am mindful of the findings in the *Freddie Reid vs SSLUHC* [2022] EWHC 3116 (Admin) ('the Reid Judgement'). In the Reid Judgement, a s73 application sought to remove an existing condition that restricted the use of thirty-four self-catering holiday units to holiday accommodation and not any other purpose, including within Class C3 of the Use Classes Order¹. The Council argued that by seeking to remove the condition, it would enable the units to be used as permanent residential dwellings, which would be contrary to the description of development.
6. The Judge found that when a condition is removed, the operative part of the permission remains intact, albeit in an unconditional way. If the condition restricting the units to holiday accommodation was removed, the way the development could change would have nothing to do with the description, but because the condition preventing the benefit of the Use Classes Order would be removed. The Judge held that what can be done with the use of the land may not be exhaustively written into the description but may arise by the operation of law (i.e. a lawful change of use to another purpose within the same Use Class by the operation of s55(2)(f) of the Act). Therefore, it is the decision-maker's function to consider, as a matter of planning judgement, the planning merits of removing the condition(s).
7. The Reid Judgement is of direct relevance to the appeal proposal as it involves the removal of a condition controlling the use of the existing building. In the case before me, the self-contained student studio apartments comprise one

¹ The Town and Country Planning (Use Classes) Order 1987 (as amended)

component of the description of the development. The use of the term 'self-contained' confirms that the units are single residential units for occupation by one person, or people, living as a single household. The primary component use is therefore residential and the disputed condition's function was a way of controlling occupation, as distinct from controlling use. As such, I consider there to be no conflict with the description from the planning permission if the disputed condition 14 were removed. This does not alter the need to consider as a matter of planning judgement, the planning merits of removing the condition.

8. Within the reason for the disputed condition, reference is given to Policy H2 of the Unitary Development Plan (UDP). The UDP has now been superseded and thus its policies weigh neither for nor against the proposal.

Background and Main Issues

9. The planning permission has been implemented and the apartments have been occupied for several years. However, the appellant seeks flexibility as to who could occupy the apartments by the removal of condition 14. The Council considers that although within the same Use Class (C3), there are material differences between students and non-students occupying the apartments that would amount to a material change of use. Moreover, as a s73 application reissues the original planning permission, and must therefore be determined against the current development plan policies, it is put to me, that the change would amount to new housing that would conflict with the development plan, due to the small size of the apartments. Moreover, the Council also advised during the appeal process that if I were minded to allow the appeal it would be seeking a proportion of the apartments to be affordable.
10. The appellant argues that the condition is not enforceable, reasonable, or necessary and seeks its removal on 'planning' and 'legal' grounds, and also disputes the Council's requirements for affordable housing.
11. Accordingly, the main issues are:
 - Whether condition 14 of the planning permission is necessary, enforceable, and reasonable, having regard to the development plan, the living conditions of future occupiers, with particular reference to internal living space and other material considerations; and
 - If condition 14 is not reasonable and necessary whether, having regard to local and national policy, there is a requirement for affordable housing to be provided and, if so, whether adequate provision would be made for affordable housing.

Reasons

The disputed condition

12. Policy DM7 of the Development and Allocation Plan (DAP) requires the design of all new homes to meet the Nationally Described Space Standards (NDSS). There is no dispute between the main parties that the size of the apartments does not accord with the NDSS. Policy DM7 is consistent with the National Planning Policy Framework (the Framework), which sets out that all new development is expected to be of a high standard of design that will function well and provide a high standard of amenity for existing and future users.

13. Condition 14 refers to Use Classes C3, C4 and Sui Generis within the Use Classes Order. However, it is common ground between the parties that the apartments fall within Use Class C3, and I have no reason to disagree. Each apartment contains sleeping/living space, cooking facilities, and an en-suite shower room. Together these elements provide occupants with facilities for day-to-day private domestic existence that are characteristic of a use falling within Use Class C3.
14. The apartments are the student occupiers only private space, where they would spend significant periods of time, studying or relaxing for example. Even if a student spends time at the University's facilities, such as the library, the apartments are available to be occupied as a student's main place of residence with facilities for day-to-day private domestic existence. This would be the case irrespective of whether the apartments are occupied by students or non-students, with no changes to the facilities provided in the apartments from the proposed removal of the occupancy restriction.
15. Any differences as to how an individual student lives, for example whether a student visits their parents at weekends or outside of term time, whether post is delivered to parents' addresses, or whether a student chooses to register at local financial or health services, or the extent of personal belongings, will vary between individuals. I am also mindful that there can be variances in how non-students live or where they spend time, for example between a retired individual and someone in employment. These nuances of how a student or non-student may live would not amount to a material change of use of the apartments if they were occupied by non-students.
16. In this regard, the removal of the disputed condition would not create 'new homes' or 'new dwellings', it would only widen the scope of who could occupy the existing homes/dwellings. Given these are the trigger points for an assessment against Policy DM7 and the NDSS, I do not consider the removal of the disputed condition 14 to trigger an assessment against either.
17. I accept that the apartments are very small. However, a student would still spend a significant amount of time at their place of residence even if the period of time that they live in the apartments is linked with their studies. As such, I do not see why being a student would necessarily mean that a lesser standard of accommodation would be acceptable compared to their occupation by any other resident.
18. In this regard, whether the apartments are occupied by students or non-students, the existing apartments do not provide a level of internal living space that would amount to a high standard of amenity for existing and future users as expected by the Framework. Moreover, even if an assessment was made against Policy DM7 of the DAP and the NDSS, the continued use of a planning condition to limit the occupancy of the existing apartments to students would not address the harms arising from the level of internal living space in the apartments.
19. I therefore conclude that the disputed condition 14 is not reasonable and necessary having regard to the development plan, the living conditions of future occupiers, with particular reference to internal living space and other material considerations.

20. Having reached these findings on the 'planning arguments', I have not considered the appellant's 'legal argument' or whether the condition is enforceable further as it would not alter the outcome of the appeal.

Affordable housing

21. Policy CS11 of the Council's Core Strategy and Urban Core Plan (CS) promotes lifetime neighbourhoods with a good range and choice of accommodation, services and facilities to meet varied and changing needs, by amongst other things, providing 15% affordable homes on all developments of 15 or more dwellings subject to development viability. This policy is consistent with the objectives of paragraph 62 of the Framework which says, amongst other things, that the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies.

22. No affordable housing provision was sought, or provided, at the time of the planning permission. Moreover, the Council advise that they would not currently seek affordable housing on student accommodation schemes. Nonetheless, having regard to my findings in the first main issue there would be no material change of use emanating from the removal of the disputed condition 14 that would trigger an assessment against Policy CS11 of the CS.

23. I therefore conclude on this main issue that having regard to local and national policy, there is no requirement for affordable housing to be provided in this instance.

Other Matters

24. The appeal premises is, in part, grade II listed and lies within the Leazes Conservation Area (CA). I have therefore had regard to the special duties placed on decision makers in section 66(1) and section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. As no physical works would result from the removal of the disputed condition 14 there would be no harm to either the listed building or the CA. Moreover, for the same reasons there would be no harm to the unlisted building which forms part of the appeal premises.

25. The appeal premises has at present, an informal wall-hung rack within the courtyard, which would be capable of holding a very limited number of cycles. These existing arrangements are below the Council's current standards set down in Policy DM12 and Appendix 6 of the DAP. However, the appeal site is within walking distance of the city centre's shops, amenities, employment, education facilities and public transport connections. In this regard, I do not consider there to be a discernible difference between non-students and students living within the apartments with a lack of on-site secure cycling parking.

26. The appeal premises have a communal refuse storage area within the rear courtyard. The bin storage capacity includes 4 x 1100 litre general waste, 1 x 1100 litre recycling, which are emptied twice a week and 1 x 240 litre glass waste, which is emptied weekly. There is no substantive evidence that the existing arrangements are not adequate for the existing occupation of the apartments or that non-students would likely generate a higher quantum of waste than students. Accordingly, I do not consider that the existing waste

arrangements would be unacceptable with the removal of the disputed condition.

27. The existing apartments would not alter. As such, the existing levels of natural light and outlook would not change whether the apartments are occupied by students or non-students. Moreover, whether the apartments are occupied by students or non-students the potential for noise and disturbance exists from individuals and there would be no significant increase in activity emanating from the removal of the disputed condition.
28. Representations were made to the effect that the appellant's human rights under Article 1 of the First Protocol, as set out in the Human Rights Act 1998, would be violated if the appeal is dismissed. This relates to the entitlement to the peaceful enjoyment of one's possessions. However, since I have decided to allow the appeal there will be no interference with the appellant's (or any occupier's) right to peaceful enjoyment of their possessions.

Conditions

29. Decision notices for the grant of planning permission under section 73 are also required to restate the conditions imposed on earlier permissions that continue to have effect. It also provides the power to not attach conditions, which were previously imposed, or to attach modified versions of them.
30. Notwithstanding condition 14 (which is the subject of this appeal), the planning permission was subject to several other conditions some of which are no longer necessary given that physical works are complete and long established. As such, the Council has provided an updated list of conditions that continue to have effect.
31. In this regard, from the planning permission the implementation condition (1) and the requirements for a construction method statement (17) are no longer necessary as the planning permission has been implemented. These conditions have subsequently also been removed in my decision along with the disputed condition.
32. The Council have also advised that several conditions from the planning permission that required additional details to be submitted to and approved by the Council, have had those details previously approved. This relates to conditions 3, 8, 10, 11, 12 and 13 from the planning permission. Accordingly, it is not necessary to repeat these in full. As such, and for the avoidance of any doubt these conditions have been amended and simplified to now require the approved details to be maintained. Moreover, the details of plant and equipment in conditions 10 and 13 from the planning permission have been merged into a single condition in the interests of brevity.
33. Considering my findings on affordable housing and cycle parking, any proposed conditions regarding these matters are not reasonable and necessary in this instance.

Conclusion

34. For the reasons set out above, the appeal is allowed.

Mr R Walker

INSPECTOR

Schedule of Conditions

1. The development to which this permission relates shall be carried out in accordance with the approved plans referenced: A(00)DEMOPB01 Basement Demolition Plan; A(00)DEMOP001 Ground Floor Demolition Plan; A(00)DEMOP101 First Floor Demolition Plan; A(00)DEMOP201 Second Floor Demolition Plan; A(00)DEMOP301 Third Floor Demolition Plan; A(00)GAE001 Proposed Elevations 1 of 3; A(00)GAE002 Proposed Elevations 2 of 3; A(00)GAE003 Proposed Elevations 3 of 3; A(00)GAE004 Proposed Rear Elevation Coloured; A(00)GAE005 Proposed Rear Elevation New Works; A(00)GAPB01 Proposed Basement Plan; A(00)GAP001 Proposed Ground Floor Plan; A(00)GAP101 Proposed First Floor Plan; A(00)GAP201 Proposed Second Floor Plan; A(00)GAP301 Proposed Third Floor Plan; A(00)GAP401 Proposed Roof Plan; A(00)GAP501 Block C Fire Places; A(00)GAS001 Block B Existing Section B-B; A(00)GAS002 Block B Proposed Section B-B; A(00)GAS003 Block C Existing Section C-C; A(00)GAS004 Block C Proposed Section C-C; A(00)GAS010 Section Through Fire Watches Tower; A(00)GAS011 Block C Detailed Bedroom Section; A(00)GAT002 Existing Percy Street View; A(00)GAT004 Proposed Percy Street View; A(22)GAPB01 Basement Partition Types; A(22)GAP001 Ground Floor Partition Types; A(22)GAP101 First Floor Partition Types; A(22)GAP201 Second Floor Partition Types; A(22)GAP301 Third Floor Partition Types; A(22)DES001 Typical Partition Head and Base Details 1 & 2; A(24)DEV001 Plan and Section Details; A(24)DEV002 Block C Internal Fire Escape Steps; A(24)DEV003 Block B rear Steps; A(24)DEV004 Block C Rear Access Gate; A(24)GAE001 Block B Stair Elevations; A(24)GAV001 Block B Stair GF FF SF TF Plans; A(24)GAV002 Block C Fire Escape Staircase; A(27)DES001 Block B - Roof Details; A(27)GAE001 Block A Existing & Proposed Water Table; A(31)DEP001 Secondary Glazing Details; A(31)DEV001 Turret Window - Block C; A(31)DEV002 Window Repair Details; A(31)GAV001 Block C Basement Toilets; A(32)DEV001 Door 125 Detail; A(74)ASV001 Acc WC Block B; A(90)GAP001 Location Plan; A(90)GAP002 Courtyard Plan; JCC14-048-100 Proposed Ground Floor Drainage Layout; JCC14-048-104 Proposed Basement Drainage Layout; CH15 001 Site Logistics - 1:500; CH15 002 Site Logistics - 1:200; and CH15 003 Hoarding Signage.
2. The materials and mortars approved as part of application 2013/1430/03/DCC shall be maintained.
3. The development shall be carried out in accordance with the details within the construction management plan approved by application 2013/1430/04/DCC.
4. The details of the junction between Block B and the original building approved by application 2013/1430/03/DCC shall be maintained.
5. The acoustic glazing and acoustic ventilation approved as part of application 2013/1430/04/DCC shall be maintained.
6. The details of the shopfronts approved by application 2013/1430/05/DCC shall be maintained.

7. The approved refuse storage area shall be maintained in accordance with the approved plans.
8. No external refuse or refuse container shall be stored outside of the approved refuse storage area at any time.
9. All equipment installed as part of the scheme approved by 2013/1430/08/DCC for extraction of fumes and odours and the prevention of odour through the building shall be maintained in accordance with the manufacturer's instructions.
10. The plant and equipment approved by 2013/1430/08/DCC shall be maintained in accordance with the manufacturer's instructions.
11. The development shall not be brought into use until the plant and equipment approved by 2013/1430/08/DCC has been implemented and retained as such thereafter.
12. No glass material or bottles shall be deposited in any skip, bin or other container which is located outside of the building, between the hours of 22:30 and 08:00 and any such skip, bin or container shall not be removed from the premises between those hours.
13. The external door(s) to the Class A3 unit shall be self-closing and shall be kept closed at all times when not in use.
14. The Class A3 unit shall close for business and all customers shall leave the premises by midnight, and the premises shall not re-open before 07.00 hours on Mondays to Sundays.

End of Conditions

APPEARANCES

FOR THE APPELLANT:

Nicola Allan	Nicola Allan Associates
Mark Walton	Michigan Investments Limited

FOR THE LOCAL PLANNING AUTHORITY:

Helen Spoors	Newcastle Upon Tyne City Council
Beth Linscott	Newcastle Upon Tyne City Council

DOCUMENTS:

- Policy DM12 of the DAP and Appendix 6
- Policy DM34 of the DAP
- Policy H1.5 of the UDP
- Commercial waste collection contract
- Rights of access plan