The Planning Inspectorate

Appeal Decision

Hearing held on 26 September 2023

Site visit made on 26 September 2023

by Ben Plenty BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 October 2023

Appeal Ref: APP/U5360/W/23/3323521
138 Albion Road, LONDON N16 9PA

- 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 Clissold Ltd against the decision of London Borough of Hackney.
- The application Ref 2023/0598 dated 18 February 2023.
- The development proposed is the conversion of the lower ground floor and ground floor former shop to two 1-bedroom self-contained residential flats.

Decision

1. The appeal is allowed, and planning permission is granted for the conversion of the lower ground floor and ground floor former shop to two 1-bedroom self-contained residential flats at 138 Albion Road, LONDON N16 9PA in accordance with the terms of the application, Ref 2023/0598, dated 18 February 2023, and the plans submitted with it, subject to the following conditions:

    1) The development hereby permitted shall begin not later than three years from the date of this decision.

    2) The development hereby permitted shall be carried out in accordance with the following approved plans: 1:1250 location plan, EMP/138/P1 – proposed lower ground floor plan and EMP/138/P2 – proposed ground floor plan.

    3) Prior to the first use of the one-bedroom flats, the details of additional bicycle storage facilities (including layout, stand type and spacing) and additional waste and recycling facilities, shall be submitted to and approved by the Local Planning Authority. These approved details shall then be fully implemented prior to the first occupation of the one-bedroom flats.

Preliminary Matters

2. The development description refers to the retention of works already undertaken. However, 'retention' is not a description of development and whilst the property has already been converted from a retail premises into two flats it has been arranged as two two-bedroom units. The ground floor flat would require some modification to alter it to a one bed flat, the basement flat would need to reassign the space to remove the second bedroom. Accordingly, the proposal has not been fully constructed as proposed and to this extent the proposal is not fully retrospective in nature. I have therefore adjusted the description of development accordingly without prejudice to any party.

3. The site has been subject to various planning decisions. An appeal[1] against an enforcement notice was dismissed in 2021 for the change of use of the building into four self-contained flats. The Inspector found, among other matters, that the ground floor two-bedroom flat did not comply with the Council's adopted space standards. It was found that the flat had only a small kitchen/living/dining area, resulting in unsatisfactory living conditions.

4. The Appellant recently submitted an update to the July 2022 Viability Assessment (VA). This revised the development value and construction costs following changes to market conditions since the original appraisal was submitted.

5. Further, the Council has recently submitted an appeal decision for Chingford Mill Pumping Station and the rateable valuation for the site from the Valuation Office Agency (VOA).

6. A Statement of Common Ground was submitted before the hearing commenced finding key areas of dispute as the viability of the scheme and with respect to the Council's suggested condition 2.

7. A S106 Legal Agreement[2] in the form of a Unilateral Undertaking (UU) has been submitted. This would provide a planning contribution toward Carbon Offset and would ensure that occupiers of the residential units do not have a Resident Parking Permit. Such a permit would otherwise allow them to park a motor vehicle on the public highway within the Controlled Parking Zone (CPZ). The second provision includes a monitoring sum. Both sums are to be paid within 28 days of any planning permission being granted.

Main Issues

8. The application was not determined by the Council within the statutorily prescribed 8-week timeframe. As such, following the submission of an appeal it falls to me to determine whether planning permission should be given.

9. In consideration of the Council's Statement of Case, officer report, and the evidence before me, the main issues are:

    - whether the proposed development would make an appropriate affordable housing contribution, and
    - whether the proposal would make an appropriate contribution towards carbon offset measures and 'car free' development.

Reasons

Policy position

10. The National Planning Policy Framework (the Framework) identifies that the size, type and tenure of housing needed for different groups in the community should be assessed and reflected in planning policies. This states that where the need for affordable housing is identified, policies should specify the type, and expect it to be met on site unless an off-site provision can be robustly justified and would create balanced communities. Paragraph 64 of the

[1] Appeal Decision Reference: APP/U5360/C/20/3266048
[2] Unilateral Undertaking, between Clissold Ltd, Hadassah Rachelle Iwanier and the London Borough of Hackney, dated 12 September 2023.

Framework states that affordable housing should not be sought for residential development that are not major developments. Nevertheless, section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise.

11. Policy H4 of the London Plan [2021] (LP) sets a strategic target for 50% of all homes to be genuinely affordable. This requires all major development to provide affordable housing. This also identifies that small sites should provide affordable housing in accordance with policy H2 of the LP requiring Council's to, *inter alia,* promote well designed new homes. The Council confirmed at the hearing that it was satisfied that the proposal would comply with LP policy H2 and hence policy H4 is engaged.

12. Policy LP13 of the Hackney Local Plan [2020] (HLP) seeks the provision of the maximum reasonable amount of affordable housing, subject to viability and site context. For schemes of 1-9 units this requires an on-site provision, or a payment in lieu of the equivalent of 50% of housing, to be delivered as affordable housing subject to viability. Moreover, the Council's affordable housing viability study document for small sites[3] (SSAHC) has considered the effect of applying a £50,000 per unit financial contribution to sites under 10 dwellings to test viability. In studying eight development typologies it demonstrates that most small schemes can make an affordable housing contribution and remain viable.

13. The Council's S106 Contribution SPD [2020] explains that median house prices were more than 15 times median income in 2017. It identifies that of the 26,000 homes needed in the borough, 92% are required to be affordable homes. It predicts that the Council's policies could deliver 9,975 units each year, far shorter than the actual need, but this recognises that setting a higher target could prevent future development being delivered. This identifies an acute shortage of affordable housing in the Borough, with demand remaining very high for the next 10 years. With generally rising house prices, and the ongoing cost of living issues, a shortage of affordable housing seems to remain an extant problem.

14. Consequently, the evidence adequately justifies the need to secure affordable housing provision on small sites to partly address the need. The Council's submitted evidence is substantive and provides an undisputed case of the need for affordable housing in the borough. Accordingly, the evidence of local demand for affordable housing is compelling and HLP policy LP13 is of greater weight than the Framework. Therefore, although the Framework is a significant material consideration it would not outweigh the development plan in this instance.

Issue 1 - Whether the proposed development would make an appropriate affordable housing contribution.

15. The role for viability assessment is ideally a matter for the plan making stage. Policy requirements in plan making should be clear so that they can be accurately accounted for by the developer in the price paid for the land. They should be informed by evidence of infrastructure and affordable housing need and a proportionate assessment of viability to ensure that policies are realistic.

[3] London Borough of Hackney: Small sites affordable housing contribution – viability study (2019)

They should be set at a level that allows development to be deliverable, without the need for further viability assessment at the decision-making stage. Where planning obligations are negotiated on the grounds of viability it is for applicants to demonstrate whether any changes in circumstances since the plan was brought into force justify the need for further viability assessment at the application stage.

16. A Viability Assessment is a process of identifying whether a development is viable, by determining whether the value generated is more than the costs of developing it. This includes consideration of gross development value (GDV), construction costs, land value, landowner premium and developer return. Initially a VA was prepared by Simon Corp in October 2021 (VA1), this was then reviewed and replaced by a new VA, by James Brown, in July 2022 (VA2) and finally updated and replaced by Mr Brown in July 2023 (VA3).

17. VA1 was prepared in consideration of a larger scheme for the entire building, but I find its assessment and conclusions with respect to GDV remain useful. This looked at sales values within a 0.25 mile radius of the site and determined that the GDV would be £975,000. VA3 has reduced this figure by £50,000 to reflect current volatility in the market with respect to rising mortgage costs and the current cost of living issues. However, the Council explained that market values have only fallen around 0.5% in the time-period, but acknowledge that a reduction of £25,000 would be appropriate noting current fluctuations in the market. I tend to agree with the Council that the Appellant's proposed reduction is too great, and a £25,000 reduction seems more suitable based on the evidence I heard. This figure is, to some extent, a 'best guess', as sale prices can be site specific and influenced by a range of local factors. Consequently, I find that a sum of £950,000 is a more realistic reduction based on the submitted evidence.

18. Both the Council and VA1 used the RICS Building Cost Information Service (BCIS) to calculate construction costs. However, this figure was adjusted in VA2 upon submission of the BTP Cost Plan[4](CP), prepared by a Quantity Surveyor. This indicated that the initial construction costs of VA1 were too low. It demonstrated that the use of BCIS for very small projects underestimates the costs of development where dis-economies of scale result in construction costs being greater than estimated. This is demonstrated by the CP finding construction cost of £436,007, which is substantially higher than has been estimated by the Council using BCIS.

19. The BCIS calculation may not be an accurate tool when considering very small sites. The Planning Practice Guidance (PPG) explains that costs should take account of abnormal costs when considering the impact of costs on return to a developer. In this case, the proposal includes the conversion of a commercial space into residential use, around half of which would be at a basement level. It is therefore reasonable to find this project would generate abnormal costs and dis-economies of scale that are beyond the typical scope of BCIS. Hence the detailed CP provides a more accurate and realistic method for assessing construction costs.

20. At the hearing I tested some of the figures within the CP as I found some parts of it to be higher than I would have expected, especially with respect to the costs of the sanitary ware. However, the CP has not been scrutinised by the

[4] BTP Group, November 2022

Council and it has not offered an alternative breakdown of associated costs. The CP therefore has substantial weight, due to its robust nature and having been prepared by a suitable qualified professional. Accordingly, whilst having some doubts about some of the stated figures, I have found the figures affected relate to relatively minor parts of the scheme. I therefore accept the CP as a fair and reasonable description of the costs associated with the required works. Furthermore, as the construction costs were derived in 4Q 2022, it is reasonable to update this figure by 2.6% to reflect build cost inflation as demonstrated in the Appellant's submission.

21. In terms of professional fees, the Council's Small Sites - Viability Study states that a 10% allowance is incorporated in its appraisals. VA2 argues that such a figure does not consider the effect of undertaking development on very small sites. There is general agreement between parties on this input where the Council helpfully explained that a percentage of 8-12% was generally found to be acceptable. VA2 provides a breakdown of professional fees, offering a sum of £50,000, increasing in VA3 to £55,000 to account for rising costs. This approach seems appropriate when dealing with extremely small projects where dis-economies of scale would result in a generally greater proportion of costs as opposed to a global percentage estimate.

22. The VA3 allows for a profit of 20% of GDV. This is within the industry standard of an acceptable return to developers as identified by the PPG of 15-20% of GDV. The Council identifies that profit could be lowered to 12.5% and has demonstrated where that has been achieved on other sites. However, these appeared to be larger sites where substantially different inputs were engaged.

23. To determine the land value, the PPG states that existing use value (EUV) is the first component of benchmark land value (BLV). In VA3 the Appellant has compared the retail unit to the sale of commercial premises in the local area and found the commercial space to have a likely value of £350,000. The Council finds the Appellant's comparables to not be directly relevant as the retail units have not been assessed with regard to two zones (relating to the proportion of unit within and beyond 6 metres of the shopfront). Nonetheless, the Appellant's evidence is not contradicted by alternative evidence from the Council that might demonstrate a lower land value. In contrast, the Appellant's evidence is relatively comprehensive and demonstrates a reasonable land value based on local sales values.

24. I am cognisant that the Council finds that the EUV should be reduced, by around £100,000 to account for the cost of returning the unlawfully constructed flats back to a shop unit. However, this is unnecessary as the Viability Appraisal process is based on a hypothetical scenario where reasonable comparable costs can be compared using up-to-date figures. As the current works, to create the two flats, are unlawful the current form of development has been bypassed for valuation purposes. As a result, the appraisal correctly considers the EUV based on the existing lawful use as a retail unit.

25. In summary, I find that the Appellant's GDV, construction costs and land value seem to be generally accurate and well evidenced. The construction costs, plus professional fees, marketing & disposal fees and finance create a substantial sum. The costs associated with the scheme are relatively high and result in only a comparatively small profit as a developer return. Accordingly, the

Appellant's VA3 has demonstrated that the proposal cannot provide a contribution towards affordable housing.

26. Furthermore, the Council's Appraisal accounted for a £100,000 affordable housing contribution, set a 12.5% profit margin, finance at 6.5% and a construction cost of £222,803, and created no deficit or surplus. As has been demonstrated by the Appellant, the construction costs, land value and finance sums of the Council's Appraisal are too low. Even if the remaining figures, in the Council's appraisal, remained the same the model would show a deficit. As such I am unconvinced, based on the Council's Appraisal, that the scheme could generate a reasonable return to a developer that would also be sufficient to make an affordable housing contribution in this case.

27. Consequently, the proposal would not generate sufficient value to be capable of providing a contribution towards affordable housing and to do so would render the scheme unviable. Accordingly, the proposal would comply with LP policy H4, HLP policy LP13 and the S106 Planning Contributions SPD [2020]. These seek, among other matters, for development of 1-9 residential units to provide an affordable housing payment, subject to the viability of the proposal.

Issue 2 – Whether the proposed development would make an appropriate contribution towards carbon offset measures and 'car free' development.

28. The UU provides a sum towards carbon offset and prevents occupiers parking within the CPZ. These requirements meet paragraph 57 of the Framework as being necessary and directly related to the development. The Council has confirmed that the UU is acceptable.

29. However, the matter of a monitoring sum with respect to the carbon offset sum is in dispute between main parties. The payment of monitoring sums is a requirement of the Council's S106 Planning Contributions SPD. This states, at paragraph 25, that the ability to charge a monitoring fee is authorised in law and the amount must fairly and reasonably relate to the development. The fee schedule identifies a monitoring sum of £555 for non-financial obligations and £555 or 5% of the financial obligation whichever is the greater. Paragraph 26 explains that the fee covers the cost of monitoring agreements and reporting on the delivery of planning obligations.

30. The monitoring sum associated with the car free development would be used by the Council to ensure that the provision is complied with and to address any ongoing monitoring of its operation. This sum is therefore fairly and reasonably related to the development. However, the requirement for a carbon offset sum is concerned with the payment of a fixed sum, identified in the UU and to be paid within the prescribed timeframe. As such, no monitoring of the sum would be required. Once received by the Council it places a duty upon it to ensure it is spent in accordance with other collected sums.

31. This therefore seems to require no ongoing monitoring, whilst the Council directed me to the S106 SPD, paragraph 25 and the Council's associated evidence does not provide sufficient detail to explain the need for such a requirement. Accordingly, based on the evidence submitted, I am unconvinced that a monitoring sum for the carbon offset contribution has been reasonably justified in this case. The S106 SPD does not appear to differentiate between provisions that require ongoing monitoring, such as affordable housing, and in

contrast those contributions that require the payment of monies, creating limited or no monitoring to ensure the provision's proper performance.

32. Consequently, the UU as submitted would be necessary in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development in accordance with paragraph 57 of the Framework. Accordingly, the Agreement complies with HLP policies LP33, LP41, LP42, LP43, LP44, LP45, LP54 and LP55. These seek, among other matters, for development to promote car free development and regulate internal and external temperatures to mitigate the urban heat island effect.

Other Matters

33. An enforcement appeal[5] was dismissed against an enforcement notice for residential development at Chingford Mill Pumping Station. The Council find this decision to be relevant to the site the subject of this appeal as it also relates to viability matters and retrospective works. My attention has been specifically drawn to paragraphs 52-58. Here the Inspector noted that where the rigid application of policy requirements for affordable housing would jeopardise the delivery of housing they may be applied flexibly, or even set aside, according to the circumstances. He found that "the justification for flexible application of policy requirements may be clear where a lack of financial viability would threaten the delivery of housing. While planning permission may be granted in respect of development that has already been carried out, it is plain that there cannot be any threat to the delivery of housing that already exists".

34. I concur with these views. The Appellant in that case stated that to make an affordable housing contribution would cause bankruptcy. It appears that the Inspector did not have access to financial details of the project, or the business and no expert witness gave financial evidence at the Inquiry. The Inspector concluded that in the absence of financial evidence justifying a determination other than in accordance with the development plan the scheme was unacceptable.

35. Although the case presents some parallels to the current appeal in broad terms, it seems that viability was not raised as a detailed matter for discussion. Although the delivery of the current proposal is not threatened, as the development has already been carried out, its viability still affects its ability to make an affordable housing contribution. Further, there is no evidence within the submitted decision that a viability appraisal was undertaken to enable me to draw any broader comparisons to the proposed scheme. The scheme described was of substantially greater scale, generating starkly different inputs and values that would be unlikely to be readily comparable to the appeal proposal. In any event, each case must be determined on its own individual merits.

36. The valuation office agency (VOA) data, submitted by the Council, shows that the retail space of the site to be smaller than that detailed in the viability appraisals. This demonstrates that the unit would have a greater rateable value than is predicted by the VOA. However, the Appellant has used a range of comparables to determine the EUV of the land and as such, the Council's evidence has had a limited bearing on my consideration of land value.

[5] Appeal Decision Reference: APP/U5930/C/21/3280591

Alternative viability appraisal models

37. The Council refutes the Appellant's financial approach to the site and asserts that the Appellant has failed to demonstrate why the scheme has been largely implemented, as it did not appear to provide a profit. The Council suggested that the VA should have been 'sense tested' to explore why an apparently unviable scheme had been implemented. The Appellant has demonstrated that the GDV minus construction costs, fees and land value leaves little or no return for the developer. The Appellant's appraisal demonstrates that the scheme would be in deficit against the BLV.

38. However, whilst the scheme has been shown to be unviable, it has been delivered, nonetheless. The delivery of a scheme is principally a matter for a developer based on their understanding of local market conditions and personal investment objectives. Developers sometimes take a 'commercial decision' to proceed at lower return levels, based on a site's individual context. The Appellant presumably proceeded with this scheme despite the low return. As such, the scheme could be delivered despite the low or zero profit and it therefore has to be assumed that Appellant is prepared to accept a lower profit. In any event, whilst I note the provisions of HLP policy LP13, LP policy H4 and the S106 SPD, deliverability is not expressly mentioned, and as such the scheme would not conflict with these policies on this basis.

39. A conventional viability appraisal does not account for future investment return of a rented asset or predict any growth of future land values; factors which may be relevant in this case to explain why the Appellant proceeded with the development. Accordingly, based on the evidence, it has not been substantiated that the Appellant's viability appraisal is either flawed or illogical.

40. Also, the Council considered that the retrospective nature of the proposal meant that the appraisal was a hypothetical model and should take into account revenue collected since the work was complete. On this basis the Council described two alternative viability models that it considered would provide a more accurate understanding of the viability of the scheme. The first approach would be to take a historical assessment of the costs and values when the work was undertaken. The second approach would be to investigate the costs of the remaining works in comparison to the GDV.

41. The first approach would rely on access to accurate historical costs and values that would be unlikely to be available. The second approach would take no regard of the costs of work already undertaken that should rightly be part of a comprehensive analysis of the financial inputs and outputs of the scheme. Accordingly, I find both offered alternative approaches to be flawed as both describe highly hypothetical scenarios that would create non-conventional and incomplete appraisals. These could not be relied on for accuracy and would not include the necessary evidential rigor to be of practical use.

Conditions

42. I have considered the use of conditions in line with the guidance set out in the PPG. As the proposal is not fully retrospective, I have imposed the standard timeframe condition to require the approved works to be completed within 3 years. Furthermore, for a similar reason, a condition has been applied requiring the development to be undertaken in accordance with the approved plans for certainty.

43. Although both a cycle store and bin store have already been installed, neither appear to provide storage of sufficient quantity to meet the Council's requirements. HLP policy LP43 requires development to enable new residents to make journeys by active modes and HLP policy LP57 requires development to provide facilities for the storage and collection of waste and recycling. An additional cycle store provision within the basement lightwell area would increase provision. Also, the existing refuse arrangement provides insufficient provision for recycling facilities. Therefore, it is necessary to impose a condition for further bin storage details to ensure the proposal would function well.

Conclusion

44. For the above reasons, the appeal is allowed and planning permission is granted subject to the attached conditions.

Ben Plenty

INSPECTOR

APPEARANCES

For the Appellant;

Eli Pick	- Planning Consultant, EM Pick Planning
James Brown MRICS	- Chartered Surveyor

For the Council;

Erin Glancy MRTPI	- Planning Officer, London Borough of Hackney
James Carney MRICS	- Valuations, London Borough of Hackney

Additional documents

Doc A: Statement of Common Ground (signed version)

Doc B: 19 July 2023 Appellant's update of viability

Doc C: 22 September 2023 Council's submission of appeal decision for Chingford Mill Pumping Station (the accompanying discussion paper was not accepted)

Doc D: 25 September 2023 Council's submission from the Valuation Office Agency.