The Planning Inspectorate

Appeal Decision

Site visit made on 17 October 2023

by Frances Mahoney MRTPI IHBC

an Inspector appointed by the Secretary of State.

Decision date: 20th February 2024

Appeal Ref: APP/A5840/W/23/3315102
41 Linden Grove, London SE15 3LW

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Ty Tikari against the decision of the Council of the London Borough of Southwark.
- The application Ref 21/AP/3580, dated 11 October 2021, was refused by notice dated 25 August 2022.
- The development proposed is for the demolition of detached house and erection of block of flats with nine units, landscaped front courtyard, two car parking spaces, communal amenity space, secure cycle and refuse storage, and garden pavilion.

Decision

1. The appeal is dismissed.

Matters for consideration

2. The Council refused planning permission on the basis of two reasons for refusal. The first related to the loss of a non-designated heritage asset in circumstances where it was proffered that the building could have been viably retained and refurbished. The second reason was that the scheme did not provide 35% affordable housing and intermediate homes or an equivalent financial contribution.

Provision of affordable homes

3. Considering the second reason for refusal first. The Southwark Plan 2022[1] Policy P1, social rented and intermediate housing, requires that development creating 9 homes or fewer (inclusive) must provide the maximum amount of social rented and intermediate homes or a financial contribution towards the delivery of new council social rented and intermediate homes within a minimum of 35% subject to viability. This policy is central to strategic policy objectives, in particular Strategic Policy SP1 which aims to deliver the Council's commitment to tackling housing affordability issues in the Borough.

4. The application of Policy P1 to minor schemes, such as that now proposed, was relatively new when the planning application was determined following the adoption of the Southwark Plan in February 2022.

5. The proposed scheme promoted the Passivhaus quality assured standard and methodology for low energy building. The Council has indicated that they gave

[1] Adopted 23 February 2022.

only limited weight to the delivery of the Passivhaus development. However, the Southwark Plan Policy P70 sets out that development must minimise carbon emissions on site and be lean (energy efficient design and construction); be clean (low carbon energy supply); and be green (on site renewable energy generation and storage). Passivhaus is a tried and tested solution to deliver net-zero new buildings optimised for a decarbonised grid and augmented for occupant health and well-being. In an environment where adapting to climate-change, including moving to a low carbon economy[2], should be at the fore of our decision-making, developers taking on the elevated standards of Passivhaus should be encouraged, and I ascribe considerable weight to the benefits which would ensue from a Passivhaus development.

6. The conclusion of the appellant's financial viability appraisal of the proposed development was that the Passivhaus scheme could not make a contribution to affordable housing with high build costs. The Council did not dispute the unviable position of the appeal scheme, in principle, but was of the view that there was potential to improve the viability at the advanced stage of development.

7. Their reasoning is based on two factors. The first centres on the fact that at application stage the residential sales value of the proposed scheme could only be based on standard new build comparables in the locality. No evidence was available to support sales values as a Passivhaus scheme in the surrounding area. The viability of the proposed Passivhaus scheme, associated with higher build costs than a standard scheme, would have the potential for sales value uplift. However, this could not be accounted for during the application stage.

8. The second factor is that this small development, being minor in nature, is not subject to policy requirements to net zero-carbon performance. So, whilst the Passivhaus standard is encouraged, there is no requirement to enter into a S106 obligation in respect of monitoring and reporting of the post-construction energy performance. That said if the energy efficient measures were not built as approved to a lesser standard, it would impact on the actual viability of the proposed scheme and the potential affordable housing contribution.

9. The Council has been proactive in keeping the workings of Policy P1 under review in respect of how the issues and process of assessing viability impacts, specifically in relation to small sites, and the consequences in relation to affordable housing provision, respond to the terms of the policy and the resultant outcomes.

10. The Council has identified, through supplementary planning guidance (SPD)[3], that there would be a requirement for late-stage review, in the event of a reduced affordable housing obligation, as a result of a viability review outcome.

11. A late-stage review mechanism ensures developments secure the maximum public benefit, being the delivery of affordable housing, over the period of a development and can encourage the build out of schemes. In particular, the late-stage review is based on actual values achieved and costs incurred. The review takes place prior to the sale of the whole development and ensures that, the review and any additional contribution (off-site financial payment) arising from this, are enforceable.

[2] National Planning Policy Framework (the Framework) para 8 c).
[3] Development Viability SPD (2016).

12. The late-stage review may use actual costs and/or revised sales values and would assess whether the permitted scheme has become more viable from the date that planning permission was granted to the date of substantial implementation. This theme is developed in more detail through the London Plan's Affordable Housing and Viability SPD (2017)[4]. The review mechanism set out in the London Plan SPD has been adopted by the Council as a standard S106 agreement mechanism for schemes found unviable at application stage. This includes small sites such as that the subject of this appeal.

13. For the benefits explained above, the Council is of the view that the introduction of a late-stage review could ensure that the maximum affordable housing contribution is secured in accordance with the requirements of Policy P1. This would enable a review of appraisal inputs, including the factors that may improve the viability of the scheme. Consequently, this would improve the prospect of an affordable housing benefit and afford considerable weight to be placed in the balance of this decision. Without the late- stage review, there is no potential for another assessment of the scheme to see if a contribution is payable. The outcome of the Council's viability review was to agree with the appellant's financial viability appraisal that the scheme at application stage could not make an affordable housing contribution.

14. However, the Council consider that the objection to the proposal, in this regard, can be resolved by means of a late-stage review mechanism agreed with the appellant and secured in a Unilateral Undertaking (UU)[5]. In the event that the UU successfully secures the mechanism to allow for a further assessment further down the line, as the development unfolds, the Council would not wish to maintain their objection and would not defend reason for refusal 2.

15. The appellant does not accept that it is necessary to provide any affordable housing for the reason that Southwark Plan Policy P1 sets out that small development[6] should provide a minimum of 35% affordable housing, subject to viability, and the Council has accepted the scheme at application/appeal stage is not viable. Further, the appellant is not aware of a requirement for affordable housing to be considered at a late-stage review.

16. This is a case of particular circumstances where the development has been promoted on the basis of it being a Passivhaus scheme which would generate higher build costs than a standard one. In my view, such a scheme would have the potential for an uplift in the sales value of the units, due to the promoted advantages of the Passivhaus methodology, which is a whole building approach with measured targets to achieve energy efficiency and thermal performance. No doubt such efficiencies would be promoted as benefits in sales material and prove attractive to purchasers looking for a home beyond the normal standard of energy efficiency.

17. The problem is with no other similar developments in the locality which have adopted the same monitored performance standards it is difficult to assess what the uplift in sales values might be. This obviously would likely impact on any assessment of viability. With the initial viability assessment being based

[4] Formula 3 and the standard trigger of the sale of 75% units.
[5] Letter of Council's Position dated 13 September 2023 & Statement of Case dated 27 November 2023.
[6] Creating 9 homes or fewer.

on standard new build values in the locality[7] the potential for the up lift in unit sales value as a Passivhaus development cannot be factored in at this stage.

18. I recognise that small developments of the size proposed are not required by policy to achieve net zero-carbon performance. However, the appellant has promoted the scheme as adopting a higher, internationally known, standard of energy efficiency and, in doing so, has elevated the scheme above the norm.

19. Therefore, if weight is to be ascribed in the balance of this decision to the environmental benefits of the Passivhaus standards, weighed against any identified harms, then the construction and future operation of the proposed development would need to be safeguarded, including monitoring. Consequently, it is not unreasonable to require a down the line reappraisal of the viability of the scheme in the more certain knowledge of the actual sales value of units tested by the market[8], appraised against know costs. A UU offers a mechanism to secure such a late-stage review and the appellant has submitted a signed and completed UU dated 27 November 2023 which seeks to meet the requirements of the Council.

20. So, on the face of it this would seem to be a matter with resolution between the parties[9]. However, the Council's Statement of Case of the 27 November 2023 then sets out concern in relation to the defining of some terms in the UU and the ability of the Undertaking to deliver the review.

21. Dispute exists in respect of two matters. The first is the level of the late-stage review cap. The appellant has assessed this on the basis of the contribution which the Council could have sought at the application stage based on the viability assessment of a scheme which does not take into account Passivhaus outcomes[10].

22. However, as I have set out above, as the scheme is being promoted as being Passivhaus, it is necessary to consider the development against the potential higher build costs weighed against the value of the sales of residential units prior to the late-stage review[11].

23. In addition, I am charged with considering this appeal on the basis of the most up to date evidence and, on this basis, I do not consider points in time can be cherry picked when the evidence has been developed further for this appeal.

24. Therefore, I do not find the appellant's figure to be of appropriate relevance in the circumstances of agreement on a late-stage review for this Passivhaus development.

25. The Council consider the late-stage review cap should be the equivalent of 50% affordable housing as per Southwark Plan Policy SP1, SPD and London Plan guidance which would yield £1,400,000[12]. However, Policy SP1 sets out 50% as a target for the provision of social rented and intermediate homes. One of the factors in achieving this is to encourage developers to exceed 35% social

[7] With the conclusion that the scheme could not make a contribution to affordable housing.
[8] Without a late-stage review there would be no opportunity for another assessment of the scheme to establish if a contribution should be paid.
[9] Confirmed with the Letter of Council's Position dated 13 September 2023.

[10] £142,739 – definitions and interpretations page 5 of the UU.
[11] Trigger would be the date seven units have been sold.
[12] 50% of no of habitable rooms x £100,000 per habitable room.

rented and intermediate homes delivery[13]. It is not a requirement to achieve 50%.

26.Southwark Plan Policy P1, where it relates to developments creating 9 homes or less, must produce a minimum of 35% social rented and intermediate homes or a financial contribution towards the delivery of new council social rented and intermediate homes, subject to viability. In policy terms it would appear that the 35% provision of affordable housing, in the circumstances of questionable future viability and the consequential need for late-stage review, would be the most reasonable and appropriate figure to pursue.

27.The £100,000 pooled contribution per habitable room of affordable housing[14] comes from SPD which still remains in draft and unadopted. Whilst this may have been subsumed into the suite of applicable planning policy documents, its draft nature does reduce the weight which can be placed upon its guidance. The Council's Viability SPD 2016 also picks up the same approach to pooled contributions. This is accepted as being guidance, but not policy and the circumstances of each case must be assessed to secure a fair and reasonable way to proceed with the ultimate aim of increasing the supply of different kinds of homes.

28.Therefore, in these circumstances[15] of a Passivhaus development, with associated credentials, I agree with the appellant that the 50% affordable housing provision applied by the Council in formulating the late-stage review cap[16] is not justified, particularly in such a small scheme where viability has yet to be established[17], hence the late-stage review. The 35%, required by Policy P1, would seem to be a more equitable starting point for the calculation.

29. The second matter is that the parties do not agree with the definition of the Breakeven Gross Development Value[18]. The Council are relying on the application viability appraisal to evidence their figure. It has already been established above that the viability appraisal at the application stage was not based on the higher standards of build measured against appropriate sales values of the Passivhaus development. Therefore, this puts into question the reliability of the Council's figure. The appellant's figure is based on up-to-date breakeven inputs from November 2023. I note the Council has not scrutinised this evidence[19] suggesting there is no reason to justify an exception given deficit would not normally be accounted for in review mechanisms. This is not a normal development as has already been established. I am more inclined towards the figure of the appellant, but I am concerned that this is not tested evidence in the context of the exceptional circumstances of the Passivhaus scheme.

30.This is not a beauty competition on the definition of GDV. I am not convinced in either respect and must charge the parties with properly evaluating the evidence in this regard to come to an agreed position.

[13] Southwark Plan Policy SP1 4. & reason 1.
[14] Southwark Affordable Housing SPD April 2011
[15] Which I consider to be exceptional.
[16] This is an assurance to the appellant that there is a ceiling to the contribution.
[17] As a Passivhaus scheme.
[18] The appellant defines it in the UU as being £5,882,504 – no deficit. The Council say it would be £4,902,00 being the GDV as evidenced by the application viability appraisal.
[19] Para 20 Council's Statement of Case 27 Nov 2023.

31. As already identified this development would represent a significant benefit by compliance with Policy P70 achieving 98% reduction in carbon emissions against 2013 Building Regulations. This benefit, however, needs to be secured. I agree with the Council that within the UU there should be an obligation that prior to occupation a validation report detailing how the actual on-site carbon savings have been achieved shall be submitted to and approved in writing by the Council. In addition, as a Passivhaus development and, with the emphasis which is being placed on its status, evidence of the Passivhaus certification should be submitted to the Council, although I am not clear what would be the trigger for that obligation as the Council indicate the certification process can be lengthy and can only be realised after completion of the scheme.

32. The Council has also asked for a clause that prior to demolition, evidence must be submitted to the Council that demonstrates the development will be built out in accordance with the planning permission to achieve Passivhaus certification. To my mind this could be dealt with by condition, and in any case the Council has already asked for an obligation requiring evidence of the Passivhaus certification.

33. I have noted the Council justifications for the other obligations within the UU and am satisfied they are justified in respect of Regulation 122 of the CIL Regulations.

34. The inclusion of a late-stage review mechanism would significantly improve the public benefits attributed to the appeal proposal. It allows for the possibility of an affordable housing contribution to be paid. It is also necessary through the UU to secure Passivhaus certification and evidence of actual on-site carbon savings in accordance with the energy statement submitted at the application stage, in order to achieve the environmental benefits of the scheme as approved. Were I confident that these public benefits would be delivered and had a mechanism before me which could do so, the weight which would be ascribed to the benefits of the proposal would be significantly greater.

35. I have identified a number of inadequacies within the terms of the promoted UU which, to my mind, result in the proffered benefits of the development being unable to be appropriately secured. It may well be possible through negotiations between the parties to resolve these matters, but this is not in my gift, and I can only consider this appeal on the basis of the UU before me which I have found wanting for the reasons already stated above.

36. Therefore, I can only ascribe limited weight to the public benefits of the scheme in the context of the delivery of the Passivhaus standard of development, as there is no adequate mechanism before me which would appropriately secure delivery of the public benefits of the scheme which need to be weighed into the balance of this decision.

Heritage Assets

37. Framework paragraph 189 identifies that heritage assets range from sites and buildings of local historic value to those of the highest significance. These assets are an irreplaceable resource and should be conserved in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of existing and future generations.

38.Framework paragraph 195 sets out that decision-makers should identify and assess the particular significance of any heritage asset that may be affected by a proposal to avoid or minimise any conflict between the heritage asset's conservation and any aspect of the proposal.

39.Framework Paragraph 203 goes on to say that the effect of an application on the significance of a non-designated heritage asset should be taken into account in determining an application. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset.

40.Linden Grove is a road of some length, skirting the north-western edge of the 19th Century, Victorian Nunhead Cemetery, a much-overgrown woodland area, now partially restored and with a local nature reserve designation. It has a strong presence along Linden Grove with the mature Cemetery edge trees and brick wall, pillars and railings defining the highway boundary on this side of the road. The Cemetery is identified as part of the Nunhead Cemetery Conservation Area which is defined by its walled boundary adjacent to Linden Grove, but is very much inward facing in nature, limiting its visual and characterful relationship with Linden Grove.

41.To the north of the appeal site is the Nunhead Green Conservation Area which includes the Green and surrounding buildings, some of which are listed. The buildings largely date from the mid to later 19th century with a generally domestic character and scale.

42.For much of Linden Grove its character can similarly be described as domestic. However, its character is mixed in respect of design and appearance of buildings. The homes at the northern end of Linden Grove, down as far as Nunhead Grove, are comparatively modern in design, including three and two storey terraced houses and terraced bungalows.

43.At the corner of Linden Grove and Nunhead Grove is a modern four storey block of apartments with parking and manoeuvring space in front and walled front boundary.

44.No 41 Linden Grove stands next to this comparatively recent addition to the street scene. It is a substantial three storey London stock brick, essentially detached, Victorian villa, set back from the road with an in-out drive and front garden planting. It is of a simple, symmetrical, classical form with some surviving details and is a good example of a villa of this nature, reflecting design features and style from the 19th century[20]. Its significance goes beyond its age, style and design and includes its rarity value being one of the very few examples of such Victorian villas in the close vicinity[21]. It is not listed nor is it within a conservation area. However, it has importance as a surviving example of Victorian Suburbia. It is on this basis that the Council consider it to be a non-designated heritage asset of local historic value. I have no reason to disagree with this assessment.

[20] The Council initially pursued an objection to the loss of the Villa on the basis that there may still be merit in conversion of the existing building to a single home or apartments. The viability of this was called into question by the appellant. The Council has not pursued this matter further at appeal and I am satisfied that this is just that a possibility but with little substantive evidence to consider as being a realistic alternative.

[21] There are four, three and two storey Victorian terraced houses within the Nunhead Green Conservation Area at the end of Linden Grove close to Nunhead Green (A2214) but at a distance to No 41.

45.I have considered this appeal in light of the statutory duties placed upon me as the decision-maker in Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 which require that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of conservation areas. Paragraph 199 of the Framework also requires that great weight should be given to the conservation of assets irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.

46.No 41 is outside of the nearby Conservation Areas and its significance is centred on its relationship with the immediate vicinity of Linden Grove rather than the Cemetery opposite or the wider Nunhead Green to the west. Therefore, I consider the total loss of the villa would have a neutral impact on the character or appearance of either conservation areas.

47.The proposed replacement building is relatively small scale and similar to other apartment developments along Linden Grove and therefore, like the Council, I see no reason to question the suitability of the proposed design, siting or scale.

48.The issue comes down to the identified effects of the appeal proposal on the significance of the non-designated heritage asset relating to heritage harm from the loss of this pleasant Victorian villa, as a rare example of such suburban 19th century development, weighed in the balance of this decision against other material considerations/benefits.

49.The Council, in initially assessing the proposal at the application stage, found that the total loss of significance of the non-designated heritage asset arising from demolition would not be outweighed by other considerations/benefits. The public benefits being referred to by the Council were those which would have come forward by the provision of affordable housing. When the application was determined by the Council the appellant was not offering any affordable housing on viability grounds nor any means to secure its provision.

50.However, following the submission of the UU in association with this appeal, the Council confirmed they would not be defending their first reason for refusal on the basis that the late-stage review of the viability of the scheme could result in an affordable housing contribution in the event the viability of the scheme improves[22]. However, this very much relies on the ability of the proffered terms of the UU to deliver the promises of the late-stage review.

51. I have already concluded above that the UU has a number of inadequacies which, to my mind, would not secure the proffered benefits which centre on the possibility of the provision of future affordable housing resulting from the delivery of the Passivhaus development. Therefore, I consider that the identified heritage harm would not be outweighed by the public benefits that the appeal proposal can deliver. I have taken into account the energy credentials of the Passivhaus development as a benefit, but without the significant weight of the future possibility that the proposal could bring forward acutely needed affordable homes in the Borough this appeal should fail.

Conclusions

52.The duty in section 38(6) of The Planning and Compulsory Purchase Act 2004 enshrines in statute the primacy of the development plan. As an

[22] Letter of Council's position (13 September 2023) & Council's Statement of Case (27 Nov 2023).

essential component of the 'plan-led' system, it is also reiterated in the Framework[23] which is of course a material consideration to which substantial weight should be attached.

53. For the reasons set out above I find that in the absence of a mechanism with appropriate terms to deliver the late-stage review, the public benefits of the scheme would not outweigh the harm to significance of the total loss of a non-designated heritage asset. In this way the terms of Southwark Plan Policy P21, London Plan Policy HC1 and the Framework, which all seek to conserve and enhance the significance of non-designated heritage assets, would be unacceptably compromised.

54. Further, the lack of the serviceable terms of the UU would result in the proposed Passivhaus development being unable to provide an affordable housing contribution into the future, as the late-stage review would not be delivered. In these circumstances the terms of Southwark Plan Policies P1 and SP1 would be offended.

55. Therefore, I dismiss this appeal.

56. In my judgement, based on the evidence before me, the key to the delivery of this Passivhaus development is the agreeing of terms acceptable to both parties to deliver the late-stage review through the UU.

Frances Mahoney

Inspector

[23] Framework para 2.