



Appeal Decision

Hearing held on 10 April 2024

Site visit made on 10 April 2024

by Jane Smith MA MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 May 2024

Appeal Ref: APP/H5960/W/23/3333977

150A-170 Penwith Road and 2-8 Thornsett Road, London, SW18 4QA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 (as amended) for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Penwith Developments Ltd against the decision of the Council of the London Borough of Wandsworth.
 - The application Ref is 2022/1029.
 - The application sought planning permission for development described as 'Demolition of existing buildings and erection of a part three, part four-storey plus basement level building to provide floorspace for Class E and Class B8 uses and residential units of both private and affordable tenure, with associated balconies and terraces, cycle parking provision and a new sub-station', without complying with conditions attached to planning permission Ref 2019/1427 dated 30 October 2020.
 - The conditions in dispute are Nos. 2 and 27 which state that:
 - *2. The development hereby permitted shall be carried out in accordance with the following approved plans: PTR-AIN-XX-XX-DR-A-201; PTR-AIN-XX-B1-DR-A-202; PTR-AIN-XX-00-DR-A-203; PTR-AIN-XX-01-DR-A-204; PTR-AIN-XX-02-DR-A-205; PTR-AIN-XX-03-DR-A-206; PTR-AIN-XX-XX-DR-A-207; PTR-AIN-XX-XX-DR-A-301; PTR-AIN-XX-XX-DR-A-302; PTR-AIN-XX-XX-DR-A-303; PTRAIN-XX-XX-DR-A-401; PTR-AIN-XX-XX-DR-A-502; PTR-AIN-XX-XX-DR-A-503; PTR-AIN-XXXX-DR-A-504; PTR-AIN-XX-XX-DR-A-505; PTR-AIN-XX-XX-DR-A-601; PTR-AIN-XX-XX-DRA-602; PTR-AIN-XX-XX-SCH-A-900.*
 - *27. The residential (Class C3) accommodation hereby approved shall not exceed 17 units overall.*
 - The reasons given for the conditions are:
 - *2. For certainty, a condition requiring the development to be carried out in accordance with the approved plans (2) would also be necessary.*
 - *27. To control the number of residential units, to accord with the planning application, in accordance with Core Strategy Policy IS5 and DMPD Policy DMH3.*
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. In the banner heading above, I have used the site address given on the appeal form and the Council's decision notice. The application form did not mention 150A Penwith Road, but it was agreed at the Hearing that this should be included for consistency with earlier decisions.
3. A draft Unilateral Undertaking (UU) was submitted shortly before the Hearing and a hard copy was provided at the event. The UU was completed and

submitted for my consideration on 19 April 2024. Both parties have commented on its contents, and I have taken those comments into account.

Background and Main Issue

4. The application is made under Section 73 of the Town and Country Planning Act 1990 (the Act) for variation of conditions imposed on planning permission reference 2019/1427 for a part three, part four storey building with basement, in mixed commercial and residential use. Planning permission was granted by an appeal decision dated 30 October 2020¹. The building has been constructed, but the areas affected by this application remain incomplete and unoccupied.
5. In January 2022, the Council approved a non-material amendment under s96A of the Act, amending the description of the development² (NMA description). Condition 27 was added at this point. The NMA description did not appear on the decision notice for this application, nor was it provided in full on the application form. However, having considered the parties' submissions, I am satisfied that the NMA description is now the description of the approved development and I have used it in the banner heading above.
6. Prior to the NMA application, the Council had approved an earlier application³ under s73, effecting design changes to the retail unit entrances. I have had regard to these revised plans to the extent that they are relevant.
7. The Council did not allege any harm in relation to variation of conditions 2 and 27 to allow an alternative residential layout increasing the number of dwellings from 17 to 19 and reducing the number of affordable dwellings from 8 to 6. The sole reason for refusal relates to the proposed variation of condition 2 to amend the uses specified on the drawing of the larger basement unit. The effect would be to allow a flexible use of this unit, encompassing Use Classes B8 (storage or distribution) and E (Commercial, Business and Service)⁴, in place of the Class B8 use currently permitted.
8. Against that background, the main issue is the effect of varying condition 2 on the proposed employment uses and the supply of industrial land.

Reasons

Development Plan

9. The appeal site is located within a Locally Significant Industrial Area (LSIA), as defined in Policy LP34 of the Wandsworth Local Plan 2023-2038 (WLP), adopted July 2023. LSIA's contribute to a strategic reservoir of industrial land which is safeguarded by Policy LP34. The LSIA at Thornsett Road includes a variety of industrial premises and related sui generis uses. Prior to its redevelopment, the appeal site included units used for light industrial purposes, storage and distribution, and sui generis uses including car repairs.
10. Where sites within LSIA's are proposed for redevelopment, Policy LP34 requires that at least the full replacement of existing industrial floorspace is provided, in accordance with a list of acceptable uses listed in Part A of the policy. These include research and development or light industrial uses within Class E(g)

¹ Appeal reference APP/H5960/W/19/3235608 (Appeal B)

² London Borough of Wandsworth Application ref 2021/5688, approved 14 January 2022

³ London Borough of Wandsworth Application ref 2021/3516, approved 14 September 2021

⁴ As defined in the Town and Country Planning (Use Classes) Order 1987 (as amended)

parts (ii) and (iii), as well as storage and distribution uses within Class B8. At the Hearing, the Council confirmed that there is no preference between these supported uses. However, neither the Policy nor the supporting text support the introduction of other uses within Class E.

11. Policy LP34 also, in limited instances, supports other small scale uses catering for people working within the LSIA. However, since those working in the Thornsett Road LSIA would have easy access to the wide range of local services and facilities on nearby Garratt Lane, there is no clear need for such uses in this location. Although other policies in the WLP support a variety of Class E uses in more general terms, the provisions of Policy LP34 mean that these are not supported within LSIA's when the development plan is read as a whole.
12. Appendix 1 of the WLP sets out requirements for marketing evidence submitted in support of proposed changes of use. Although Policy LP34 is listed among the policies to which Appendix 1 is relevant, it is referred to only in part D of Policy LP34, which applies to sites outside LSIA's. Therefore, while I have had regard to the marketing evidence which has been presented, that evidence does not gain support from the provisions of Appendix 1.

Industrial Land Supply

13. The evidence underpinning Policy LP34 is set out in the Wandsworth Employment Land and Premises Study 2020 (WELPS), which identifies a requirement for an additional 8.6ha of industrial land in the Borough during the period 2019 to 2034. The WELPS furthermore highlights that the stock of industrial land had fallen since 2016, with additional losses anticipated through approved changes of use. Although the WELPS pre-dates introduction of Class E, no updated or alternative figures have been provided by either party.
14. The Council explained at the Hearing that there is a physically constrained supply of land within this urban borough and therefore the above requirement can only realistically be met by intensifying and redeveloping existing industrial land. In that context, even small areas of industrial land are important and the LSIA's have a particular role in supporting small businesses which are prevalent in the borough. These factors underpin the robust approach taken to safeguarding existing industrial land in accordance with Policy LP34.
15. The Greater London Authority (GLA) published draft guidance on Industrial Land and Uses in December 2023⁵. This includes updated guidance for local planning authorities on understanding supply and demand for industrial land. Class E is recognised as having a positive role to play in accommodating industrial uses, but the risk of industrial land being lost to other Class E uses is also highlighted. This emerging guidance carries limited weight for decision-making purposes. However, it does provide some indication that the availability of industrial land to meet demand continues to be a strategic issue in the short period since the WELPS was published and the WLP adopted.

Permitted and Proposed Employment Uses

16. The originally approved development is capable of accommodating a significant increase in light industrial and B8 floorspace, compared to the previous uses on the site. When granting planning permission, the Inspector made clear that this increased industrial capacity, and the consequent contribution to the

⁵ London Plan Guidance: Industrial Land and Uses, Consultation Draft December 2023

availability of industrial premises, were among factors which carried very significant positive weight.

17. Use Class E was introduced shortly before the 2020 appeal was determined. Consequently, the units originally proposed for light industrial use can be used for other purposes within Class E, which would not comply with Policy LP34. The basement B8 unit is the only part of the building which unambiguously provides replacement industrial floorspace in line with Policy LP34. Against that background, its continued availability for uses supported by Policy LP34 is a matter to which I give very significant weight.

Suitability and Marketing

18. Efforts to market the unit for B8 purposes have so far been unsuccessful, with the Appellant reporting that the basement location is a significant deterrent to potential occupiers. It was clarified during the Hearing that the unit has been in its current state of partial completion for around 18 months. Marketing started earlier than that, while the building was under construction, and remains ongoing. A specialist commercial agent is engaged. Notwithstanding the authorised B8 use, the market for other potential uses within Class E, including those supported in Policy LP34, has been explored. To date the Appellant reports a complete lack of interest.
19. The unit's disadvantages for storage and distribution uses are apparent on site, with access currently being available only by means of a passenger lift and single stairwell. There is no external yard and the location of the loading bay within the highway means that it may not always be available when required.
20. However, while I accept that these are significant drawbacks for storage and distribution uses, I am not persuaded that the unit is unsuitable for other uses supported by Policy LP34. Light industrial or research and development users are likely to have less intensive servicing requirements. Although the platform lift shown on the original approved plans has not been installed, a void has been retained between the basement and the vacant ground floor unit, maintaining the option of goods lift access to street level. While the development does not have sole use of the loading bay, it is conveniently located for commercial occupiers of these ground floor and basement units.
21. The basement is large, but it was confirmed at the Hearing that subdivision is possible. If so, units of a similar area to the first-floor unit which was originally designed for light industrial use could be achieved.
22. The appeal site is in an area where there is evidence of a diminishing stock of industrial land, against a forecast of increasing demand. There were several active businesses nearby at the time of my site visit and no indication of vacant floorspace other than on the appeal site. As such, the road layout within the LSIA does not appear to be a significant deterrent to the small firms which the Council described as having a major role in the local economy. The Council also refers to other light industrial and storage units in the locality being let and planning applications submitted for provision of these uses.
23. Although a basement unit is unusual, the development was purpose-designed in the very recent past for light industrial and storage and distribution uses. It provides modern commercial floorspace in an accessible location alongside other industrial and related uses. Potential occupiers may have been deterred

by the restricted B8 use under the current planning permission, notwithstanding the flexible approach taken in marketing. Therefore, a wider range of permitted industrial uses may improve the prospects for occupation. That being the case, while I have had regard to the evidence of unsuccessful marketing to date, it does not in my view outweigh the requirement under Policy LP34 that the unit should be safeguarded to support evidenced need.

Variation of Condition 2

24. While a flexible Class E/B8 use, as proposed, would allow for industrial use of the unit, any potential industrial occupiers would have to compete with a wide variety of alternative Class E uses. As such, it is significantly less likely that the unit's long-term availability for industrial purposes would be secured and in those circumstances the stock of industrial land would be further diminished. Restricting only the retail elements of Class E would not go far enough to safeguard the availability of industrial land, since it would still allow for a wide range of uses not supported by Policy LP34.
25. The Council accepts that variation of Condition 2 would be reasonable, if an additional condition was imposed to restrict the permissible Class E uses to those within Class E(g)(ii) and E(g)(iii). For the reasons given above, I concur with that view. This would allow for a more diverse range of potential industrial users, in line with paragraph 18.31 of the WLP, while avoiding erosion of the LSIA by non-industrial uses.
26. I recognise that the Appellant objected at the time of the application to imposition of a similar condition and continues to maintain that it would be unreasonable and unnecessary. I also recognise that Planning Practice Guidance advises that use of conditions to restrict changes of use may not pass the test of reasonableness or necessity. Nevertheless, such conditions can be used where those tests are met.
27. In the circumstances of this particular case, the restriction would be necessary to avoid conflict with the development plan and reasonable given that the basement unit appears capable of occupation if a wider range of industrial uses is permitted. A condition specifying permitted uses within Class E would be both precise and enforceable. Regulation of the use of land within the LSIA is clearly relevant to planning. It would also be relevant to the development in question, which was permitted on the understanding that it would contribute to the availability of industrial floorspace.
28. I am mindful that the 2020 appeal Inspector concluded that a condition restricting use of the Class E units was not reasonable or necessary. He reasoned that there would be no deterrent to occupation of the light industrial units for their stated purpose. However, at this point those units remain unoccupied and there is no clear evidence that they will help address the evidenced need for industrial land. Other Class E uses were mentioned at the Hearing as being more likely occupiers of the space. This increases the justification for securing industrial use within the single part of the building where that can still be achieved. As such, circumstances have changed since 2020 and based on the evidence before me I have reached a different view.

Unilateral Undertaking

29. The 2020 planning permission was subject to a legal agreement under s106 of the Town and Country Planning Act 1990. For the most part, the UU provided with this appeal encompasses similar obligations, while omitting those which have already been discharged during the construction process. It includes obligations in relation to highways and transportation, carbon offsetting and connection to a future district heating network. These are in line with requirements in the Council's Planning Obligations SPD⁶ and closely reflect the equivalent obligations in the original s106 agreement. The 2020 appeal Inspector concluded that these obligations met the relevant tests as set out in the Framework and Regulation 122(2) of the Community Infrastructure Levy Regulations 2010. Based on the evidence before me, I have no reason to reach a different view in relation to those aspects of the UU.
30. However, the UU otherwise departs from the original s106 agreement in two notable respects. Firstly, in the event that my decision on this appeal results in Class E use of the basement being restricted, other than in relation to retail use, the UU would secure provision of just two affordable housing units; a reduction from the six units proposed in the application. Secondly, a financial cap would be placed on the cost of providing managed workspace. Furthermore, the UU no longer specifies a clear trigger for submission of the Managed Workspace Plan or a mechanism for resolution of any dispute regarding the Managed Workspace Projected Costs.
31. The Council objects to these changes being introduced through the appeal process. As such, when considering these aspects of the UU, I have had regard to the principles in the Holborn Studios⁷ case; namely, whether the amendments introduced by the UU would make a substantive difference to the proposed development and, if so, whether any procedural unfairness would arise to any relevant party.
32. Given that the application was under s73 of the Act, the Council's consideration would have been limited to the variation of the conditions in question. There is no apparent expectation in the Officer Reports of any material change to the scope of the 2020 planning obligation, other than omission of the affordable housing financial contribution and reduction from 8 to 6 affordable housing units. While the Appellant has provided evidence that concerns about the managed workspace obligation had been raised in correspondence relating to drafting of a Deed of Variation, there is no evidence of the Council's response at that time and the matter did not reach a conclusion, since the application was refused.
33. I accept that the mechanism included in the original s106 agreement to offset the cost of managed workspace against the affordable housing financial contribution is no longer workable, since no such financial contribution is now offered. I also accept that the achievable level of both affordable housing and managed workspace are subject to viability considerations under the relevant policies in the WLP. However, that is a different matter from whether the UU conflicts with the Holborn principles, by introducing substantive changes through the appeal process which would result in procedural unfairness.

⁶ Wandsworth Local Plan Supplementary Planning Document: Planning Obligations, October 2020

⁷ Holborn Studios Ltd v The Council of the London Borough of Hackney [2017] EWHC 2823 (Admin)

34. Provision of two units of affordable housing would be a substantive change from the six units which were given positive weight in the Officer Report as a benefit of the proposal. Under the original s106 agreement, the expectation was that managed workspace would be provided, but that this might result in a reduced affordable housing contribution. Under the mechanism now proposed, there is less certainty that managed workspace would be secured, and the Council would have less opportunity to test any viability argument presented to them. This is also a substantive change to the proposed development.
35. Neither change would have been apparent to interested parties, including the Council's Affordable Housing consultee, when the application was considered. Members of the Council's Committee would have been unaware of either change when reaching their decision and the Council's representative at the Hearing confirmed that officers do not have delegated powers covering the proposed changes. As such, it would be procedurally unfair for me to reach a decision which triggers these substantive changes which have been introduced at a late stage in the appeal process.

Conclusion on Main Issue

36. For the reasons given above, I conclude that the proposed variation of condition 2 would have a harmful effect on the proposed employment uses and the supply of industrial land. The proposal would conflict with Policy LP34 which amongst other things requires that redeveloped sites provide at least the full replacement of existing industrial floorspace and does not support the use of land within LSIA's for non-industrial purposes.
37. The above harm could be overcome by imposing an additional condition limiting the range of permitted Class E uses in the basement to those within Class E(g)(ii) and E(g)(iii). I have found that a condition to that effect would meet the tests in the Framework, in the particular circumstances of this proposal. However, the Appellant maintains that such a condition would be unduly restrictive. Furthermore, due to the terms of the UU, the additional condition would trigger substantive changes in the proposed development as considered by the Council, which would lead to procedural unfairness. Therefore, allowing the appeal on that basis is not an option available to me.

Other Matters

38. The application includes minor elevational changes to align with the revised residential layout. Neither the Council nor any other party has alleged any harm arising from this aspect of the proposal and based on the evidence before me I have no reason to reach a different view.
39. As requested by the Appellant, I have considered whether it would be appropriate for me to vary conditions 2 and 27 in relation to the residential layout only. Based on the circumstances pertaining at the time of the application, neither the Council nor any other party alleged any harm arising from this aspect of the proposal. However, a variation to that effect would trigger the changes in the UU, including the reduced affordable housing provision, since use of the basement would remain restricted to B8 only. As such, allowing the appeal on this more limited basis would also be procedurally unfair for the reasons given above.

Conclusion

40. For the reasons given above, the appeal should be dismissed.

Jane Smith

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Jeffrey Field MA Dip TP Dip PVL MRTPI MRICS
Planning Director, Lambert Smith Hampton

Alex Lewis MRICS Director, Lewis & Co

Robert Conroy Style & Space Ltd

Tom Crabtree Style & Space Ltd

FOR THE LOCAL PLANNING AUTHORITY:

Julia Kelly Senior Planning Officer (Development Management West Team)

Joanna Hill MA Urban Design & Planning, RTPI Licentiate Member
Senior Planner Officer (Policy – Spatial Planning & Design)

HEARING DOCUMENTS:

1. Letter dated 17 December 2021 as submitted with LB Wandsworth application 2021/5688 for approval of a non-material amendment under s96A of the Act.
2. Officer Report on application 2021/5688.
3. LB Wandsworth application 2021/3516 decision notice 14 September 2021.
4. Draft Unilateral Undertaking by Penwith Developments Limited in favour of the Mayor and Burgesses of the London Borough of Wandsworth.
5. Plans A, B and C to accompany draft Unilateral Undertaking.