



Appeal Decisions

Site visit made on 30 April 2024

by AJ Steen BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 July 2024

Appeal A Ref: APP/A2280/C/21/3284561

55 Marlborough Road, Gillingham, Kent ME7 5HB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended). The appeal is made by Windmill Construction (Marlborough Road) Ltd against an enforcement notice issued by Medway Council.
- The notice was issued on 16 September 2021.
- The breach of planning control as alleged in the notice is without the benefit of planning permission the erection of a residential block of flats comprising 25 one-bedroom and 10 two-bedroom flats on the Land.
- The requirements of the notice are to:
 - (i) Demolish the unauthorised residential block of 35 flats in its entirety
 - (ii) Remove all resultant debris and associated materials from the Land.
- The periods for compliance with the requirements are:
 - (a) The requirements of 5(i) within four calendar months from the date when the notice takes effect.
 - (b) The requirements of 5(ii) within five calendar months from the date when the notice takes effect.
- The appeal was made on the grounds set out in section 174(2)(a), (b), (f) and (g) of the Town and Country Planning Act 1990 (as amended). Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
- This decision supersedes that issued on 20 March 2023. That decision on the appeal was quashed by order of the High Court.

Summary Decision: The appeal is allowed and the enforcement notice is quashed.

Appeal B Ref: APP/A2280/W/21/3284817

55 Marlborough Road, Gillingham ME7 5HB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Windmill Construction (Marlborough Road) Ltd against the decision of Medway Council.
- The application Ref is MC/21/0991.
- The development is residential block of 35 no. apartments.
- This decision supersedes that issued on 20 March 2023. That decision on the appeal was quashed by order of the High Court.

Summary Decision: The appeal is dismissed.

Preliminary Matters

1. A revised National Planning Policy Framework (the Framework) was issued during the course of the appeal. The changes in relation to the development subject of this appeal were minor. I have taken the latest version of the Framework into account in coming to my decision.
2. Since determination of the application subject of appeal B, the Council has granted planning permission reference MC/21/3198 for a block of 34 flats. They

describe that application as retrospective. Two subsequent applications have been approved for the conversion of the store and concierge areas to flats, references MC/23/2616 and MC/23/2617. Other applications have been made relating to the submissions of details or removal/variation of conditions relating to MC/21/3198. I have queried how these permissions relate to the development under consideration in these appeals.

3. The Council indicate that the development constructed is a combination of that approved under planning permission reference MC/21/3198 and the development proposed under appeal B. They suggest that MC/21/3198 was a retrospective application, such that it has been implemented. That appears to be reflected in the grant of planning permission MC/23/2617 that related to the change of use of a storage space that was part of MC/21/3198, but proposed as a flat in the development subject of appeal B. I have queried whether it would be possible to implement both planning permission reference MC/21/3198 and the development proposed under appeal B or whether they are mutually exclusive. However, I have not received a response so I will proceed to determine the appeals on the basis of the development proposed. I will take the other planning permissions into account in coming to my decision.
4. If planning permissions MC/21/3198, MC/23/2616 and/or MC/23/2617 have been implemented, section 180 of the Act states that where, after service of a copy of an enforcement notice planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission.
5. I note a previous approval for 31 flats on the site, reference MC/19/1369. I will also take this into account, although note the above applications for planning permission are more recent.

Appeal A

Ground (b)

6. An appeal on this ground is that the matters described in the notice have not occurred. The burden of proof is on the appellant, with the relevant test of the evidence being on the balance of probability.
7. The Council allege that the building shown on the drawings relating to appeal B had been substantially constructed up to four storeys in height, including openings for windows and doors, on the date of their site visit in relation to that planning application, 28 May 2021. They inspected the building internally at lower ground floor level and the building was not fitted out but had been laid out as six flats, including a flat within the area proposed as the concierge unit in that planning application. It is clear from their description that the flats were not complete or occupied. As a result, it is clear that the flats were under construction and a residential use had not commenced. It is unclear whether further visits prior to the issue of the enforcement notice may have taken place.
8. The appellant estimated that, at the time the notice was issued, the building was 60% complete. They state that the internal accommodation had not been properly defined or fitted out. They have supplied a number of photographs of the building taken after the enforcement notice was issued. These show the building as unfinished, albeit with a number of internal walls dividing the space.

9. I note that the Council suggest the description of the breach of planning control could be varied with reference to 35 flats rather than 25 one-bedroom and 10 two-bedroom flats. However, that would not address the fact that the building was still under construction and a residential use had not commenced at the date the notice was issued.
10. Based on the evidence submitted and on the balance of probability, the operational development was not substantially complete and was not in use as a block of flats on the date the notice was issued. As a result, the development described in the notice had not occurred by the date of issue of the notice. As such, the appeal on ground (b) must succeed.

Conclusion

11. For the reasons given above, I conclude that the appeal should succeed on ground (b). The enforcement notice will be quashed.
12. In these circumstances, the appeals on grounds (a), (f) and (g) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act (as amended) do not fall to be considered.

Appeal B

Main issues

13. The main issues are:

- the effect of the flats on the living conditions of neighbouring occupiers of 67 Marlborough Road with particular regard to privacy; and
- whether occupiers enjoy satisfactory living conditions, having particular regard to outlook and privacy for flat 7 and the size of external living space for flats 1-3, 7, 9-17 and 21-33.

Reasons

Living conditions of neighbouring occupiers

14. No. 67 Marlborough Road neighbours the flats at No. 55, both fronting the road and separated by the access drive to parking for the flats at No. 55, over which further flats are proposed to be built. It comprises a terraced house, with a private garden to the rear. The development comprising appeal B would comprise flats to the front facing the road with further flats to the rear. These are arranged such that, on each of the ground to third floors, there are two flats behind one another to the rear facing over the access drive to the garden of No. 67. These overlap, so that the front flat on each floor has a Juliet balcony in the living room facing toward the rear and a living room window facing toward the garden of No. 67. Both flats on each floor have bedrooms facing in the same direction.
15. There is a fence on the boundary that would obscure views from the ground floor flats. However, as a result of the layout of the rear flats closest to No. 67, occupiers of those flats on the upper floors would be able view into that garden. Therefore, the windows facing in that direction in the flats on other floors would result in overlooking of the garden of No. 67 and harm the privacy of occupiers of that house.

16. I note that obscure glazing and non-opening windows have been or could be fitted to the secondary living room windows and, subject to a condition ensuring this is fitted and retained, would reduce overlooking to some extent. However, similar windows within the bedrooms would result in a lack of outlook from those windows and inadequate living conditions for occupiers for that reason.
17. I understand that changes to the development proposed in planning permission reference MC/21/3198 would overcome this issue, including directional privacy panels over the bedroom windows. However, that is not before me in this appeal.
18. For these reasons, I conclude that the windows proposed in bedrooms and living rooms on the upper floors of the proposed flats facing toward the rear of 67 Marlborough Road would result in harm to the living conditions of occupiers of that property by reason of privacy. As such, the development is contrary to Policy BNE2 of the Medway Local Plan and paragraph 135f) of the Framework that seek a high standard of amenity, including protecting living conditions of nearby and adjacent properties in relation to privacy and other matters.

Living conditions of occupiers of the flats

19. In relation to the above mentioned flats, the window to the second bedroom of the rearmost flats is at right angles to the Juliet balcony of the flats in front. They are in very close proximity such that there would be intervisibility between the rooms. As a result, it would be possible to view a significant part of each room through the windows. That results in a lack of privacy in the living rooms and bedrooms of these flats.
20. For the reasons given above, I consider that similar obscure glazing and fixing shut the bedroom window would result in a lack of outlook for occupiers of that room. As such, that would result in inadequate living conditions for occupiers of those flats. The doors to the Juliet balconies provide the main outlook and light into these living rooms. As a result, inadequate living conditions for occupiers of those flats would result from them being fixed shut and obscure glazed. The solutions proposed in planning permission reference MC/21/3198 are not before me in this scheme.
21. The flats to the rear of the building were not proposed to have private external living space in this scheme. This has been provided for some flats in the revised scheme and constructed on site. Nevertheless, I need to consider what was proposed in this application. That lack of private outdoor space means that the living conditions of occupiers of the affected flats would be poor. I note that there is a park opposite that provides public space, but that does not wholly overcome the lack of private space proposed.
22. I note that this is a high density scheme and that the expectations of residents of flats in such a scheme in relation to privacy is less than may be the case elsewhere. Nevertheless, the proximity of windows in this case is particularly close, such that even taking these factors into account the effect on the privacy of occupiers would not be acceptable. I note also that in granting planning permission reference MC/19/1369 the Council weighed up the effects on privacy against the benefits of the development. I will return to that later in my decision.

23. As a result, the windows in bedrooms and living rooms of the rear flats closest to 67 Marlborough Road would result in inadequate living conditions for the occupiers of those flats for reasons of privacy. This could not be overcome by condition. The lack of outdoor amenity space for many of the flats further contributes to inadequate living conditions for many of the occupiers. As such, the development would be contrary to Policy BNE2 of the Medway Local Plan and paragraph 135f) of the Framework that seek to provide a high standard of amenity for occupants.

Other Matters

24. 55 Marlborough Road is located within Brompton Lines Conservation Area. I have paid special attention to the desirability of preserving or enhancing the character or appearance of the area in accordance with section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

25. The conservation area contributes to the historic setting of Chatham Dockyard. The dockyard and its defences are of international significance as a substantially unaltered Royal Navy Dockyard that dates from the age of sail and contributed to the industrialisation of shipbuilding. The Lines comprised linear defences to the dockyard on the landward side, now within a substantial open park. Development on Marlborough Road comprises primarily 18th and 19th century houses overlooking the park. The significance of the conservation area is derived from the open space and surrounding development containing former landward defences forming the setting of the dockyard.

26. The appeal site now comprises a modern development facing over the park. The front elevation of the proposed building would have the same effect on character and appearance as that approved under MC/21/3198. It is modern in style and larger than some nearby development. Nevertheless, its materials reflect those of surrounding buildings and the use of balconies to the front results in a positive relationship with the open space opposite. As a result, it preserves the character and appearance of the Brompton Lines Conservation Area, so would be a neutral consideration in the balance.

27. I note that issues relating to the adequacy of on-site turning facilities were raised during the processing of this application. However, these were resolved in relation to the later permission reference MC/21/3198. Cycle parking has been shown within the lower ground floor and I understand this is sufficient to meet the needs of the development. Retention of the vehicle and cycle parking could be subject of a condition. As a result, the proposal would provide adequate access and egress from the parking provision, and adequate cycle parking.

28. A condition could be attached to any planning permission to ensure that appropriate provision would be made for drainage. A unilateral undertaking has been submitted relating to the effect of the development on the Thames Estuary and Marshes, and Medway Estuary and Marshes Special Protection Areas. If I were minded to allow the appeal, I would need to carry out a Habitats Regulations Assessment including appropriate assessment. The appellant has paid contributions toward the provision of local facilities and infrastructure that they suggest meet the needs of the development, taking account of a viability report. It is unclear how these are linked to the development subject of this appeal. If I were minded to allow the appeal, I would return to this.

29. The later grants of planning permissions MC/21/3198, MC/23/2616 and MC/23/2617 result in the provision of 36 flats. That would be more than would be allowed by this appeal (or the same if it were possible to implement this development along with planning permission MC/23/2616).

30. These other matters would have a neutral effect on the overall balance.

Other material considerations

31. Taking all of the above into account, I conclude that the development would harm the living conditions of occupiers of 67 Marlborough Road and does not provide adequate living conditions for occupiers of many of the flats. Whilst I have concluded that there are no other reasons to consider the development unacceptable, there are no other benefits of the scheme. As a result, there is nothing to outweigh the conflict with the development plan as a whole. However, the Framework is also a material consideration of great weight in the planning balance.

32. Paragraph 11 of the Framework states that where the Housing Delivery Test indicates that the delivery of housing was below 75% of the housing requirement over the previous three years that the most important development plan policies for determining the appeal may be out-of-date. I understand this may be the case in Medway. If so, the Framework states that permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

33. I have concluded that the development would conflict with policies of the Framework. This relates to the effects of the development on living conditions of neighbouring occupiers at 67 Marlborough Road and those of occupiers of many of the flats by reason of overlooking and lack of external amenity space.

34. I have concluded that the grants of planning permissions MC/21/3198, MC/23/2616 and MC/23/2617 result in the provision of 36 flats, more than would be allowed by this appeal (or the same if it were possible to implement this development along with planning permission MC/23/2616). In this context, in terms of the Framework the contribution of this development to housing supply would be minimal.

35. For these reasons, I conclude that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

Conclusion

36. For the reasons set out above, I conclude that on balance the development does not accord with the development plan as a whole. I have not found any material considerations that would outweigh the conflict with the development plan. The appeal on ground (a) therefore fails.

Formal Decisions

Appeal A

37. The appeal is allowed and the enforcement notice is quashed.

Appeal B

38. The appeal is dismissed.

AJ Steen

INSPECTOR