

Appeal Decision

Site visit made on 1 November 2016

by **David Reed BSc DipTP DMS MRTPI**

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 6 December 2016

Appeal Ref: APP/Q1445/W/16/3152366

Hove Business Centre, Fonthill Road, Hove, East Sussex BN3 6HA

- 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 Mr Nigel McMillan, Pearl & Coutts against Brighton & Hove City Council.
 - The application Ref BH2014/03742, is dated 6 November 2014.
 - The development proposed is the creation of 4 no. 1 bed flats, 4 no. 2 bed flats and 1 no. 3 bed flat on the roof of the existing building, removal of redundant industrial pitched roof lights and creation of new ground floor link between the front and rear of the building.
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Decision

1. The appeal is allowed and permission is granted for the creation of 4 no. 1 bed flats, 4 no. 2 bed flats and 1 no. 3 bed flat on the roof of the existing building, removal of redundant industrial pitched roof lights and creation of new ground floor link between the front and rear of the building at Hove Business Centre, Fonthill Road, Hove, East Sussex BN3 6HA, in accordance with the terms of the application, BH2014/03742, dated 6 November 2014, subject to the attached schedule of conditions.

Application for costs

2. An application for costs was made by Mr Nigel McMillan, Pearl & Coutts against Brighton & Hove City Council. This application is the subject of a separate Decision.

Preliminary matter

3. The application was not determined within the prescribed period but the Council subsequently resolved there would have been one reason for refusal.

Main Issue

4. The main issue is whether the proposal should provide for a contribution towards affordable housing.

Reasons

Background

5. The proposal is for a row of nine flats to form an additional storey on the flat roof of Hove Business Centre, a part three part four storey building which runs

parallel to the railway line near Hove Station. The Council accept the principle of the development and resolved to grant planning permission subject to a Section 106 agreement on 9 December 2015. This agreement, which provides for a residential travel pack and financial contribution towards sustainable transport, was finally submitted on 28 April 2016.

6. In the meantime, on 24 March 2016, the Council adopted the Brighton & Hove City Plan Part One (CPP1) following an examination. This introduced a new policy, CP20, requiring affordable housing on sites of five or more dwellings. As the application was still undetermined, the Council sought a financial contribution in accordance with this new policy, notwithstanding that Government policy to waive any requirement for affordable housing on sites of ten dwellings or less was reintroduced on 11 May 2016¹. The appellant then made clear his opposition to any financial contribution towards affordable housing and appealed against non-determination.

Affordable housing

7. Policy CP20 of the CPP1 requires sites of between 5 and 9 dwellings such as this to provide 20% affordable housing in the form of a financial contribution. In a graduated approach, larger sites of 10+ and 15+ dwellings are required to provide 30% and 40% affordable housing respectively. In accordance with the Council's Developer Contributions Technical Guidance the sum sought is £241,500, sufficient to provide two one-bedroom units off site.
8. However, Policy CP20 is in conflict with Government policy as expressed in the Written Ministerial Statement (WMS) of 28 November 2014 and Planning Practice Guidance (PPG), which state that affordable housing and tariff style planning obligations should not be sought from developments of 10 units or less and which have 1000 m² or less floorspace². The policy, which is intended to prevent a disproportionate burden on small scale developments, allows for a lower threshold in certain rural areas but otherwise allows no flexibility.
9. The WMS was successfully challenged in the High Court on 31 July 2015 and a declaration issued that it must not be treated as a material consideration in planning decisions; however this decision was reversed by the Court of Appeal on 11 May 2016 when the WMS was reinstated as a material consideration and PPG was updated accordingly. It was during the period when the WMS was suspended, on 24 March 2016, that the Council adopted Policy CP20.
10. Planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise. Policy CP20 forms part of the development plan, whilst the WMS and PPG are a material consideration. However, as the WMS and PPG came into effect after the adoption of the CPP1 and Policy CP20, it represents the latest expression of national policy and carries very considerable weight in the balancing exercise.
11. Policy CP20 was drawn up and adopted in the light of strong evidence of the need for affordable housing in Brighton & Hove. The current objectively assessed need for affordable housing is put at 11,528 plus 810 pa. This is actually more than the likely delivery of all housing types in the City which is only 660 pa given the tight geographical constraints which apply. First time buyer houses are 9.6 times average earnings. In addition, schemes of less

¹ by decision of the Court of Appeal – see explanation in paragraph 9

² PPG Paragraph 031 Reference ID: 23b-031-20160519

- than 10 units deliver over 50% of new housing in the City, so if such sites do not contribute towards affordable housing its delivery will be seriously affected.
12. In this context, the Inspector who examined the CPP1 endorsed the policy³. She noted that the approach was supported by a study into its effects on the viability of housing development⁴ and furthermore that the policy itself includes a degree of flexibility to allow site specific circumstances, including viability, to be taken into account. Policy CP20 therefore complies with paragraph 173 of the National Planning Policy Framework (NPPF) which requires the scale of obligations and policy burdens to not threaten the viability of development⁵.
 13. The case for affordable housing contributions on sites between 5 and 9 houses in Brighton and Hove is therefore strong, and Policy CP20, as part of the recently adopted CPP1, should therefore also be afforded substantial weight.
 14. The appellant does not argue that the contribution requested would threaten the viability of the scheme in this case, but that the WMS and PPG should take precedence as a matter of principle. Importantly, Policy CP20 was adopted during the period when the WMS was not a material consideration; it was not therefore tested when the WMS was in force. On the contrary, the Council's Proposed Modifications published in June 2015 put forward changes to make Policy CP20 consistent with the WMS, but these were subsequently withdrawn after the High Court judgement.
 15. In the light of these Proposed Modifications it is likely that Policy CP20 would have been modified if the WMS had remained in force throughout. The Council did not seek to pursue its preferred policy as an exception to the WMS. In any event, the WMS and PPG represent later, national policy, that unambiguously define when a disproportionate burden would be placed on a small development. There is flexibility in some rural areas but noticeably not urban areas or large cities. The aim is to boost small-scale housing schemes generally, and brownfield sites in particular, and, notwithstanding the undoubted need for affordable housing in Brighton & Hove, I see no reason why the WMS and PPG should not apply.
 16. For these reasons I conclude, on balance, that national policy in the WMS and PPG should outweigh Policy CP20 of the CPP1. Consequently, a financial contribution towards affordable housing is not required.
 17. The Council have drawn my attention to one appeal decision, in Elmbridge, where development plan policy for affordable housing was held to outweigh the WMS/PPG⁶. On the other hand, I have been supplied with nine appeal decisions in four local authority areas which prefer the WMS/PPG over local policy. However, none of these appeals relate to Brighton and Hove, where the need for affordable housing and the development plan will reflect unique local circumstances, so they do not set a precedent for this case.

Other matters

18. The proposal raises a large number of other issues which have been carefully considered by the Council over a lengthy period of time. These include the

³ Paragraphs 38 and 39 of the Report to Brighton and Hove City Council dated 5 February 2016

⁴ Affordable Housing Viability Study Update 2012

⁵ The Combined Policy Viability Study Update 2014 deals with the overall obligation and policy burden

⁶ APP/K3605/W/16/3146699

principle of adding an additional floor to a locally listed building, the effect on the setting of the Hove Station Conservation Area and Grade II listed Hove Station, the detailed design and appearance of the flats, the standard of accommodation which would be provided, the potential for noise disturbance affecting occupiers of the new flats, the impact on the living conditions of nearby residents, the effect on existing businesses in the building, and the implications for sustainable transport and sustainability. The Council are satisfied that, subject to conditions and a planning obligation, the proposal is acceptable in relation to all these matters and I see no reason to disagree.

Planning Obligation and Conditions

19. The Council sought a contribution of £6,750 towards sustainable transport infrastructure in the vicinity of the development and the provision of a residential travel pack together with membership of a car club for occupiers of the scheme. A signed unilateral undertaking has been submitted dealing with these matters and this is now dated. The Council has confirmed that the limit of five contributions being used for any one infrastructure project is not breached. The appellant now appears to dispute the need for the undertaking but this was not a ground of appeal and by only raising the matter at final comments stage there was no opportunity for the Council to respond.
20. No parking spaces would be provided for the residents of the flats despite the scheme generating the need for an estimated five spaces. Given the pressure on parking spaces in the area there is a need to promote sustainable travel and the financial contribution and other measures are therefore necessary, directly related to the development and fair and reasonable in scale and kind⁷. I am therefore satisfied that the measures in the undertaking are legitimate and justified in this case, and comply with Policy CP9 of the CPP1 which seeks to promote a sustainable transport system.
21. The Council has proposed a number of conditions should the appeal be allowed. I have assessed these against the relevant tests, amending them where necessary, and have also taken account of the appellant's objections. I agree there is no need for a condition related to potential contamination as the site is above ground.
22. In addition to the standard implementation time limit it is necessary to define the plans which have been approved in the interests of certainty. Conditions to control the materials to be used and the balcony screens and railings are necessary to ensure the development has a satisfactory appearance. Further conditions to restrict access to the flat roof and ensure the west facing window is obscure glazed/non opening are necessary to protect the living conditions of nearby occupiers. A Construction Environmental Management Plan is required in view of the constrained nature of the site and the need to tailor construction arrangements to the specific local context. Traffic routing can be controlled through construction contracts.
23. Notwithstanding the submitted noise assessment it is necessary to impose enforceable conditions to ensure the acoustic environment and ventilation in the flats provide satisfactory living conditions for future occupiers. A condition requiring submission of details of the ground floor entrance doors is necessary

⁷ The three tests in the Community Infrastructure Regulations 2010 and paragraph 204 of the National Planning Policy Framework.

as the current proposal appears to conflict with the needs of the existing business units. A scheme for a segregated footway within the car park is required to reduce pedestrian/vehicular conflict in the interests of pedestrian safety, a planning concern whether or not on highway land. Storage facilities for refuse/recycling and cycle parking are necessary to ensure a satisfactory development and to encourage sustainable transport respectively.

24. Finally, conditions are necessary to comply with Policy CP8 of the CPP1 to ensure enhanced energy performance⁸ and water efficiency and Policy HO13 of the Brighton & Hove Local Plan 2005 to ensure accessible and adaptable dwellings⁹. The latter two are optional requirements in the building regulations which are triggered by a condition on a planning permission.
25. A number of these conditions need to be discharged before work commences on site as these are fundamental to a satisfactory scheme.

Conclusion

26. Having regard to the above the appeal should be allowed.

David Reed

INSPECTOR

⁸ Equivalent to Code for Sustainable Homes Level 4 for Energy Use as permitted by the Written Ministerial Statement dated 25 March 2015

⁹ Interpreted by reference to the nearest equivalent national technical standard (M4(2)).

Schedule of conditions

- 1) The development hereby permitted shall be begun before the expiration of three years from the date of this decision.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans:
 - Site plan 13-113-01 rev A
 - Existing block plan 13-113-02 rev A
 - Proposed block plan 13-113-03 rev B
 - Existing ground and roof plans 13-113-04 rev A
 - Existing south, north and west elevations and section A-A 13-113-05 rev A
 - Proposed ground and roof plans 13-113-06 rev D
 - Proposed south, north and west elevations and section AA 13-113-07 rev C
 - Proposed roof plan/flat layouts 13-113-08 rev C
 - Part front elevation 13-113-09 rev B
 - Part rear elevation 13-113-10 rev B
 - Proposed section A-A 13-113-11 rev C
 - Existing and proposed front elevation 13-113-12 rev B
- 3) Prior to the commencement of the relevant part of the development samples of the following materials to be used in the external surfaces of the development hereby permitted shall be submitted to and approved in writing by the local planning authority:
 - a) samples of the cladding and roofing materials
 - b) samples of the proposed window and door treatmentsDevelopment shall be carried out in accordance with the approved details.
- 4) Prior to the commencement of the relevant part of the development full details of the design, materials and finishes for the balcony screens and railings, and their relationship with the parapet roofline, shall be submitted to and approved in writing by the local planning authority. Development shall then be carried out in accordance with the approved details.
- 5) Other than amenity spaces to the front of the building as detailed on drawing nos 13-113-06 rev.D and 13-113-08 rev.C, access to the flat roof of the building shall be for maintenance or emergency purposes only and the flat roof shall not be used as a roof garden, terrace, patio or similar amenity area.
- 6) The window in the west side elevation of the development hereby permitted shall be obscure glazed and non-opening, and thereafter permanently retained as such.
- 7) No development shall take place until a Construction Environmental Management Plan (CEMP) has been submitted to and approved in writing by the local planning authority. The CEMP shall include:
 - a) a scheme of how the contractors will liaise with local residents to ensure that residents are kept aware of site progress and how any complaints will be dealt with, reviewed and recorded (including details of any considerate constructor or similar scheme)
 - b) a scheme of how the contractors will minimise complaints from neighbours regarding issues such as noise and dust management, vibration,

site traffic and deliveries to and from the site

c) details of hours of construction including all associated vehicular movements

d) details of the construction compound

e) a plan showing construction traffic routes

The construction shall be carried out in accordance with the approved CEMP.

- 8) All glazing within the residential units hereby permitted shall achieve a minimum performance of 33dB Rw, and shall be retained as such thereafter.
- 9) Prior to first occupation of the residential units hereby permitted, an acoustic report shall have been submitted to and approved in writing by the local planning authority indicating that an assessment has taken place to determine whether the soundproofing measures between the dance studio and the flats above has achieved a minimum performance of 70dB Rw. If the levels are not met, the report shall provide information on the further mitigation measures needed and a timeline within which these will be carried out to ensure that the levels are achieved. The flats shall not be brought into use until the minimum performance of 70dB Rw has been reached and agreed in writing by the local planning authority.
- 10) Prior to development commencing, the applicant shall submit a written scheme for approval to the local planning authority on how and where ventilation will be provided to the various flats including specifics of where the clean air is drawn from and that sufficient acoustic protection is built into the system to protect end users of the development. The scheme shall ensure compliance with Building Regulations as well as suitable protection in terms of air quality.
- 11) Notwithstanding the submitted details, the ground floor entrance doors shall not be installed until a revised opening arrangement that allows for access for larger goods and deliveries has been submitted to and approved in writing by the local planning authority. Development shall be carried out in accordance with the approved details and retained as such thereafter.
- 12) No development shall commence until details of a scheme of works to provide a segregated footway within the Hove Business Centre car park from Fonthill Road to the new residential access has been submitted to and approved in writing by the local planning authority. The works shall be completed prior to the first occupation of the development hereby permitted and shall thereafter be retained.
- 13) The development hereby permitted shall not be occupied until the refuse and recycling storage facilities indicated on the approved plans have been fully implemented and made available for use. These facilities shall thereafter be retained for use at all times.
- 14) The development hereby permitted shall not be occupied until the cycle parking facilities shown on the approved plans have been fully implemented and made available for use. The cycle parking facilities shall thereafter be retained for use by the occupants of, and visitors to, the development at all times.

- 15) None of the residential units hereby approved shall be occupied until a minimum energy efficiency standard of a 19% CO2 reduction against Building Regulations requirements Part L 2013 (TER Baseline) has been achieved.
- 16) None of the residential units hereby approved shall be occupied until the Buildings Regulations optional requirement part G paragraph 36 (2)(b), a water efficiency standard of 110 litres per person per day, has been achieved. Evidence of compliance shall be notified to the building control body appointed for the development in the appropriate Full Plans Application, or Building Notice, or Initial Notice to enable the building control body to check compliance.
- 17) The new dwellings hereby permitted shall be completed in compliance with Building Regulations optional requirement M4(2) (accessible and adaptable dwellings) prior to first occupation and shall be retained as such thereafter. Evidence of compliance shall be notified to the building control body appointed for the development in the appropriate Full Plans Application, or Building Notice, or Initial Notice to enable the building control body to check compliance.