Neutral Citation Number: [2024] EWHC 2383 (Admin)

Case No: AC-2024-LON-002053

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN LONDON

Tuesday, 24th September 2024

Before:
FORDHAM J

- -

Between:

SEVEN CAPITAL (HIGHGATE HILL) LTD	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
(2) ISLINGTON COUNCIL	**Defendants**

- -

- -

Gwion Lewis KC (instructed by Fieldfisher LLP) for the **Claimant**
Ben Du Feu (instructed by GLD) for the **First Defendant**
David Forsdick KC (instructed by Islington Council) for the **Second Defendant**

- -

Hearing date: 19.9.24
Draft judgment: 20.9.24

- -

Approved Judgment

- -

FORDHAM J

Remote hand down. This judgment was handed down remotely at 10am on 24th September 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

FORDHAM J:

Introduction

1. The planning inspector's appeal decision which is impugned on this application for permission for planning statutory review is dated 9 April 2024 and can be found published online with an appeal reference APP/V5570/W/23/3326166. I will use paragraph numbers to refer to relevant contents of the decision. I am having to give reasons in writing, after the hearing, because the oral submissions exhausted the available court time. The Developer (Seven Capital) had applied for planning permission in November 2022 (with the reference P2022/4011/FUL). This was a "meanwhile use" (MU) application relating to Archway Campus on Highgate Hill in London N19 5LP. Determination by the local planning authority or LPA (Islington Council) was 'timed-out' and the developer appealed to the Secretary of State. In the impugned decision, the inspector dismissed the appeal and refused planning permission. The Developer was seeking planning permission for a two-year consent for temporary use, to provide a maximum of 195 artist studios/ exhibition space at the site. By the time the inspector came to determine the appeal, there were 5 relevant putative reasons for refusal being put forward by the LPA (see §4) and 4 agreed Main Issues (see §8). There was a positive benefit in economic, employment and cultural terms with buildings occupied and a demand met, albeit for the limited two-year period of the MU (§81). But that was significantly and demonstrably outweighed by the adverse impacts of the proposed development which would bring harms in terms of delay to housing delivery and development plans conflict as well as potential issues with fire safety and the potential reduction of CIL contribution (§§80 and 82). The planning balance was decisively against permission being granted (§82).

The Reduced-Period Issue

2. Main Issue 2 was whether the proposed MU would – by reason of 4 features the first of which was "the period of use proposed" – impede the policy priority for the residential-led redevelopment of the site and the urgent delivery of conventional housing contrary to Site Allocation ARCH 5, Local Plan Policy H1 and/or Local Plan Policy R9 (see §8). In addressing this (§§16 to 33), the inspector concluded that there was a breach of Policy R9B(i), which stipulates that any MU will be appropriate where it "does not preclude permanent use of the site, particularly through the length of any temporary permission". The Main Issue referred to "the period of use proposed" and the Policy referred to the "length of any temporary permission". The Developer's case was that the two-year permission sought was justified in planning acceptability terms. The LPA's case included the point that there was likely to be "at least" a 9 month clash between the two-year period sought for the MU and the implementation of the expected development under site allocation ARCH5 (§§17 and 19).

3. Mr Lewis KC's first ground is that the inspector arguably gave legally inadequate reasons, having first referred to the LPA's submission that to avoid the clash it would be "necessary to restrict any MU permission to at most 15 months with consequences for the benefits" (§17), and having second gone on to describe the harm in "unacceptable delay" that "the 2-year length of this temporary permission" would bring (§19). Mr Lewis KC says that this was not a question of 'casting around' for a planning condition, but of following through on the 15-month condition which had been "canvassed" by the LPA, which was being said by the LPA to be suitable at least in

terms of addressing the relevant harm. What was inadequate was for the inspector to say that this harm was "not a matter that I could consider could be satisfactorily overcome by planning condition" (§19), without recording any reasoned view on the overall suitability of a 15 month condition. The inspector needed to follow through on what had been "canvassed" and could address the harm, to express a view on planning suitability.

4. In my judgment, this is not an arguable ground with a realistic prospect of success. From the Developer's perspective a two-year temporary permission was what was being sought and that was all that was being sought. There was no alternative or fallback position being put forward. That remained the case after 2 February 2024, when the written submissions of the LPA said that the only possible way to address the harm would be to restrict any permission to "at most" 15 months which could "go a long way" to resolving the clash, but that this was apparently "not on offer" from the Developer. The point was not taken up. It was not put forward. There were three months to do so. Importantly, the LPA had taken a clear position that a 15 month condition could not be an acceptable solution. That was because of the "consequences to the benefits" to which the inspector referred (§17). The LPA had taken the clear position that (a) the practical implications of a 15-month permission would be "at least 5 months from the grant of permission to the commencement of use" and (b) even "just a year" as a "window for the use" was one which "would make no sense for a proposal of this scale". This was not a viable alternative. It was one which would "make no sense". The Developer did not contest any of this. It is artificial to subdivide the question of appropriateness, when the LPA was saying why this would not be an acceptable alternative, and the developer at no stage disagreed. The inspector explained what was wrong with the 2-year temporary permission being sought, that it would mean a clash of at least 9 months. He did not need to get into whether and why a 15 month permission would make no sense. It was not being sought, even after 2 February 2024, and the LPA's position that it would make no sense was not contested. It was plainly adequate to conclude, and to say, that the issue could not be "satisfactorily overcome by planning condition" (§19).

The Fire-Safety Detail Issue

5. Main Issue 4 was whether the proposal failed "to provide sufficient detail to demonstrate that the operation of the proposed MU would achieve the high standards of fire safety and ensure the safety of all building users, contrary to Policies D5 and D12 of the London Plan" (§8). In addressing this (§§52-79) the inspector concluded that the lack of detail provided in the Fire Statement (5 January 2024), which failed to show how the proposal would 'function' in terms of fire safety" gave rise to potential harm and "fundamental concerns" going to "the heart of compliance with D12", which could not satisfactorily be overcome by a condition deferring matters to a post-permission stage, such that the proposal breached Policy D12 in failing to provide sufficient detail to demonstrate that the operation of the proposed MU would achieve the high standards of fire safety and ensure the safety of all building users (§§78-79). Those conclusions need to be read in the light of the entirety of the preceding paragraphs addressing this issue. There was a temporal theme, about whether matters could be deferred to a later stage including assessment by a building control officer. There was an information theme, about whether adequate information had been

provided to make the required evaluative assessment. There was also a source theme, about information provided within "the Fire Statement" (§§76-77).

6. Mr Lewis KC again submits that the inspector arguably gave legally inadequate reasons, leaving important controversial issues unaddressed and unresolved. Two of the four topics of site specific information (§§60, 76) had been addressed with the LPA's own expert witness in cross-examination, as being deliverable and achievable, namely delivery of compartmentalisation (fire doors) and levels of fire resistance. As to details that vehicle access and firefighting shafts can be provided for the existing buildings to achieve the highest standards of fire safety (§77), the inspector recorded that the Developer's "closing submission" involved "detailed responses", presenting "evidence" and a "level of detail" (§72). But the inspector simply said he was "not persuaded" regarding "insurmountable issues" (§72); he identified nothing that was an "insurmountable" issue or why; he did not say what "details that vehicle access … can be provided" were missing (§77); he spoke of an absence of details that "firefighting shafts can be provided" (§77) when the point was not "can" but "should", the Developer's case being that it was "very unlikely that the building control officer will require firefighting shafts to be installed" (§72). The Developer's evidence and submissions called for adequate reasons which grappled with the points made and explained why they were rejected. The standard of legally adequate reasons was, at least arguably, breached.

7. I am unable to accept these submissions. The inspector was not concluding that there were "insurmountable issues". He was rejecting the Developer's argument that the required level of detail had been provided to enable him to be satisfied, as he needed to be. He did not agree with the Developer that details could be deferred, for a subsequent assessment; still less by a building control officer. He said there was expect evidence from the LPA's expert "that there would be major difficulties in delivering the high standards of fire safety for the site" (§76) and Mr Lewis KC accepts that this description was fairly open to the inspector even after the cross-examination. The point about it being "very unlikely that the building control officer will require firefighting shafts to be installed" was a closing "submission", rather than expert evidence. The inspector thought the Fire Statement was a vital discipline, and repeatedly focused on what had been included in it (§§76-77). His point about vehicle access was in the context where there had been "no tracking survey to show how provision will be made within the curtilage of the site to enable fire access" (§69), a point which the informed audience knew was said by the LPA to be "the short and fundamental point". The references to "firefighting shafts" need to be read in the broader context that Policy B5 requires "reasonable facilities to assist fire fighters in the protection of life" with "internal fire facilities" (§68), and that the site specific information listed (§76) was "consideration of the existence, adequacy or need for firefighting shafts" (§61); all in the context of the need for a Fire Statement in which a qualified assessor gave "details [of] how the proposal will function" (§§54, 78). These are adequate and intelligible reasons. It was open to the Developer to argue that the conclusion was unreasonable, but no such claim has been advanced. On the facts and in the circumstances, there is no realistic prospect, in my judgment, of the Developer demonstrating that these were legally inadequate reasons.

The Future Levy Implications Issue

8. That leaves the final ground raised by the Developer, which relates to the community infrastructure levy (CIL). There was a big debate about whether (a) CIL contributions from the residential development were a necessary material consideration and (b) whether in this case it ought to attract any weight (§§34-41). Mr Lewis KC accepts that the test of fair and reasonable relationship to the development (§37) is relevant, but maintains that so is the Mount Cook [2003] EWCA Civ 1346 "framework" (§41). The Developer argued in favour of the Mount Cook framework and, in the alternative, that no significant weight should be accorded to this factor even if it was a material consideration (§41). The Inspector preferred the LPA's position, distinguishing Mount Cook (§42), found that the test of fair and reasonable relationship to the development was satisfied (§44), but agreed with the Developer that little weight could be attributed to this factor (§51). The inspector expressly spelled out that, even ignoring the CIL issue, the planning balance was decisively against permission being granted (§82).

9. Mr Lewis KC says there are strong public interest reasons to allow this academic issue – which he says is properly arguable – to be ventilated, to secure an authoritative ruling at a substantive hearing. He says it is a point of significant concern, within London and beyond. He says it could be relevant to this very site. He says the published decision of the inspector in this case stands as likely to have a 'chilling' effect for other cases, which should not be allowed to stand, if it is wrong in law.

10. I am unable to accept these submissions. The immateriality of the issue, on the express terms of the impugned decision, stands as a complete answer to the grant of permission. I can assume for the purposes of the present case, in the Developer's favour, that statutory review applications (where the remedy is quashing) are to be approached in the same way as judicial review claims. Mr Forsdick KC belatedly raised a query as to whether there was "jurisdiction" to deal with an academic point in statutory review proceedings, but this was not part of any grounds of resistance or skeleton argument. However, applying a judicial review approach, I am unable to accept that there is any compelling or exceptional reason why it would be right to allow this academic issue to proceed to a substantive hearing: see Heathrow Hub Ltd v Transport Secretary [2020] EWCA Civ 213 at §208. I am quite sure that the point, if it is going to be ventilated in High Court proceedings, should be addressed as to its viability and (if appropriate) at a substantive hearing, against a set of concrete facts of a case where it matters and is said to be capable of making a difference; a case where it is legally and factually relevant; and not a case on whose facts the point attracted no significant weight, and was expressly and unassailably found to have no practical significance.

Conclusion

11. In all the circumstances and for these reasons, I dismiss the renewed application for permission for statutory review. The parties – to whom I am grateful – are agreed, in those circumstances, that the costs orders made by Lang J (29.7.24) should stand and no further Order is needed.

24.9.24