



Appeal Decision

Site visit made on 5 June 2023

by Robert Parker BSc (Hons) Dip TP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 July 2023

Appeal Ref: APP/N1730/W/21/3278561

Zenith House, 3 Rye Close, Fleet GU51 2UY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Article 3(1) and Schedule 2, Part 3, Class O, Paragraph O.2(1) of the Town and Country Planning (General Permitted Development) (England) Order (as amended).
 - The appeal is made by Mr James Archer of L W Zenith Limited against the decision of Hart District Council.
 - The application Ref 21/00844/PRIOR, dated 22 March 2021, was refused by notice dated 21 May 2021.
 - The development proposed is the change of use of offices to form 34 flats.
 - This decision supersedes that issued on 15 February 2022. That decision on the appeal, and the associated costs decisions, were quashed by order of the High Court.
-

Decision

1. The appeal is allowed and prior approval is granted for the change of use of offices to form 34 flats at Zenith House, 3 Rye Close, Fleet GU51 2UY in accordance with the terms of the application, Ref 21/00844/PRIOR, dated 22 March 2021, and the plans submitted with it, subject to the conditions set out in the attached schedule.

Applications for costs

2. An application for costs was made by L W Zenith Limited against Hart District Council. A separate application for costs was made by Hart District Council against L W Zenith Limited. These applications are the subject of separate decisions.

Preliminary Matters

3. Article 3(1) and Schedule 2, Part 3, Class O, Paragraph O.2(1) of the Town and Country Planning (General Permitted Development) (England) Order (as amended) (the Order) permits, subject to certain restrictions, development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a)(offices) of the Schedule to the Use Classes Order, to a use falling within Class C3(dwellinghouses) of that Schedule.
4. It is worth noting that there have been various amendments to the Order in relation to this permitted development right. The first of these follows modifications to the Use Classes Order which subsumed Class B1 into a new Class E (Commercial, business and service). Transitional arrangements allow for the current application for prior approval to be determined as if the old use classes still apply.

5. The second change to the Order is the insertion of Article 3(9A) which states that Schedule 2 does not grant permission for, or authorise any development of, any new dwellinghouse that does not meet the size standards indicated, including the Nationally Described Space Standard. Transitional arrangements mean that this provision only applies to applications submitted after 6 April 2021. The application which the subject of this appeal was submitted before that date and therefore the requirement does not take effect.
6. Finally, an additional prior approval matter was added by virtue of paragraph O.2(1)(e) in relation to the provision of adequate natural light in all habitable rooms of the dwellinghouses. These provisions apply to prior approval applications submitted after 1 August 2020. There is no dispute that this consideration is relevant in this particular case.

Background and Main Issue

7. At the time of the Council determining the application there was an Article 4 Direction in force relating to a number of Strategic Employment Sites and Locally Important Employment Sites. The Direction had the effect of removing permitted development rights under Class O, such that changes of use from offices to dwellings would require an application for planning permission.
8. The Article 4 Direction excluded any building or land in relation to which prior approval under Class O had been granted or treated as granted under Schedule 2 of the 2015 Order. The main matter in dispute was whether permitted development rights had been removed, given that prior approvals under Class O had been granted by the Council at the appeal site prior to the Article 4 Direction taking effect on 6 May 2019. This matter was considered at length by the Inspector in their appeal decision of 15 February 2022, which has since been quashed by order of the High Court.
9. Since that appeal decision, there has been a material change in circumstances in that the Article 4 Direction was cancelled with effect from 1 August 2022. Its provisions cease to apply and therefore the application before me is no longer affected by any restrictions contained within it. The debate over whether the permitted development rights have been removed is no longer relevant.
10. There is no suggestion that the proposal would fail to comply with any of the limitations and restrictions set out in paragraph O.1 of the Order and I have no basis to reach a different view. Hence, it is necessary to consider whether prior approval should be granted in respect of the matters set out within paragraph O.2(1) (a)-(e) of the Order. This is the main issue for my consideration.

Reasons

11. Paragraph O.2(1) of the Order requires the developer to apply to the local planning authority for a determination as to whether prior approval will be required as to the following matters: (a) transport and highways impacts of the development, (b) contamination risks on the site, (c) flooding risks on the site, (d) impacts of noise from commercial premises on the intended occupiers of the development, and (e) the provision of adequate natural light in all habitable rooms of the dwellinghouses. I shall consider these matters in order.
12. The proposed development would make use of existing accesses onto Rye Close and would include provision for a total of 60 parking spaces to serve 34 flats. I note that this is similar to previous schemes that were granted prior

approval. I have seen nothing to indicate that there is a Highway Authority objection to the scheme, or any other evidence to demonstrate that the development would have a detrimental impact on highway safety or the road network. As such, I consider the transport and highway impacts of the development to be acceptable.

13. Turning now to contamination risks, the proposal relates to the change of use of a building rather than the redevelopment of the site. There would be no need for significant groundworks, beyond those required to enclose an existing parking undercroft, and these have already been granted planning permission¹. The site has been deemed acceptable for use as offices previously and therefore conversion of the building to dwellings is unlikely have any additional implications for human health. There would be no contamination risks at the site that would make the proposal unacceptable.
14. The site is in flood zone 1 which means that it is at low risk of flooding from rivers and groundwater. However, the emergency flood plan refers to the site as a dry island, generally surrounded by land at a higher risk of flooding. Furthermore, the site may be prone to surface water flooding. I therefore consider that it would be sensible to make future occupiers aware that access and egress to the wider area could be restricted. Subject to adherence with the proposed flood mitigation measures and emergency plan, a matter which could be conditioned, the proposal would be acceptable in flood risk terms.
15. The wording of paragraph O.2(1) (d) restricts consideration of noise to that which emanates from commercial premises. It does not extend to traffic noise from nearby roads. The Planning Practice Guidance (PPG) explains that a local planning authority, and by extension an Inspector, cannot consider any matters, other than those stipulated, when determining a prior approval application. The site is surrounded by commercial premises, including offices and a newly constructed development of industrial and warehouse units. There is no suggestion that any of the neighbouring uses would be likely to result in unacceptable levels of noise for the intended occupiers of the proposed dwellings and the separation distance is sufficient to prevent noise nuisance.
16. Most of the proposed flats would be served by existing window openings and these would ensure adequate levels of natural light in all habitable rooms. Those units on the third floor, within the existing roof space, would be reliant upon the creation of window openings contained within new dormers. These structures, which are yet to be constructed, would secure adequate levels of natural light within the third-floor apartments. The dormers have already been permitted under a separate planning permission, with that permission also covering other physical works such as the enclosure of the parking undercroft.
17. The previous Inspector was not prepared to attach a condition requiring the completion of other consented development in its entirety as part of the prior approval process. However, in the judgment of the High Court, His Honour Judge Jarman KC opined that there was nothing in paragraph W(13) of the Order, or in the PPG, to prevent the imposition of a negatively worded condition, relating to occupation. I favour that approach and agree that such a condition would be reasonably related to the subject matter of the prior approval.

¹ Ref 19/00312/FUL dated 17 April 2019

18. The Council disputes that the planning permission for the dormers remains extant and alleges that the High Court was given incorrect information. There is no substantive evidence to demonstrate that this issue was raised at any point in proceedings and no appeal against the Court's decision. At the site visit I saw that trenches had been dug for the foundations of the walls required to enclose the undercroft. The appellant has supplied an email from an Approved Inspector at London Building Control which confirms that the trenches were inspected on 7 April 2022, within the life of planning permission ref 19/00312/FUL. In a late addition to its evidence, the Council has conceded that its officers witnessed the same works at a site visit on 13 April 2022.
19. It is not for me to make a formal determination on matters of lawfulness in the context of a s78 appeal. Even if the planning permission had lapsed, which seems unlikely based on the evidence presented, it would not prevent me from imposing a negatively worded condition, if I deemed that there was a reasonable prospect of the physical works being carried out during the lifetime of the prior approval. The Council has provided no compelling evidence to persuade me that permission would be withheld in the event that a fresh planning application for the works were submitted. Given that a scheme has had permission in the recent past, its merits already having been considered, with no significant change in circumstances having been drawn to my attention, I consider that a condition along the lines of that suggested by the appellant would pass the tests set out in paragraph 56 of the National Planning Policy Framework and the PPG.
20. To conclude, I have no concerns in respect of any of the prior approval matters. Subject to the imposition of conditions in respect of flood risk and the natural light issue, a grant of prior approval is appropriate.

Other Matters

21. The site lies within the zone of influence for the Thames Basin Heaths Special Protection Area (SPA), which is designated as being of international importance for rare and vulnerable species of birds. It is common ground that the proposal for residential development at the site would lead to increased recreational pressures on the SPA. There is no dispute that mitigation measures would be necessary to make the development acceptable and ensure that it meets the requirements of the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations).
22. Article 3(1) of the Order provides that, subject to the provisions of the Order and Regulations 75-78 of the Habitats Regulations, planning permission is granted for the classes of development described as permitted development in Schedule 2. Regulation 75 of the Habitats Regulations states that it is a condition of any planning permission granted by a general development order made on or after 30 November 2017, that development which is likely to have a significant effect on a European site must not be begun until the developer has received written notification of the approval of the local planning authority under Regulation 77. This is a separate process, triggered by the provisions of Article 3(1) which effectively imposes a pre-commencement condition on development permitted by the Order.
23. The appellant entered into a Deed of Covenant for the provision of a Suitable Alternative Natural Greenspace (SANG) with Taylor Wimpey Developments Ltd, but due to the High Court proceedings this Deed has expired. The appellant states that they are in the process of entering into a renewed Deed on

substantively the same terms and further acknowledges the need for a s106 Unilateral Undertaking to secure the SANG and payment of a Strategic Access Management and Monitoring contribution. I have not had sight of the signed documents, but this is not a pre-requisite for a grant of prior approval under Class O of the Order. The matter can be progressed separately.

Conclusion

24. For the reasons given above I conclude that the appeal should be allowed, and prior approval granted. Development under Class O is permitted subject to the condition that the development must be completed within a period of 3 years starting with the prior approval date.

Robert Parker

INSPECTOR

SCHEDULE OF CONDITIONS

- 1) The development must be completed within a period of 3 years starting with the prior approval date.
- 2) The occupation of the residential flats authorised by this Prior Approval shall not commence until all the works shown on the drawings approved pursuant to the planning permission ref 19/00312/FUL dated 17 April 2019, have been completed.
- 3) The development authorised by this Prior Approval shall be carried out in accordance with the approved Zenith House Emergency Flood Plan for MAM Zenith Ltd dated August 2017. The Flood Plan shall be made available for all site owners and managers for the lifetime of the development. The passive flood resistant measures set out in Section 5 of the Plan shall be fully implemented prior to first occupation of the development and subsequently maintained in accordance with the details set out in Appendix C.

*** END OF CONDITIONS ***