The Planning Inspectorate

Appeal Decisions

Inquiry Held on 18, 19 & 20 March 2019
Site visit made on 18 March 2019

by Chris Preston BA (Hons) BPl MRTPI

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

Decision date: 05 September 2019

Appeal A Ref: APP/D5120/C/18/3206359
Europa House, Europa Trading Estate, Fraser Road, Erith DA8 1QL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Solomon Grunfeld (Primeregal Ltd.) against an enforcement notice issued by the Council of the London Borough of Bexley.
- The enforcement notice was issued on 12 June 2018.
- The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised material change of use of the land to a mixed use comprising:
  i) 14 live/work units on the third floor and third floor mezzanine level;
  ii) Education (Class D1), church (Class D1), office (Class B1), workshop (B1/B2) and storage (Class B8) uses on the second floor; and
  iii) Gymnasium (Class D2), office (Class B1), workshop (Class B1/B2) and storage (Class B8) uses on the ground floor.
- The requirements of the notice are: (i) cease the use of the third floor mezzanine level for live/work units and remove all kitchen and bathroom facilities from the live/work units; (ii) Cease the use of the second floor for education and church uses (other uses not enforced against); (iii) cease the use of the first floor for church use (other uses not enforced against); and (iv) cease the use of the ground floor as a gymnasium (other uses not enforced against).
- The period for compliance with the requirements is: For step (i), 6 months and, for steps (ii), (iii) and (iv) 3 months from the date the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been made on ground (a) and the requisite fees have been paid and application for planning permission is deemed to have been made under section 177(5) of the Act.

Appeal B Ref: APP/D5120/W/18/3194920
Europa House, Europa Trading Estate, Fraser Road, Erith DA8 1QL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr Solomon Grunfeld (Primeregal Ltd.) against the decision of the Council of the London Borough of Bexley.
- The application Ref 17/01126/FUL, dated 29 March 2017, was refused by notice dated 01 August 2017.
- The development proposed is described on the application form as: Proposal for 7 light industrial units on the ground floor with minor alterations to accommodate a new communal refuse store adjacent to the main entrance with 33 live work units to the upper floors, alterations to internal layouts, insertion of rooflights to front and rear roof slopes and the creation of terraces and insertion of rooflights to front and rear roofslopes.

Appeal C Ref: APP/D5120/C/17/3188733
Fraser House, Europa Trading Estate, Fraser Road, Erith DA8 1QL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Solomon Grunfeld (Primeregal Ltd.) against an enforcement notice issued by the Council of the London Borough of Bexley.
- The enforcement notice was issued on 05 October 2017.
- The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised material change of use of the building to provide 3 light industrial units (Class B1) on the ground floor and 19 live/work units (Sui Generis) on the upper floors.
- The requirements of the notice are: (1) cease the use of the upper floors of the building as 19 live/work units and (2) Remove all kitchenette and bathroom facilities currently located within the 19 live/work units. land.
- The period for compliance with the requirements is 6 months from the date the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2) (f) and (g) of the Town and Country Planning Act 1990 as amended.

Decisions

Appeal A – Europa House Enforcement Appeal

1. It is directed that the enforcement notice be varied by:

   - The deletion of the words "6 months" in relation to the time period for compliance at section 6(i) and the substitution of the following words "For the cessation of the live/work use at third floor and third floor mezzanine level; 9 months from the date this notice takes effect and; for the removal of all kitchen and bathroom facilities from within the live/work units; 10 months from the date this notice takes effect."

   - The insertion of the words "from the date this notice takes effect." following the words "3 months" in sections 6 (ii), 6(iii) and 6(iv).

   Subject to these variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B – Europa House Planning Appeal

2. The appeal is dismissed.

Appeal C – Fraser House Enforcement Appeal

3. It is directed that the enforcement notice be varied by:

   - The deletion of the words "6 months from the date this notice takes effect" in relation to the time period for compliance at section 6 and the substitution of the following words: "For the steps required by section 5(1) of the notice; 9 months from the date this notice takes effect and; for the steps required by section 5(2); 10 months from the date this notice takes effect."

   Subject to those variations the appeal is dismissed and the enforcement notice is upheld.

Application for costs

4. At the Inquiry an application for costs was made by the Council of the London Borough of Bexley against Mr Solomon Grunfeld (Primeregal Ltd.) in relation to Appeal C. This application is the subject of a separate Decision.

Preliminary Matters

5. Three appeals are before me; two made in relation to Europa House, and one relating to Fraser House. I have referred to them as Appeals A, B and C, as set out in the banner heading above, Appeal A being made against the decision to issue an enforcement notice in relation to Europa House, Appeal B against the refusal to grant planning permission in relation to that property and Appeal C against the decision to issue an enforcement notice in relation to Fraser House. I have considered all three appeals within this decision letter, addressing each in turn.

6. Following the close of the Inquiry I received a completed and executed s106 agreements in relation to Appeals A and B. The content of those finalised agreements was the same as the draft versions discussed at the event and I have taken them into account in reaching my decision.

APPEAL A – Europa House Enforcement Appeal

Procedural Matters

7. Appeal A was initially made on grounds (a), (b), (f) and (g) of section 174 of the Town and Country Planning Act (1990) (the Act). However, in the lead up to the Inquiry the appellant withdrew the ground (b) appeal and the appeal proceeds on grounds (a), (f) and (g).

8. Where an appeal is made against an enforcement notice on ground (a) planning permission is sought for the matters identified in the enforcement notice that constitute the breach of planning control. The description of the breach at Europa House is set out in the banner heading above. It is open to me to grant planning permission for the whole, or any part, of the breach having regard to the terms of paragraph 177(1)(a) of the Act. In that regard, the appellant made clear that he did not seek planning permission for the church and education uses on the second floor of the building.

9. However, it is not possible for me to grant planning permission for a substantively different form of development. During the Inquiry, various suggestions were made by the appellant as to how the scheme could be amended to address concerns that have been raised, particularly in relation to the outlook and living conditions of existing occupants.

10. The suggested amendments were put forward by Mr Horne in his oral evidence. They included a proposal to insert new rooflights to provide natural light into rooms in units T02, T03, T04 and T05. At present certain rooms within those units do not benefit from any natural light, other than borrowed light. I am satisfied that such alterations could be secured by condition because the effect on the external appearance of the building would be limited and there would be no impact on neighbouring privacy because the rooflights would be set high in the roof such that internal views would be upwards to the sky.

11. As a suggestion for addressing the lack of external amenity space for the existing live-work units Mr Horne proposed alterations to reconfigure the roofspace to create sunken outdoor terraces. However, such changes would have a much greater impact on the external appearance of the building which would be difficult to assess in the absence of any proposed plans. Moreover, the change would require the loss of some of the existing internal floorspace, thereby affecting the living arrangements of those residing and working at the property.

12. Those occupants would have every right to expect an opportunity to comment on those proposals and that would not be possible in an appeal scenario. Taking that into account, and the degree of physical alteration that would be required the suggested changes would amount to a fundamentally different scheme. Accordingly, having regard to the case law referred to by the parties, to consider such alterations would be beyond the scope of what could be considered in relation to the ground (a) appeal.

13. Therefore, I have considered the ground (a) appeal on the basis of the existing layout, taking account of the possibility of installing rooflights in specific units.

14. In the lead up to the Inquiry the parties agreed that suitable conditions could be imposed to ensure that satisfactory living conditions could be achieved in respect of noise. As a result no expert witnesses were called in that respect and I find no reason to depart from that agreed position.

Appeal A on Ground (a)

15. In view of the above, the main issues in the determination of the appeal on ground (a) are:

    (1) Whether the development provides acceptable living conditions for occupants of the live-work units with respect of the level of internal space and levels of light and outlook;

    (2) Whether the development would lead to an unacceptable loss of employment floorspace, having regard to the policies of the development plan in that respect; and

    (3) Whether the development should be required to contribute towards the provision of affordable housing and, if so, whether adequate provision is made in that respect.

Living Conditions

16. I had the opportunity to visit the appeal site on the first morning of the Inquiry. The "Technical housing standards – nationally described space standard" (2015), as adopted in the London Plan (2016), requires a minimum floorspace of 50m² for a 2 bed, 2 person unit or 58m² where the unit is over 2 storeys. I was told that higher standard was to compensate for the fact that "dead space" will be created underneath the staircase leading to the upper level.

17. There is some variety in the size and internal footprint of the units but, with the exception of units T1 – T3, which are estimated to have a floorspace of 55m², all of the units fall below 50m². Whilst I note the stairs leading to the mezzanines are steeper than a normal staircase, thereby creating slightly less "dead space" underneath, the stairs nonetheless limit the usable floorspace on

the lower level. It is also clear that a number of units are occupied by more than one person and I agree with the conclusions of the Inspector in the previous appeal relating to Fraser House that it would be unreasonable to impose a condition seeking to limit use to no more than one person. The result in this case could be to split up families or established couples.

18. Although the space standards are devised for purely residential properties and not live-work units they are a useful starting point for the assessment of what amounts to a reasonable living space. Where a work element is included it seems logical that a greater level of floorspace should be required because of the need to accommodate any necessary equipment and to allow for the possibility of segregating the work area from the living area if that is how the occupant wishes to operate.

19. In this case, the majority of units lack the space to create such segregation and the work element exists cheek by jowl with the living space. The result is not only a cramped form of accommodation but a lack of any identified space for occupants to withdraw or rest away from work. A number of occupants are clearly creative people and have made imaginative use of the space available. However, that doesn't disguise the limitations in the size of the units which, for the most part, are cramped and unsuitable to accommodate living and working space.

20. The harm in that respect is amplified by the absence of any external amenity space. The location of the site within an industrial area is such that it is some distance to the nearest external greenspace. To my mind access to outdoor space is all the more important due to the fact that occupants are likely to spend their working day and their non-working time in the same space. The proposed scheme in Appeal B attempts to overcome the issue through the inclusion of a sun terrace for each unit. No such option is available in the case of the existing layout.

21. Moreover, due to the location of the units within the upper floor and roofspace there are no windows within the lower section and main living area of each unit (except T1). Natural light is borrowed from rooflights positioned high above but this light source will be limited on overcast and dark days. The lack of outlook and light is unsuitable, especially when one considers the length of time occupants are likely to be inside and adds to the cramped feeling of the units. Some limited outlook is available through rooflights when stood at mezzanine level but, even there, unless the occupant was tall and had the rooflight open so as to peer out, the general outlook would be upwards to the sky.

22. When considered in the round the units are severely deficient in terms of available space, the lack of amenity space and the low levels of light and outlook. The resulting living conditions are extremely poor and the development is contrary to the aims of saved policies H6, H7 and H11 of the UDP and the aims of paragraph 127(e) of the National Planning Policy Framework (the Framework) which requires that planning should create places with a high standard of amenity for existing and future users.

23. Arguments were presented to the effect that people seem content to live in the units which provide affordable live-work accommodation which is seemingly hard to come by. The fact that someone may be content to put up with unsatisfactory living conditions in those circumstances does not obviate the

need to assess the proposal on the basis of modern accepted planning practice. Arguments to that effect are, in many ways, the antithesis of the planning system and the outcome of such a laissez-faire approach could be to drive standards down towards the unregulated conditions of the past.

Loss of Employment Floorspace

24. In the previous appeal relating to Fraser House the Inspector concluded that saved policy E3 of the UDP was broadly consistent with the aims of the Framework and afforded the policy significant weight as a result. There is no suggestion that the revision to the Framework since that decision was issued has led to any change in emphasis that would lead me to reach a different conclusion.

25. The policy seeks to safeguard land and buildings for industrial and commercial uses, as appropriate to each area. With some exceptions, the policy defines industrial and commercial uses as those falling within Classes B1, B2 and B8 of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO). Other "sui generis" uses that do not fall into a specific use class will be considered on their individual merits, depending on the appropriateness for the specific location. The previous Inspector determined that the sui-generis live-work units could, in principle, be appropriate within Fraser House but was concerned that the exposure to noise of the residential elements could be incompatible with existing or future employment uses.

26. Subject to conditions, the noise issues raised in that case could be addressed in relation to Europa House and the Council no longer raises an issue in terms of the principle of live-work units. I find no reason to take a contrary view, having regard to the conclusions of the previous Inspector.

27. The majority of the first and second floor of the building is occupied for purposes within Classes B1 and B2 and, understandably, the enforcement notice does not seek to enforce against those elements. The appellant does not seek permission for the church and education uses at first floor level and those elements are clearly contrary to the terms of the policy.

28. There was much discussion regarding the nature of the gym at ground floor level. Class D2 of the UCO does not distinguish between a gymnasium that is open to members of the public and one that may be a private facility where tuition is given. I am not convinced by arguments that a gym is different to a gymnasium and, setting those semantics aside, it appears to me that the gym at ground floor level would fall squarely within Class D2. As such, it does not fall within the definition of an employment use and does not comply with the aims of policy E3.

29. There may well be cases where an exception to the policy is justified, for example if industrial floorspace is difficult to let and/or a specific non-industrial or commercial use would bring benefits in terms of employment. However, limited information is before me to suggest that is the case in this instance. The gym did not appear to be open when I visited the site or when I passed the building the day before the Inquiry and the number of employees is likely to be limited.

30. I have not been presented with any marketing information to suggest that the ground floor space would be difficult to let, although I do recognise that it is an

old industrial building that may be less attractive to modern businesses. A letter from a letting agent at appendix 8 of Mr Horne's proof related specifically to Fraser House, recognising its limitations but noting that the Europa Trading Estate as a whole had been "letting quite well" in the previous 5 years or so. In addition, the fact that the proposed application in Appeal B puts forward a reconfigured layout with employment uses at ground floor level may be an indication that employment uses could be attracted if a suitable configuration was found.

31. Consequently, whilst recognising the limitations of the building in terms of its age and design, the ground floor gym and first floor church and education use are clearly contrary to the aims of policy E3 which seeks to safeguard employment uses. No satisfactory justification to diverge from the aims of that policy has been presented.

Affordable Housing

32. In order to meet the tests set out at regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (the CIL Regulations) an obligation to provide affordable housing must be necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind.

33. In essence, the appellant's case is that the provision of affordable housing is not necessary or related to the development in question because the provision of live-work units is not the same as the provision of dwellinghouses falling within Use Class C3 of the UCO. In the words of Mr Parker, it is like comparing apples with pears. In order to be directly related to the development he argues that any affordable provision would need to be provided "in kind", as a live-work unit and that evidence based policies to support the need for such affordable units would be needed to justify an obligation.

34. Policy H14 of the UDP states that "the Council will seek to secure the provision of affordable housing in suitable residential developments of 15 dwellings or more". The development in this case does not fall into that category because no dwellings are proposed. Policy CS10 of the London Borough of Bexley Core Strategy (2012) (the CS) states that the Council will seek the maximum reasonable amount of affordable housing in residential schemes of ten units or more. The term "residential scheme" is not defined in the CS but the policy states that it is the Council's aspiration to achieve 50% of affordable housing as a proportion of all provision over the plan period as a whole. The policy envisages that "housing provision" will include a mix of dwelling types, size and tenure to meet the needs of Bexley's current and future population. When read in ordinary terms it appears to me that the policy requirement is referring to housing provision in the ordinary sense of the word as it relates to dwellinghouses or other forms of accommodation within Use Class C3 of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO).

35. My views on that are reinforced by the Council's Planning Obligations Guidance (2008). Table 3.1 lists the "qualifying development" including "Residential developments of 10 dwellings or more (including as part of a mixed use scheme)". Dwellings are clearly referred to as falling within Use Class C3. To my mind, the reference to mixed use at appears to refer to situations where a dwelling or flat may be situated within a building alongside offices or retail uses for example.

36. Having regard to the above, the policy rationale for requiring contributions is to ensure that a proportion of housing developments are provided as affordable housing to make sure that the needs of those who cannot afford market housing are catered for. By its very nature, a live-work unit of the kind proposed is a mixed "sui generis" use that does not fall within the definition of a dwellinghouse. In fact, if the units proposed were dwellinghouses, the Council would argue, as they have in relation to two solely residential units proposed in Appeal B, that planning permission should not be granted in this location.

37. The only reason the principle of the development is acceptable in this location, having regard to policy E3 of the UDP, is that the employment element is integral to the way in which the units operate. The units are genuinely "live/work" with little physical delineation between the residential and employment elements.

38. In that sense, I am not convinced of the link between the provision of live/work units at the site and the wider housing needs of the borough which adopted policies seek to meet. If the development were to be approved, it would not be at the expense of housing development and would not add to the demand for housing within the area but would meet a specific need for live/work accommodation. In effect, the Council is seeking a financial contribution from one form of development to cross-subsidise the provision of a different form of development and I am not satisfied that such a contribution would be directly related to the development to be permitted.

39. Mr Turek referred me to paragraph 3.5 of the Mayor of London's Housing Supplementary Planning Guidance as evidence that affordable housing can be sought from forms of housing other than those falling within Class C3 of the UCO. Sub-paragraph 3.5.1 identifies that new approaches to meeting housing need are emerging and that those products can play an important role in meeting housing need. The third bullet point of the paragraph states that affordable housing can be sought on residential schemes that fall into other use classes, including sui generis uses. Whilst not a direct reference to live/work units I see no reason why such accommodation should not fall within the scope of the guidance as a matter of principle.

40. However, the paragraph makes clear that Local Plans should provide a robust framework for decision making in relation to emerging house types in order that proposals can demonstrate how they meet identified housing needs. In other words, the context for the suggestion that affordable housing contributions can be sought for such schemes is based on an understanding that local plans will have identified the need for such accommodation and set robust policies stating how proposals will be expected to meet those needs.

41. If a need for live/work units was identified in local policy, or more specifically a need for the affordable provision of such accommodation, it would be open to the appellant to provide affordable live/work units on site, that being the starting preference for the delivery of affordable accommodation.

42. However, in this case, the Council has provided no evidence of the need for live/work units in the local area and the option of providing affordable live/work units as part of the scheme does not appear to have been considered or put to the appellant because it is not a form of housing that the Council has identified a need for in policy terms. In my view, the SPG does not set a clear policy

basis for the collection of "in lieu" payments from one form of housing, for which there is no identified need, to be used to provide a different form of housing elsewhere. To put things bluntly, the Council is seeking a contribution for a form of development that would not be acceptable at the appeal site and it is not clear how that is directly related in kind to the development being considered.

43. I am mindful that the Council may be concerned about the principle that could be set if no affordable housing provision was secured. Developers elsewhere could no doubt seek to include a live-work element as a means to try and avoid making a contribution. However, in my view, the context for the scheme is different than would be the case if the scheme was being brought forward on an allocated housing site, or even on a site where housing would be in compliance with development plan policy.

44. On an allocated housing site there would be an expectation that traditional forms of housing would be delivered and, if a scheme not comprising traditional dwellinghouses was proposed, without an affordable housing element, the Council would need to consider whether it complied with the aims of the development plan.

45. Consequently, I am not satisfied that the policies of the UDP and CS set out a clear requirement for affordable housing to be provided as part of the development. The live-work units in question fulfil a different function to general housing and are located in an area where general housing would not normally be permitted. I am not convinced that contribution can be said to be directly related to the development in question.

46. Nor am I satisfied that such a contribution is necessary to make the development acceptable in planning terms because an approval, without such a contribution, would not materially affect the supply of general or affordable housing in the Council's area. Rather, it would amount to an approval for a sui generis use providing accommodation in an area that would not be suited to a standard housing product. In that sense I am not satisfied that any harm would arise that would need to be mitigated in the form of a contribution because the scheme would provide residential accommodation in a location that would not normally be expected in terms of the policies of the development plan.

47. For all of those reasons I conclude that the financial contribution sought would fail to comply with two of the three tests laid out at Regulation 122(2) of the CIL Regulations, as set out at paragraph 56 of the Framework and I have taken no account of the provisions of the s106 agreement relating to affordable housing in reaching my decision.

48. My conclusions on that point differ from those of the Inspector in the previous appeal. However, it does not appear that the principle of whether a contribution should be made was in dispute in that appeal and, as such, it is unlikely that the Inspector heard detailed evidence on the matter, unlike the present appeals where proofs were submitted and witnesses were cross examined. Consequently, I have been required to reach a conclusion on the basis of the information presented to me and am not bound by that previous decision.

Other Matters

49. It is clear that there would be significant consequences for the residents/ occupiers of the units if I were to dismiss the appeal and uphold the enforcement notice in terms of their home lives and business arrangements. Whilst it is not a matter that has been explicitly raised by the appellant or the occupants themselves, it is clearly a situation where Article 8 Convention Rights are engaged[1]. Article 8(1) states that everyone has the right to respect for his private and family life, his home and his correspondence. Article 1 concerns enjoyment and deprivation of possessions.

50. Article 8(2) identifies that there shall be no interference by a public authority with the exercise of Article 8 rights except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the prevention of crime and disorder, the protection of health or morals, or for the protection of the rights or freedoms of others.

51. Rights under Articles 1 and 8 are qualified rights and, in appropriate circumstances, interference may be justified in the public interest. Regulation of land use through development control measures is recognised as an important function of Government and is necessary to ensure the economic well-being of the country. In that sense, the regulation of development for legitimate planning aims can be said to be in the public interest. The aim is to strike the right balance between the general interests and rights of the wider community and the requirement to protect an individual's private rights. Central to the principle of a fair balance is the doctrine of proportionality.

52. I heard from a number of residents and it is clear that they were attracted to the property on account of the ability to live and work in the same space, in terms of practicality and the cost benefit of paying a single rent as opposed to renting separate living and work spaces. Anecdotal evidence suggests that opportunities for that kind of arrangement are limited within the London area and I can appreciate that may well be the case.

53. I also heard of the cooperation between residents and the sense of community that has established. The range of creative industries was evident at the time of my site visit and I accept the likely collective benefits of living alongside people engaged in similar activities. Consequently, at least in the short term, residents would lose their main place of residence, their workplace and the benefits arising from living in a creative hub. It seems unlikely that many residents would be able to find similar arrangements in the local area and the immediate consequences would be significant.

54. However, nothing has been presented to suggest that any of the residents would be rendered homeless as a result of the enforcement notice on account of an inability to find alternative living accommodation. Similarly, whilst the benefits of living and working in the same space may not be easy to find elsewhere in the local area, the occupants would have the opportunity to find alternative business space elsewhere. I accept that may be more costly and less practical than current arrangements but the evidence presented does not demonstrate it would not be possible to achieve.

[1] Article 8 of the European Convention on Human Rights (ECHR), enshrined into UK law by the Human Rights Act 1998

55. Moreover, I am mindful that the Council does not object to the principle of live-work units being provided in Europa House. The outstanding issues relate to matters of detail. An application is before the Council but a decision is pending, awaiting the outcome of these appeals. The outcome of that application is a matter for the Council to consider but, subject to the details being agreed, the upper floors of the unit have scope to accommodate substantially more live-work units than the building houses at present. The appellant has indicated a desire to provide live-work accommodation and has said that he intends to implement an approved scheme which includes 8 live-work units in Fraser House, the neighbouring unit.

56. The size and form of any reconfigured units is unlikely to match the present arrangement and I cannot be sure that they would meet the needs and/or be affordable to present tenants. However, nor can I rule out that they would be suitable for existing tenants on the information provided and the likelihood of an alternative scheme being approved and implemented is a material factor to be taken into account.

57. In order to determine whether the interference with the Article 8 rights of the occupants of the property is justified I must carry out a proportionality assessment, taking into account the above matters, in addition to my findings on the main issues above. I shall carry out that balance as part of my overall conclusion.

Conclusion in Relation to Appeal A on Ground (a)

58. The live-work units provide severely sub-standard levels of floorspace, light and outlook, with no access to external amenity space or any suitable alternative. The harm is amplified by the fact that occupants live and work in the same space such that they are likely to spend considerable periods of time within the units. The development is contrary to the aforementioned policies of the development plan in those respects. The need for acceptable living conditions is a fundamental and essential part of the planning system and I attach significant weight to the failings of the development in that regard.

59. In addition, the ground floor gym and first floor church and education uses are clearly contrary to the aims of policy E3 which seeks to safeguard employment uses. No material factors have been put forward that would justify a departure from the aims of the development plan in that regard.

60. I have concluded that a contribution towards off-site affordable housing provision is not justified, either by development plan policy or other evidence. However, the lack of harm in that regard does not amount to a positive consideration in favour of the scheme.

61. I was impressed by the creative businesses operating in many of the units and recognise the vibrancy of the community that has been established. However, the weight I attach to those other matters does not outweigh the significant harm identified in relation to the main issues. In addition, the fact that people may be prepared to live in sub-standard conditions, perhaps on account of cheap rent or unavailability of similar accommodation elsewhere, does not justify a departure from recognised planning standards.

62. The dismissal of the appeal and upholding of the enforcement notice would interfere with the rights of the existing occupiers of the live-work units under

Articles 1 and 8 of the ECHR. However, the regulation in the use of land through the planning system is recognised as being in the national interest and the specific policies of the development plan in this instance have clear aims in terms of health (with regard to living conditions) and economic well being (with regard to the protection of employment uses).

63. Having regard to the severely substandard living conditions I am of the view that the interference with the rights of the occupants is justified because the continued occupation of such a poor living environment would be detrimental to the health of those concerned. That reason alone would lead me to conclude that interference is justified. However, whilst alternative, directly comparable, premises may be difficult to find in the short term there is nothing to indicate that the occupants would be rendered homeless and I am also mindful that a reconfigured development comprising live-work units may come forward at the appeal site. Those matters strengthen my conclusion that interference is justified and I consider that a decision to refuse to grant planning permission and uphold the notice would not amount to a violation of the rights of those concerned.

64. When viewed in the round, the development is clearly contrary to the relevant policies of the development plan and the aims of the development plan as a whole. Decisions should be made in accordance with the development plan unless material considerations indicate otherwise and no such material considerations have been put forward in this case.

65. Accordingly, I conclude that planning permission should not be granted and I shall dismiss the appeal on ground (a).

Appeal A on Ground (f)

66. The purposes for which an enforcement notice may be served are governed by section 173(4) of the Town and Country Planning Act 1990 (the Act). Those purposes are:

    (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

    (b) remedying any injury to amenity which has been caused by the breach.

67. An appeal on ground (f) is made on the basis that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. In order to determine the scope of such an appeal it is necessary to understand the purposes behind the issue of the enforcement notice and whether they fall within section 173(4) (a) or (b).

68. In this case the Council's aims appear to be to remedy the breach by requiring the live/work use to cease and the kitchens and bathrooms to be removed. There appears to be no dispute that the kitchens and bathrooms in question were installed to facilitate the use as live/work units. In other words, they did not exist before the unauthorised change of use occurred.

69. Both advocates have referred to the *Kestrel Hydro* judgement[2] which identifies that an enforcement notice can legitimately seek the removal of works that were undertaken to facilitate an unauthorised material change of use, as in the case of the kitchens and bathrooms in this instance. In that respect, it is clear that their removal goes no further than is necessary to remedy the breach of planning control.

70. The appellant accepts that point but contends that I should exercise discretion in allowing for the retention of at least some of the facilities. Mr Caws referred to the judgement of Carnwath L.J. in *Tapecrown*[3] in respect of the powers available to an Inspector in relation to appeals on ground (a) and (f). Where an appeal is made on ground (f) alone, an Inspector's powers will be limited to looking at whether the steps required by a notice exceed what is necessary to achieve its objectives. In the context of ground (f) alone, the steps required in this instance go no further than is necessary to remedy the breach of control.

71. However, where an appeal on ground (a) is also made Carnwath L.J. identified that an Inspector may consider the inspector has wide powers to decide whether there is; '*any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, he should be prepared to modify the requirements of the notice, and grant permission subject to conditions (or to accept a s.106 agreement, if offered)*'.

72. It appears to me that the powers being referred to are more applicable to a situation where part of a development may be considered acceptable in planning terms, such that planning permission may be granted in part under ground (a). For example, a single storey and two storey addition may have been added to a building without the necessary planning permission. In order to remedy the breach of planning control and to return the land to its former condition, both elements would need to be demolished. A notice requiring that would not exceed what was necessary under ground (f). However, if a ground (a) appeal was made, and the Inspector considered that the single storey element was acceptable in planning terms he could grant planning permission accordingly and, if necessary, vary the terms of the notice. In other words, he could consider a remedy short of complete demolition having regard to the powers open to him.

73. However, in this case, the works to install the bathrooms and kitchens did not require planning permission of themselves; it was the material change of use that required planning permission. It is not open to me to grant planning permission for the kitchens and bathrooms in isolation. Nor is it the purpose of a ground (f) appeal to consider whether the facilities could be put to use in association with some future occupation of the building, whatever that may be.

74. Rather, the question is whether their removal would exceed what is necessary to remedy the breach of control. If I were to vary the terms of the notice to allow their retention what would be left would be the empty shell of a live/work unit still containing facilities associated with it. I am not satisfied that would fully remedy the breach of control. In order to achieve that aim, the unauthorised use needs to cease and the works that facilitated that change of use need to be removed.

[2] Kestrel Hydro v SSCLG [2016] EWCA Civ 784
[3] Tapecrown v First Secretary of State [2007] 2 P&CR 7

75. For those reasons the appeal on ground (f) must fail.

Appeal A on Ground (g)

76. The appeal on ground (g) is made only in relation to the time period for compliance with section 5(i) of the enforcement notice in relation to the cessation of the live/work use at third floor and third floor mezzanine level and the removal of associated kitchens and bathrooms. Presently, the notice allows a period of 6 months to comply with those elements.

77. The appellant requests a minimum period of 9 months on account of the likely disruption to the lives and business arrangements of those living and working in the units, citing the apparent shortage of similar affordable accommodation in the area. A ground (g) appeal is not an opportunity to re-run the planning merits and the issue is whether the compliance periods are reasonable and proportionate.

78. The Planning Practice Guidance (PPG) confirms that there is a clear public interest in enforcing planning law and planning regulation in a proportionate way. It also identifies three reasons for effective enforcement; to tackle the unacceptable impact on the amenity of the area; to maintain the integrity of the decision making process; and to help ensure public acceptance of the decision making process is maintained[4]. The second and third are of relevance here and there are strong reasons for remedying the breach of planning control in the shortest period. It is also the case that residents are presently living in sub-standard conditions.

79. The Article 8 Convention right is relevant to ground (g) because the residents would stand to lose their settled base, home and also their business space. A short compliance period probably would result in a greater level of interference with their Convention rights whereas a longer period may help them to find accommodation elsewhere.

80. Clearly there is a conflict between the public and private interests. It is a difficult balance to strike. On balance, I consider that the period of 9 months, as suggested by the appellant for the cessation of the use is a reasonable balance between remedying the breach in an expedient manner and affording sufficient time for those living and working at the site to find alternative arrangements, particularly having regard to the fact that they would need to find space in which to live and space to locate their businesses. It is logical that the kitchens and bathrooms could only practically be removed once the use has ceased and people have moved out. I consider that an additional month after the cessation of the use should be allowed to enable that work, which should be sufficient time, given the scale of what is required.

81. There was some discussion at the Inquiry with regard to whether the phasing of any future development at the site could take account of the possibility of occupants moving between existing and refurbished units. However, no plan has been provided and no planning permission yet exists for Europa House, albeit that an application is pending a decision. Consequently, I cannot give any weight to those suggestions and must consider what is proportionate based on the current position.

[4] Paragraph: 005 Reference ID: 17b-005-20140306

82. In view of the above, the appeal on ground (g) succeeds and I shall vary the terms of the notice accordingly.

Overall Conclusion in relation to Appeal A

83. For the reasons set out above, I conclude that the appeal should be dismissed. I shall refuse to grant planning permission and uphold the enforcement notice, as varied.

APPEAL B – The Europa House Planning Appeal

Procedural Matter and Main Issues

84. The first reason for refusal, as set out in the decision notice, related to the Council's concerns that the loss of employment floorspace resulting from the conversion to live/work units would be contrary to development plan policies that seek to retain the supply of employment land. As set out in relation to Appeal A, above, the previous Inspector considered that the live/work element would not necessarily be in breach of relevant development plan policy, subject to the employment element being secured.

85. In light of that decision the Council no longer opposes the principle of live-work units on the upper floors of the building. However, it maintains an objection on the basis that two of the proposed units (F13 and S13) would not have any associated work space directly within or adjacent to the living area. As such, the Council maintains that those units would effectively amount to dwellinghouses or flats within Class C3 of the Town and Country Planning (Use Classes) Order 1987 (as amended). The Council oppose the development on account of the loss of employment floorspace arising from those purely residential units. Moreover, the appellant accepts that the development, as currently proposed, would be contrary to the relevant policies of the development plan and that it would be 'inappropriate' to grant planning permission unless the matter could be resolved[5].

86. Thus, I find myself in the slightly unusual position of being presented with an appeal proposal that both parties agree should not be allowed in its present form. I find no reason to depart from that agreed position. No material considerations have been put forward to justify a departure from the development plan and, whilst the redevelopment of what is an old industrial building would no doubt bring some benefits, no rationale for the inclusion of purely residential units in the scheme has been presented. The revised scheme currently under consideration by the Council contains purely live/work units on the upper floors and that indicates that there is no technical reason why a policy compliant scheme in that respect could not be brought forward.

87. Consequently, the outstanding main issues between the parties centres on whether the proposal could be amended within the scope of the appeal to turn the purely residential units into live/work units. If that was possible, the parties dispute whether a financial contribution towards affordable housing provision should be made and, if so, how much that contribution should be.

[5] Paragraph 6 of Mr Caws' closing submissions.

Procedural Matter Relating to the Scope of the Appeal

88. The first of those matters is essentially a procedural issue in relation to the scope of the appeal. The description of the proposed development refers to 33 live-work units.

89. A number of alternatives were put forward to remove or address the two units which presently have no associated workspace. The first was to consider a split decision granting planning permission for 31 live-work units on the upper floors with 7 light industrial units at ground floor level but refusing permission for the 2 residential units. The second option was to amalgamate units F12 with F13 and S12 with S13 to create larger units capable of accommodating live-work space. Again, that would result in 31 live-work units on the upper floors as opposed to the 33 proposed in the application decided by the Council. A third was to tie some of the ground floor industrial units to the dwellings without designated employment space through a s.106 agreement and/or condition.

90. The result of the first two scenarios would be less units than originally proposed the development would be materially different numerically and in terms of layout and the mix of accommodation proposed. I am not satisfied that is a minor matter that can be dealt with in the scope of the appeal before me. Interested parties may wish to comment on the layout and configuration of the units or the relationship between live-work units and other elements of the scheme.

91. I am also mindful of the fact that people are living and working in the building at present – I heard from a number of those individuals at the Inquiry. They have a strong interest and engagement in the future of the building and to proceed to consider an amended scheme without consultation would deprive them of an ability to comment on matters that may be important to them.

92. In addition, to grant a split decision for the proposal, other than units F13 and S13 would leave uncertainty as to precisely what the future use of those parts of the building would be. The remaining spaces would not be large enough to accommodate live/work units. It may be that they could be used for whatever the last lawful use of those parts of the building was which could give rise to problems of the compatibility of neighbouring uses. In view of that uncertainty, the option of granting planning permission for part of the scheme through a split decision is not one that I am prepared to consider.

93. The option of restricting the use of some of the ground floor employment space to use in connection with residential units could have potential implications for the marketability of the remainder of the ground floor space. No layout depicting how the arrangement would work has been provided and it is unclear how the space would relate to other proposed business space or how it would be accessed from the two residential units in question. Without a clear link, I am not convinced that the arrangement would be a true live/work unit or be substantively different from any other arrangement where a resident may rent employment space away from their home.

94. For all of those reasons, and having regard to the case-law referred to by the parties, I am not satisfied that the alternative proposals put forward by the appellant can be considered within the scope of this appeal.

95. In fact, it is notable that a revised application for 31 live-work units on the upper floors and employment uses on the ground floor has been submitted to the Council. A decision was pending at the time of the Inquiry. The fact that the appellant deemed it appropriate to submit that as a revised application reinforces my view that it was a materially different scheme from the one before me. For all of those reasons I have considered Appeal B on the basis of the development that was submitted to and determined by the Council.

Affordable Housing Provision

96. Given that I will determine the appeal on the basis of the plans submitted to the Council, and the parties agree that planning permission should not be granted for that scheme, the question of affordable housing provision is somewhat academic. However, my conclusions on the principle of the matter are set out fully in relation to Appeal A and those conclusions would apply equally in relation to Appeal B.

Overall Conclusion in Relation to Appeal B

97. For the reasons given above, the development is contrary to the relevant policies of the development plan insofar as it proposes the provision of two residential flats without any obvious associated work element. No material considerations have been advanced that would outweigh the harm or the presumption in favour of the development plan and, accordingly, I conclude that planning permission should not be granted and I shall dismiss the appeal.

APPEAL C – The Fraser House Enforcement Appeal

Procedural Matter

98. Appeal C was initially made on grounds (a), (f) and (g) but the appeal on ground (a) was withdrawn the week before the Inquiry. Consequently, the deemed application for planning permission in relation to that appeal no longer falls to be considered and the appeal proceeds on grounds (f) and (g).

Appeal C on Ground (f)

99. The ground (f) appeal was made on the same basis as the ground (f) appeal in relation to Appeal A and the same principles apply. It is clear that the kitchens and bathrooms within the live/work units were installed to facilitate the unauthorised change of use and that the Council is seeking to remedy the breach of planning control and not just any injury to amenity that has been caused by the breach.

100. For the reasons given above the removal of the kitchens and bathrooms would go no further than is necessary to achieve that aim. That is the question that must be assessed in relation to ground (f) and not whether the facilities may come in useful for some future use of the building, whatever that may be. Thus, for the same reasons set out in relation to Appeal A, the appeal must fail.

Appeal C on Ground (f)

101. The ground (g) appeal is also made on the same grounds as that in Appeal A. The same difficult balance applies between public and private interests, including taking account of the Convention rights of the occupiers of the units. Given that the issues are the same, and that nothing has been presented that would lead me to reach a different conclusion, I conclude that a reasonable

period for compliance would be 9 months for the cessation of the live/work use and 10 months for the removal of the kitchens and bathrooms, for the same reasons as set out above.

102. Planning permission has been granted for an alternative scheme in relation to Fraser House but no information is before me as to when, if, or how that scheme will be implemented. Consequently, it is not possible to vary the requirements with a view to phasing the works such that certain occupiers could move between the presently unauthorised units and any reconfigured accommodation.

103. Consequently, the appeal succeeds and I shall vary the terms of the enforcement notice accordingly.

Conclusion on Appeal C

104. For the reasons set out, I shall vary the enforcement notice in respect of the time period for compliance but, subject to that variation, the appeal shall be dismissed and the enforcement notice upheld.

Chris Preston

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr Eian Caws	of Counsel

He called:

Mr David Parker	Pioneer Property Services Ltd.
Mr Derek Horne Dip TP MRTPI	Derek Horne & Associates (Agent)

FOR THE LOCAL PLANNING AUTHORITY:

Mr Alexander Greaves	of Counsel

He called:

Mr Habib Sanni	Senior Surveyor
Mr Richard Turek BSc (Hons) PG Dip	Deputy Area Team Manager

INTERESTED PARTIES

Mr Len Arnold	Former tenant of 49-51 Fraser Road
Mr Wolf Reicherter	Tenant/ resident at Europa House
Mr Petrit Ceka	Caretaker
Mr Dorian	Tenant/ resident at Fraser House
Mr Chant	Tenant/ resident at Europa House

Documents Submitted to the Inquiry

1) Statement of Common Ground (SoCG)
2) Written copies of the opening statements of Mr Greaves and Mr Caws
3) Copy of Short-Term commercial lease relating to unit T7, Europa House
4) Schedule of suggested conditions
5) Written copies of the closing statements of Mr Greaves and Mr Caws
6) Transcript of *Kestrel Hydro v SSCLG [2016] EWCA Civ 784*
7) Transcript of *Tapecrown v First Secretary of State [2007] 2 P&CR 7*
8) Transcript of *R v Coventry City Council, ex p Arrowcroft* [2001] PLCR 7
9) Transcript of *R (Holborn Studios Ltd) v Hackney LBC [2018]* JPL 567
10) Transcript of *North Wiltshire District Council v SSE & Clover* [1993] 65 P & CR 137
11) Signed and executed copies of s106 agreements
12) "Enforcement Memos" drafted by the Council in relation to the decisions to take enforcement action in respect of Europa House and Fraser House