

Appeal Decisions

Inquiry held and site visit made on 6 September 2016

by Alan Woolnough BA(Hons) DMS MRTPI

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

Decision date: 12 October 2016

Appeals A & B: APP/N5090/C/16/3141620 & APP/N5090/C/16/3141621 10 Hillview Gardens, London NW4 2JH

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Moshe Winegarten (3141620, Appeal A) and Mrs Ruth Winegarten (3141621, Appeal B) against an enforcement notice issued by the Council of the London Borough of Barnet.
- The Council's reference is ENF/01065/15.
- The notice was issued on 27 November 2015.
- The breach of planning control as alleged in the notice is: 'Without planning permission the construction of a rear extension at ground floor, first floor and roof level incorporating a roof terrace'.
- The requirements of the notice are:
 - 1 Demolish/dismantle the rear extension at ground floor, first floor, and roof level including the roof terrace
 - 2 Permanently remove all constituent materials resulting from the works in 1. above from the property
- The period for compliance with the requirements is five months.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (d) and (f) of the 1990 Act as amended. Since the prescribed fees have not been paid within the specified period for Appeal B, the appeal on ground (a) and application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered in that case. Appeal B is therefore proceeding on grounds (d) and (f) only.

Summary of Decisions: Appeal A succeeds in part on ground (a) and planning permission for that part is granted in the terms set out below in the formal decision. Both Appeals A & B further succeed in part on ground (f) but otherwise fail and the enforcement notice as corrected and varied is upheld.

Procedural matters

1. All oral evidence presented at the Inquiry was taken on solemn affirmation.
 2. Shortly before the Inquiry, by way of a proof of evidence, the Appellants sought to introduce additional appeals against the enforcement notice on ground (c). They reasoned that part of the single storey element of the appeal development benefited from an existing planning permission when constructed and did not therefore amount to a breach of planning control.
 3. However, the same argument had already been addressed through the Appellants' ground (f) appeals (on the table since the beginning of the appeal process), in which it is contended that the requirements of the notice are
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excessive so far as they require the removal of that part of the development. It was therefore agreed at the Inquiry that the matter was best considered under the ground (f) banner and that additional ground (c) appeals need not be pursued.

4. At the Inquiry I also raised the question of whether a contention included in the Appellants' statement of case (but not pursued in later proofs of evidence) to the effect that there was in fact no roof terrace in place when the notice was issued equated to appeals on ground (b). However, it was agreed at the Inquiry with both parties that whether an area of flat roof at the rear of the property functioned in practice as a terrace could be adequately dealt with under ground (a) alone when assessing whether harm is caused by reason of overlooking. Appeals on ground (b) were not therefore introduced.

The notice

5. The Council made it clear in pre-Inquiry submissions that it would be agreeable to an amendment to the enforcement notice that would distinguish the rearmost part of the appeal development, namely the single storey timber structure identified by the Appellants as a 'Succah' (and hereinafter referred to as such), from the rest, in recognition that it was erected later. However, I find no need to do so. I am satisfied that the term 'rear extension at ground floor ... level' used in the alleged breach of planning control at section 3 encompasses both the Succah and the structure it adjoins, irrespective of whether it was constructed separately, and that the Appellants interpreted the notice on that basis.
6. Notwithstanding this, the term 'Permanently' used at the beginning of requirement 2 of the notice is superfluous, given the provisions of section 181 of the 1990 Act as amended. I will therefore delete it and am satisfied that, in doing so, no injustice to any party arises.

The appeals on ground (d) – Appeals A & B

7. In appealing against the enforcement on ground (d) the onus of proof is firmly on the Appellants to demonstrate on the balance of probabilities that some or all of the development targeted by the notice was immune from enforcement action by the time it was issued by reason of having been substantially completed at least four years previously (hereinafter referred to as 'the relevant period'). The material date is therefore 27 November 2011.
8. The Appellants' case in this regard is limited to the upper two storeys of the appeal development, the construction of which they contend was a building operation distinct from those that have taken place at ground floor level. The judgment in *Gabbitas v SSE & Newham LBC* [1985] JPL 630 makes it clear that if the local planning authority has no evidence of its own, or from others, to contradict or otherwise make the Appellants' version of events less than probable, there is no good reason to dismiss an appeal on any 'legal ground', including ground (d), provided the Appellants' evidence alone is sufficiently precise and unambiguous.
9. The Appellants argue that the development subject to the notice took place in three separate phases, with three substantial completions at different times of operations so distinguishable from one another that they effectively amounted to three different developments. Of these, it is common ground between the

- main parties that the 'second and third phases' so claimed, namely the construction of the blockwork section of the ground floor extension and the construction of the timber-framed structure adjoining it, were separated in both time and operational construction. On the evidence before me, I concur. However, as the substantial completion of each is agreed as having taken place after the material date, any distinction between them and agreement in relation thereto is irrelevant for the purposes of my decision on ground (d).
10. Rather, my focus must be the distinction drawn by the Appellants between what they perceive as the substantial completion of 'phase one', comprising the two upper storeys of the appeal development, in July 2011 and the commencement of 'phase two' the following month, being the construction of the blockwork ground floor extension beneath the upper storeys. The Council takes the contrasting view that 'phase one' was not distinguishable from 'phase 2', such that no substantial completion took place between them and they were essentially part and parcel of a continuous, single building operation.
 11. Both main parties make reference in this regard to the House of Lords' finding in *Sage v SSETR & Maidstone BC* [2003] UKHL 22, 1 WLR 983 which, accordingly, is my starting point in addressing the differences between them. In *Sage*, Lord Hope made clear that '*... regard should be had to the totality of the operations which the person originally contemplated and intended to carry out. That will be an easy task if the developer has applied for and obtained planning permission. It will be less easy where, as here, planning permission was not applied for at all. In such a case evidence as to what was intended my have to be gathered from various sources, having regard especially to the building's physical features and its design*'.
 12. Pursuant to the above, the Appellants point as evidence of intent to the fact that, on 7 March 2011, the Council granted planning permission under ref no H/00219/11 for a single storey rear extension and, on 1 April 2011, issued a lawful development certificate (LDC) under ref no H/00218/11 for, amongst other things, 'erection of rear dormer extensions to main roof and roof of two storey rear projection to facilitate a loft conversion'. The approved scheme for the former resembles closely the ground floor element of the development subject to the current enforcement notice (excluding the Succah), whilst the scheme endorsed as lawful by the latter is similar (but by no means identical to) what has since been built at roof level.
 13. The Appellants argue that these two separate approvals demonstrate an intention that the upper floors and ground floor should be two separate sets of operations and, therefore, distinct developments each of which could be subject to 'substantial completion'. However, I am mindful that the distinction between the two on the Appellants' part is more likely to have arisen from the fact that one element benefitted from deemed planning permission (hence the LDC) and one required express permission. Moreover, the applications for both were made on the same date (9 January 2011) and thus, to my mind, can reasonably be read as potentially part and parcel of a single project.
 14. This does not mean to say that, if implemented as endorsed/approved, the loft conversion and ground floor addition could not have been separate developments, given that neither would have been physically linked to the other and would thus have been severable. However, in the event, that is not what has occurred on site. In between, adjoining the additions above and

below, is an extension at first floor level with a terrace on its roof. This did not form part of any scheme previously before the Council and is such that the rear 'additions' in fact read as one entity. Additionally, the loft conversion departs significantly from the LDC scheme to the extent that it is physically dependent, at least in part, on what has been added at first floor level.

15. Initial intent as claimed by the Appellants to be represented by the two formal Council decisions has not therefore been followed through, at least in full. This being so, I find *Sage* to be of little assistance to their case. My focus must therefore turn to whether the development at upper floor and roof level was, when carried out, genuinely separate and severable from what has occurred at ground floor level, both physically and in terms of timing, such that substantial completion of part of what is now targeted could be said to have taken place before the material date.
16. At the Inquiry Mr Winegarten gave evidence to the effect that, in his view, the works at first floor and roof level were substantially completed 'before August 2011' such that accommodation on the upper floors could be brought into use. In his version of events, the ground floor extension (excluding the Succah) was then commenced separately and substantially completed before the end of that year. Pending completion of the ground floor, the upper storeys extended over (and were partly supported by) a steel frame. He was unable to be more precise about dates of commencement and completion, having handed project management to others and been distracted at the time by personal matters.
17. So far as I was able to ascertain during the Inquiry through direct questioning of Mr Winegarten, the responses to which also lacked precision, the space within the steel frame supporting the upper floors remained an open void following their 'completion' and was not filled in with further development for some months. No photographic evidence or other first hand accounts shed light on this particular matter and I therefore assume on the balance of probabilities, and drawing on the limited information available, that my understanding of the situation is correct.
18. The Council presented evidence drawn from Building Control (BC) records to the effect that work at ground floor level had begun by 7 September 2011, when a commencement was noted. The contemporaneous comments by BC Surveyor Mr Hill indicate that the ground floor had not progressed beyond damp proof course level by the material date. No mention is made in Mr Hill's notes of there being ongoing or recently completed works at first floor or roof level at the time of his first visit. Nor is there any separate BC record of visits relating to those works, albeit that the overall record of Mr Hill's series of inspections describes the proposal as 'ground and first floor rear extension, loft conversion, front porch and internal alterations' and gives a completion date for those works of 14 March 2013.
19. Mr Hill himself did not attend the Inquiry, so was not able to clarify what was already in place at the time of his first visit to No 10. His fellow BC Surveyor Mr Calvey, who was not involved in Mr Hill's inspections but did appear at the Inquiry as a witness, confirmed that a total absence of reference to recently completed or ongoing development in records of this kind would be unusual but not impossible.
20. Additionally, I have before me written statements, albeit not sworn, by Mr Frankel (a chartered surveyor who states that he regularly visited the

property next door, No 12, during 2011) and a nearby resident, Ms Cernenco, to the effect that a loft conversion and first floor extension had been finished by October or November 2011. Mr Frankel provides a photograph purporting to date from January 2011 which depicts demolition of a first floor element of No 10 as having taken place, seemingly in preparation for the construction of what has since replaced it. Moreover, the then owner of No 12, Mr Green, although also not available for questioning at the Inquiry, confirms in a statutory declaration that the Appellants' building works 'were completed soon after the Jewish New Year and Festivals in autumn 2011'.

21. Weaving these threads together and bearing in mind the provisions of *Gabbitas*, I find on the balance of probabilities that some form of development had commenced at the rear of the appeal property by early 2011 but that this was not recorded by Mr Hill during his visits, perhaps as Building Regulations approval had not been sought for it. I do not therefore rule out the likelihood that the first floor and roof level works now subject to the enforcement notice had progressed substantially by the material date, despite an absence of this from BC records. On a similar basis, I do not rely on the Council's BC records or Mr Hill's written evidence as an indicator that, by the time of his visits, the first and second floors and supporting steel frame as described by Mr Winegarten were not in place.
22. Nor do I find any sound reason to doubt that Messrs Green and Frankel and Ms Cernenco observed what they regarded as a completed first floor and roof conversion at the times they say. Nonetheless, nothing before me suggests that any of them was in a position to assess accurately whether the development then observed was substantially complete in itself for the purposes of planning law or whether it was instead merely part of an incomplete larger development that in due course incorporated the ground floor. Tellingly, none refers to the supporting steel frame said by Mr Winegarten to have been in place, which leads me to question their perception of what had actually occurred.
23. I am further troubled by what, even on the Appellants' evidence, appears to be a very short gap in time between the 'substantial completion' of the upper floors of the development and the commencement of ground floor works recorded by Mr Hill. This amounts to little more than five weeks and, on the evidence before me, seems more likely to have been a mere hiatus in building operations occasioned by the Appellants' dismissal of one team of designer/builders with whom they were dissatisfied and the engagement of another to complete the job, rather than the substantial completion of one development and the subsequent commencement of a separate one.
24. A change in personnel is not in itself sufficient to trigger a new phase of development for the purposes of planning law. In any event, most conclusive is the image painted for me by the Appellants of first and second floor development effectively suspended above ground bar the support of an open, exposed steel frame. In my view, irrespective of whether the upper floors were occupied, this would have been a clear indication to any reasonable person in a position to inspect the building as a whole that work had yet to be substantially completed and that there was 'more to come' as part and parcel of the same project to finish it off.

25. I therefore conclude on the balance of probabilities that the development before me, excluding the Succah, is more properly viewed as one entity constructed through a prolonged single set of building operations and which was not substantially completed until well after the material date. The Court's ruling in *Garland v MHLG* [1968] 20 P&CR 93 makes it clear that operational development undertaken as a single entity must be considered in its entirety and should not be subdivided into parts that constitute permitted development and parts that do not.
26. The project as a whole (as distinct from the envisaged works to the roof in isolation that were subject to the LDC) is too large to have benefited from permitted development rights¹. On a similar basis, nor could part of the scheme be said to be pursuant to the 2011 planning permission granted for a single storey extension. Rather, whilst what has occurred at ground floor level resembles what was approved, its integration with unauthorised works at first floor level effectively removed it from the scope of that permission and it was instead, in all likelihood, part of a larger, entirely unlawful development.
27. I thus conclude overall on the balance of probabilities that neither the subject development as a whole nor any reasonably severable part of it had been substantially completed by the material date. It follows that no part of it was by then lawful by reason of the passage of time and, this being so, the appeals on ground (d) fail in their entirety.

The appeal on ground (a) – Appeal A only

Main issues

28. The main issues in determining the appeal on ground (a) are the effect of the development on:
- the character and appearance of the host property and the surrounding area; and
 - the living conditions of neighbouring occupiers, with particular regard to privacy and outlook.

Planning policy

29. The development plan includes the Council's Local Plan Core Strategy (CS) and Development Management Policies (DM) Development Plan Documents, both adopted in September 2012. Paragraph 215 of the National Planning Policy Framework (the Framework) records that due weight should be given to relevant policies in existing plans according to their degree of consistency with it.
30. I find no significant conflict between the Framework and the development plan policies cited in this case. Accordingly, I will give them full weight so far as they are relevant to the appeal scheme. Reference is also made to the Council's Residential Design Guidance Supplementary Planning Document (SPD), issued in April 2013.

¹ Development benefitting from deemed planning permission as defined by the Town and Country Planning (General Permitted Development) Order 1995 as amended. Although the 1995 Order has since been superseded by the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended, it was in force at the time that the works are said by the Appellants to have taken place and is therefore the relevant legislation for the purposes of my decision on ground (d).

Reasoning

31. Before assessing the planning merits of the extension as built, it is necessary to consider what the likely scenario would be should planning permission be refused pursuant to this appeal and the enforcement notice upheld so as to require complete demolition of the subject development. The planning history of the property is such that the ground floor extension approved in 2011 would, in all probability, be reapplied for. Nothing before me suggests that the material considerations that led to the approval of that scheme have since changed to any significant degree. It is therefore reasonable to surmise the likelihood that permission for a similar scheme would be forthcoming and implemented. It is common ground that the 2011 approval resembles closely the ground floor element of the appeal development.
32. It is also reasonable to assume that, if required, express planning permission would be forthcoming for the reinstatement of the first floor element of the appeal property's original rear projection that appears to have been demolished and replaced as part of the unauthorised works. This would be a straightforward replication of what existed for many years previously and, thus, unlikely to prove controversial. I further surmise that this would also be implemented to provide the household with the functional living space it seeks.
33. Subject to the above, there is no reason to assume that something similar in size and design to the scheme subject to the 2011 LDC would not then be implemented as a separate building operation pursuant to permitted development rights. The first floor structure required to support it would be in place and there is nothing to suggest that legislation and circumstances would differ from what prevailed five years ago so as to preclude such a scheme from once more benefitting from deemed planning permission. As previously acknowledged, the LDC scheme was similar, albeit not identical, in bulk and design to what has since been built at roof level.
34. The series of events envisaged above does not constitute a lawful fallback position in the sense of something that the Appellants could implement in the wake of failed appeals without requiring further express planning permission. Nonetheless, in my judgment it does represent a highly likely consequence of dismissal which, necessarily, amounts to an important material consideration to which I must give very substantial weight in determining the appeal on ground (a). I will therefore refer to it as the 'fallback' position from hereinafter for the sake of convenience.
35. My finding in this regard and reliance thereon is strengthened by the Council's concession² that, should the appeal on ground (a) fail and notwithstanding its stance that the development as a whole is unlawful, it would not object should the enforcement notice be varied as a consequence of success on ground (f) so as 'to allow the elements that benefit from planning permission or a certificate of lawfulness to be retained'. This being so, I will confine my reasoning under ground (a) to an assessment of the harm to interests of acknowledged importance that might arise from the appeal development over and above any that might be associated in any event with the 'fallback' position.

² Paragraph 6.3 of Mr Gould's proof of evidence in the context of the appeal on ground (f), subsequently confirmed in oral evidence at the Inquiry.

Character and appearance

36. The appeal development, in particular its upper storeys, is visible in private views from the rear windows and gardens of a number of residential properties. However, no part of it can be seen from any public viewpoint and private sightlines are not so numerous as to equate to a public perception of No 10. This must inevitably temper the degree to which the development can be held to impact adversely on the character and appearance of the host property or the surrounding area.
37. Moreover, I regard the ground floor component of the development as uncontroversial in the context of this issue, by reason of its low lying position and the close resemblance of much of it to the approved scheme. The Succah did not form part of the latter and I acknowledge that the tall posts and ropes that form part of its roof-opening mechanism are unusual in appearance. However, even this structure, given its lightweight construction and secluded location, does not have an unacceptable impact on the visual setting of the property.
38. The additions at roof level are more prominent and by reason of their bulky and boxlike appearance cannot be upheld as examples of sympathetic design. On the contrary, they draw in no discernible way on the architectural merits of the host property and cannot be said to constitute high quality development in compliance with the objectives of national and local policy. Nor am I aware of anything similar in the immediate locality.
39. Nonetheless, whilst there are differences from the LDC scheme in terms of external finish, fenestration and features such as a slight cantilevered overhang, these are not so marked as to result in greater visual harm that breaches policy to a significantly greater extent than would otherwise be the case. The use of render on the elevations rather than brick or tile is a notable departure from what would constitute permitted development. However, contrasting materials are sufficiently commonplace at the rear of nearby residential properties to preclude this in itself as justification for the removal of the roof development.
40. This leaves only the first floor component of the development and the terrace perceived to occupy part of its roof, which have not benefitted from former approvals or permitted development rights. Again, the flat roofed form of this part of the scheme owes little to the principles of good design. However, its impact on the surrounding area is necessarily limited in visual terms given the absence of any public sightline and it pales into insignificance in comparison with the roof conversion above it.
41. Indeed, I will go so far as to say that the departure from conventional and sympathetic design is established primarily by the loft conversion, the visual consequence of which is addressed above. In comparison, the first floor addition is less prominent and, indeed, is effectively subsumed by those elements of the development likely to be replicated or retained in the event of the failure of ground (a). In other words, the first floor makes little difference to the overall visual impact of the scheme as a whole and, this being so, no sound argument for its removal arises in the context of this particular issue.
42. I conclude that the harm to the character and appearance of the host property and surrounding area arising from the appeal development as a whole, over

and above that which would be associated with the position likely to develop in the event that the appeal on ground (a) is dismissed, is not significant enough to justify a refusal of planning permission. Whilst there is conflict with CS Policies CS1 and CS5, DM Policy DM01, the Council's SPD and the relevant provisions of the Framework in the context of this issue, the 'fallback' position justifies a departure therefrom in this particular case.

Living conditions

43. At the Inquiry the Council alluded to impacts on neighbouring living conditions in terms of loss of light and outlook caused by the first floor element of the appeal development, this being an element of the scheme not encompassed by the 'fallback' position. However, no case of substance has been advanced by the Council or any other party in that regard and my own observations on site do not lead me to regard such impacts as significant.
44. I find that only two matters merit further consideration in the context of this issue so far as they might give rise to harm over and above any associated with the 'fallback' position. The first of these concerns overlooking from what the Council has described as a roof terrace. The second concerns the implications of the Succah for the outlook from No 8's rear garden.
45. The Appellants' contest the use of the term 'roof terrace', asserting that access to the roof above the first floor extension is for maintenance purposes only. However, I note that access to the area in question is provided directly from a second floor bedroom via a glazed door and that it is surrounded by a parapet wall sufficient to ensure the safety of anyone standing on it. Its restricted area is such that its function is more akin to that of a small balcony than a sitting out area. Nonetheless, it is readily accessible to those occupying the dwelling domestically. I therefore take no issue with the Council's use of the term 'roof terrace'.
46. Irrespective of the Appellants' claims regarding their personal usage of the terrace to date, I consider that it would almost certainly be used on a daily basis by most potential occupiers of the adjoining bedroom, at least during the warmer months, if only to 'take the air' for short spells. In doing this, anyone standing on the terrace is able to obtain views over the parapet wall to both north and south, taking in parts of neighbouring rear curtilages that would not have been clearly visible from established windows in No 10 or other properties.
47. I acknowledge that views from windows within the appeal development are unlikely to be significantly more invasive than those available from windows that would otherwise be lawfully present. However, those available from the terrace are clearly so. The obvious remedy is to physically prevent access to the terrace from within the host building. A means of doing so could be readily secured and implemented through conditions attached to a grant of planning permission, whilst still allowing for the external door to the bedroom in question to open inwards.
48. I turn now to consider the Succah. This is bolted onto the end of the ground floor blockwork extension to No 10, abutting No 8's rear garden and increasing the extent of development along that boundary to considerably more than approved in 2011. As previously mentioned, it is relatively lightweight in appearance and construction. However, notwithstanding the Appellants'

contention, its height exceeds that of the established boundary wall to such a degree that, combined with its length, it impacts unacceptably on the outlook from the neighbouring garden. Removal of the poles and ropes associated with its roof mechanism, as suggested by the Appellants, would do little to mitigate this.

49. The Appellants have also suggested as a more stringent measure that the walls and roof of the Succah be removed other than at festival times, when they would be temporarily reinstalled. These arrangements would be governed by a condition, leaving in place only a timber frame described as a pergola for most of the year. However, it has not been demonstrated to my satisfaction that the structure is pieced together in such a way that this would be practical, or indeed reasonable or properly enforceable in terms of the tests of conditions set out in the DCLG's Planning Practice Guidance (PPG).
50. Moreover, even if it had been I find that a pergola of this size immediately adjacent to No 8's boundary, although an open structure, would still be higher than the established garden wall and would still give the impression of an excessively extended dwellinghouse and unacceptable heightened sense of enclosure. Having said this, it became apparent at the Inquiry that the current occupier of No 8, Mr Sherr, does not raise objection to the Succah on these grounds. Mrs Cohen, currently resident at No 12, has also written to support the scheme as a whole.
51. With reference to these representations in particular the Appellants cite the Court's finding in *R v Leominster DC, Ex Parte Potheary* [1998] JPL 335 to the effect that the fact that development is already there is a material consideration that can be taken into account in favour of permission being granted. I have weighed this in the balance but, having done so, am not persuaded that lack of objection from those parties is in itself sufficient for me to find the Succah acceptable in planning terms. It is clear from the judgment that, as one would expect, weight to be attached to this matter is discretionary and a matter for the decision maker.
52. In this regard I am mindful that Mr Sherr made it clear at the Inquiry that his assessment was in part informed by the structure's religious role. Drawing more objectively on my own inspection, I think it likely that many potential future occupiers of No 8 would take a different view and that, this being so, allowing the structure to remain would effectively amount to a downgrading of local housing stock. Whilst this of itself might be minor, the precedent thus set could have serious cumulative implications, undermining the effectiveness of local policy and guidance and making it more difficult for the Council to resist similar erosion of outlook elsewhere.
53. It has not been demonstrated that the erection of a freestanding outbuilding in No 10's rear curtilage that would comply with permitted development restrictions would have an impact on the outlook from neighbouring gardens so similar to that of the Succah that it should be factored in as a significant, comparable lawful fallback position. I therefore conclude that retention of the Succah would perpetuate an unacceptable impact on the outlook available from a neighbouring property and would thus continue to impact harmfully on the living conditions of adjoining occupiers to an unacceptable degree over and above that associated with the 'fallback' position.

54. This would be contrary to CS Policy CS5, DM Policy DM01, the Council's SPD and the relevant provisions of the Framework and outweighs the absence of objection to the Succah in terms of the character and appearance issue set out above. However, I am satisfied that additional harm in the context of this issue could otherwise be addressed satisfactorily by conditions.

Other matters

55. I have considered all the other matters raised. The Appellant has explained that the purpose of the Succah is to facilitate the family's annual celebration of the Jewish Festival of Tabernacles over a period of eight days between late September and late October. During this time, observers of the festival must eat their meals in the Succah and sleep there under an open roof. However, it is obvious that a permanent structure is not required to facilitate this.
56. I have considered the possibility of granting planning permission for the subject Succah at festival times only. However, this would not be appropriate, given that it is firmly bolted to the block-built extension and thus falls to be regarded for purposes of planning law as a permanent structure. It has not been demonstrated to my satisfaction that this particular wooden frame is readily detachable from the host property so as to facilitate temporary re-erection with reasonable ease.
57. Article 9 of the European Convention on Human Rights as incorporated by the Human Rights Act 1998 states that everyone has the right to manifest one's religion or beliefs subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of, amongst other things, the protection of the rights and freedoms of others. In this, the rights of others are infringed by reason of impact on outlook. Moreover, in my understanding Succahs are often temporary structures, either freestanding or loosely supported by neighbouring buildings, present only for the duration of the festival.
58. I do not therefore doubt that suitable alternative arrangements could be made by the Appellants' family at the appropriate time, either at No 10 or elsewhere. I therefore find that whilst removal of the Succah would constitute an interference with the family's Human Rights, this would not be disproportionate or amount to a violation thereof. For similar reasons I find in applying the Public Sector Equality Duty that such a decision pays due regard to the needs recited in section 149 of the Equality Act 2010.
59. The concept of 'intentional unauthorised development' (IUD) is, in accordance with a Written Ministerial Statement issued on 31 August 2015, a material consideration in the determination of ground (a) appeals made from that date onward. However, this is not relied on by the Council as part of its case and nothing before me suggests that the Appellants knew that the works in question were unauthorised until nearing completion. On the contrary, convincing evidence given at the Inquiry by Mr Winegarten suggests that he had placed the project in the hands of others whilst distracted by family matters on trust that they would ensure that the necessary approvals were obtained. I therefore attribute little weight to IUD in this instance.
60. Mr Sherr raised a number of concerns regarding perceived encroachment by the appeal development onto his property. However, these are not planning matters that I can have regard to and fall instead to be resolved through

discussion with the Appellants, ultimately with recourse to the Courts if need be. Discharge from a vent in the side of the appeal development facing No 8, also referred to by Mr Sherr, could potentially be a planning consideration but for the fact that any adverse effects of this have not been demonstrated and, in any event, the Appellants assert that the opening in fact ventilates Mr Sherr's own property. He presented no evidence to the contrary.

61. Therefore, neither these nor any other matters are of such substance or significance as to outweigh the considerations that have led to my conclusions on the main issues. Accordingly, I am minded to grant planning permission pursuant to the appeal on ground (a) for all but the Succah.

Conditions

62. I have considered the conditions suggested by the main parties and discussed at the Inquiry, having regard to the advice in the PPG. In some cases I have edited the suggested wording to reflect that advice.
63. A condition merely requiring access to the roof to be limited to maintenance and repair, as suggested by the Appellants, would not be properly enforceable. Rather, the condition must secure the installation and retention of an approved physical barrier that effectively precludes ready access in the interests of neighbouring residential amenity. In order to itself be effective, this must require the demolition of the subject development in its entirety in the event of non-compliance and include reference to the appeal process, thereby ensuring that the ability to adhere fully to the terms of the condition remains in the hands of those implementing the permission.
64. For the same reason, separate conditions to secure immediate cessation of the use of the roof terrace and the permanent retention and maintenance of the means of prevention referred to above must also be imposed. To prevent further invasive overlooking, permitted development rights for the insertion of further windows into the side elevations of the appeal development must be removed.

The appeals on ground (f) – Appeals A & B

65. In the light of my finding on ground (a) and consequent grant of planning permission for all but the Succah, it is only the latter that now falls to be considered in the context of ground (f). In appealing on this ground, the Appellants must show that the requirements of the enforcement notice exceed what is necessary to remedy the breach of planning control or, as the case may be, any harm to amenity arising from that breach.
66. The impact of retaining the Succah on amenity having already been considered under ground (a), I am concerned here solely with the Appellants' suggestion that requirement 2 should be varied to facilitate the retention on the appeal property of the constituent materials of that particular structure. This would be to facilitate its temporary re-erection on an annual basis for a week or so to facilitate the Appellants' religious observation during the Festival of Tabernacles.
67. The removal of all constituent materials of an unauthorised development from a property or planning unit has long been accepted by the Courts as a legitimate safeguard against the re-introduction of that development. However, having said that, I cannot see that retention of the component

parts of the disassembled Succah on site is essential to remedy the breach of planning control in this case or likely in itself to give rise to further planning harm.

68. Having regard to my finding on ground (a), I cannot go so far as to endorse the Appellants' intention to erect the structure for a few days each year given that, if fixed to land or building in some way, this would be an act of operational development requiring planning permission. Nonetheless, I am aware that neither the neighbour most affected, Mr Sherr, nor the Council raised objection at the Inquiry to such a scenario. Indeed, the Council advised that it is general practice within the Borough to tolerate such structures for a few days at festival times.
69. Whether such tolerance should be exercised in this particular case is a matter for the Council rather than me. Nonetheless, I see no reason to render religious observation any more inconvenient for the occupiers of the property than it need be. I will therefore vary the notice accordingly at requirement 2. Accordingly, the appeals on ground (f) succeed to that extent.

Conclusions

70. For the reasons given above I conclude that Appeal A should succeed in part on grounds (a) and (f) but should otherwise fail. I will grant planning permission on the deemed application for all but the Succah that forms the rearmost part of the subject development, but otherwise will uphold the notice with a correction and a variation and refuse to grant planning permission on the other part of the development.
71. I further conclude that Appeal B should succeed in part on ground (f) but should otherwise fail. The requirements of the upheld notice will cease to have effect so far as they are inconsistent with the planning permission granted pursuant to Appeal A, by reason of the provisions of section 180 of the 1990 Act as amended.

Formal decisions

72. It is directed that the enforcement notice be:
- (i) corrected by, in requirement 2 in section 5, the deletion of the words 'Permanently remove' and the substitution therefor of the word 'Remove'; and
 - (ii) varied by, at the end of requirement 2 in section 5, the addition of the words 'with the exception of those which comprise the single storey Succah that forms the rearmost part of the subject development'.
73. Subject to this correction and variation Appeal A is allowed in part on grounds (a) and (f) and the enforcement notice is upheld. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for most the development already carried out, namely the construction of a rear extension at ground floor, first floor and roof level but excluding the single storey timber framed Succah, at 10 Hillview Gardens, London NW4 2JH, subject to the following conditions:
- 1) All use of the roof terrace accessed from the second floor rear bedroom shall cease with immediate effect and shall not resume at any time.

- 2) The development hereby permitted shall be demolished in its entirety and all constituent materials shall be removed from the property within one month of the date of failure to meet any one of the requirements set out in (i) to (iv) below.
 - (i) Within three months of the date of this decision, details of a scheme to secure the permanent closure of all access to the roof terrace from within the dwelling shall be submitted in writing to the local planning authority, together with a timetable for its implementation.
 - (ii) Within six months of the date of this decision the details and timetable submitted pursuant to (i) above shall have been approved by the local planning authority or, if the local planning authority refuses to approve them or fails to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - (iii) If an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted details and timetable shall have been approved by the Secretary of State.
 - (iv) The means of access closure shall have been fully implemented in accordance with the details and timetable approved pursuant to (i) to (iii) above.
 - 3) Once installed the means of access closure approved pursuant to condition 2) above shall be retained and maintained in the approved form at all times.
 - 4) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (or any order revoking and re-enacting that Order with or without modification), no windows other than any expressly authorised by this permission shall be constructed in the northern or southern elevations of the development hereby permitted.
74. Appeal A otherwise fails on ground (a) and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended in respect of the construction of the single storey timber framed Succah already carried out at 10 Hillview Gardens, London NW4 2JH.
75. On the same terms, Appeal B succeeds in part on ground (f) but is otherwise dismissed.

Alan Woolnough

INSPECTOR

APPEARANCES

FOR THE APPELLANTS:

Charles Streeten	Of Counsel, instructed by Mr A Ormonde
He called	
Mr M Winegarten	Appellant
Mr A Ormonde	Planning and Project Management Services

FOR THE LOCAL PLANNING AUTHORITY:

Nicholas Ostrowski	Of Counsel, instructed by the London Borough of Barnet
He called	
Mr J Calvey	Principal Building Control Surveyor, London Borough of Barnet
Ms K Gorasia	Planning Officer, London Borough of Barnet
Mr J Gould BSc(Hons)	Planning Officer, London Borough of Barnet

INTERESTED PERSON:

Mr Y Sherr	Local resident
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DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Email from Bilha Cohen to Mr Omonde dated 6 September 2016, submitted by the Appellants
- 2 Statement by Mr Sherr, submitted by Mr Sherr
- 3 *Authorities R v Leominster DC* [1997] 76 P&CR 346 and *Sage v SSETR & Maidstone BC* [2003] UKHL 22, submitted by the Appellants

PLAN

- A Plan attached to the enforcement notice

PHOTOGRAPH SUBMITTED AT THE INQUIRY

- 1 Photograph of the appeal development, submitted by the Council