

Appeal Decisions

Site visit made on 2 June 2017

by Debbie Moore BSc (HONS) MCD MRTPI PGDip

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

Decision date: 7th August 2017.

Appeal A - Appeal Ref: APP/K5600/W/17/3168385 2 Marlborough Street, London SW3 3PS

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Mrs Christina Copinger-Symes against the decision of The Council of The Royal Borough of Kensington & Chelsea.
- The application Ref CON/16/06407, dated 21 September 2016, sought approval of details pursuant to condition Nos 4 and 5 of a planning permission Ref PP/13/06229, granted on 23 December 2013.
- The application was refused by notice dated 7 November 2016.
- The development proposed is construction of a subterranean basement level under footprint of property and rear garden.
- The details for which approval is sought are:

No 4: No development shall commence until a Construction Traffic Management Plan has been submitted to and approved in writing by the local planning authority. The statement should include:

- a) routeing of demolition, excavation and construction vehicles, including a response to existing or known projected major building works at other sites in the vicinity;
- b) access arrangements to the site;
- c) the estimated number and type of vehicles per day/week;
- d) details of any vehicle holding area;
- e) details of the vehicle call up procedure;
- f) estimates for the number and type of parking suspensions that will be required;
- g) details of any diversion or other disruption to the public highway during demolition, excavation and construction works; and
- h) work programme and/or timescale for each phase of the demolition, excavation and construction works;
- i) details of measures to protect pedestrians and other highway users from construction activities on the highway;
- j) work programme and/or timescale for each phase of the demolition, excavation and construction works;
- k) a strategy for coordinating the connection of services on site with any programme work to utilities upon adjacent land; and
- l) where works cannot be contained wholly within the site a plan should be submitted showing the site layout on the highway including extent of hoarding, position of nearby trees in the highway or adjacent gardens, pedestrian routes, parking bay suspensions and remaining road width for vehicle movements.

The development shall be carried out in accordance with the approved Construction Traffic Management Plan.

No 5: No development shall commence until a Chartered Civil Engineer (MICE) or Chartered Structural Engineer (MI Struct.E) has been appointed to supervise the construction works throughout their duration and their appointment confirmed in writing

to the Local Planning Authority. In the event that the appointed engineer ceases to perform that role for whatever reason before the construction works are completed those works will cease until a replacement chartered engineer of the afore-described qualification has been appointed to supervise their completion and their appointment confirmed in writing to the Local Planning Authority. At no time shall any construction work take place unless an engineer is at that time currently appointed and their appointment has been notified to this Authority in accordance with this condition.

- The reasons given for the conditions are:

No 4: To minimise the impact of construction works upon highway safety and nearby residents' enjoyment of their properties in accordance with the Subterranean Development SPD and policies CT1 and CL5 of the Core Strategy.

No 5: The details are considered to be material to the acceptability of the proposal, and for safeguarding the amenity of neighbouring residential properties and to comply with the Subterranean Development SPD and policy CL2(g) (ii) of the Core Strategy.

Appeal B - Appeal Ref: APP/K5600/W/17/3168386 5 Marlborough Street, London SW3 3PS

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Mrs Christina Copinger-Symes against the decision of The Council of The Royal Borough of Kensington & Chelsea.
- The application Ref CON/16/06356, dated 21 September 2016, sought approval of details pursuant to conditions Nos 4 and 5 of a planning permission Ref PP/13/06270, granted on 15 January 2014.
- The application was refused by notice dated 7 November 2016.
- The development proposed is excavation and construction of a single storey basement extension under the property and rear garden including four associated lightwells.
- The details for which approval is sought are:

No 4: No development shall commence until a Construction Traffic Management Plan has been submitted to and approved in writing by the local planning authority. The statement should include:

 - a) routeing of demolition, excavation and construction vehicles, including a response to existing or known projected major building works at other sites in the vicinity;
 - b) access arrangements to the site;
 - c) the estimated number and type of vehicles per day/week;
 - d) details of any vehicle holding area;
 - e) details of the vehicle call up procedure;
 - f) estimates for the number and type of parking suspensions that will be required;
 - g) details of any diversion or other disruption to the public highway during demolition, excavation and construction works; and
 - h) work programme and/or timescale for each phase of the demolition, excavation and construction works;
 - i) details of measures to protect pedestrians and other highway users from construction activities on the highway;
 - j) work programme and/or timescale for each phase of the demolition, excavation and construction works;
 - k) a strategy for coordinating the connection of services on site with any programme work to utilities upon adjacent land; and
 - l) where works cannot be contained wholly within the site a plan should be submitted showing the site layout on the highway including extent of hoarding, position of nearby trees in the highway or adjacent gardens, pedestrian routes, parking bay suspensions and remaining road width for vehicle movements.

The development shall be carried out in accordance with the approved Construction Traffic Management Plan.

No 5: No development shall commence until a Chartered Civil Engineer (MICE) or Chartered Structural Engineer (MI Struct.E) has been appointed to supervise the construction works throughout their duration and their appointment confirmed in writing to the Local Planning Authority. In the event that the appointed engineer ceases to perform that role for whatever reason before the construction works are completed those works will cease until a replacement chartered engineer of the afore-described qualification has been appointed to supervise their completion and their appointment confirmed in writing to the Local Planning Authority. At no time shall any construction work take place unless an engineer is at that time currently appointed and their appointment has been notified to this Authority in accordance with this condition.

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No 5: The details are considered to be material to the acceptability of the proposal, and for safeguarding the amenity of neighbouring residential properties and to comply with the Subterranean Development SPD and policy CL2(g) (ii) of the Core Strategy.

Appeal C - Appeal Ref: APP/K5600/W/17/3168387 6 Marlborough Street, London SW3 3PS

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant consent, agreement or approval to details required by a condition of a planning permission.
- The appeal is made by Mrs Christina Copinger-Symes against the decision of The Council of The Royal Borough of Kensington & Chelsea.
- The application Ref CON/16/06412, dated 21 September 2016, sought approval of details pursuant to conditions Nos 4 and 5 of a planning permission Ref PP/13/06234, granted on 23 December 2013.
- The application was refused by notice dated 7 November 2016.
- The development proposed is excavation and construction of a single storey basement extension under the property and rear garden including four associated lightwells.
- The details for which approval is sought are:
 - No 4: No development shall commence until a Construction Traffic Management Plan has been submitted to and approved in writing by the local planning authority. The statement should include:
 - a) routeing of demolition, excavation and construction vehicles, including a response to existing or known projected major building works at other sites in the vicinity;
 - b) access arrangements to the site;
 - c) the estimated number and type of vehicles per day/week;
 - d) details of any vehicle holding area;
 - e) details of the vehicle call up procedure;
 - f) estimates for the number and type of parking suspensions that will be required;
 - g) details of any diversion or other disruption to the public highway during demolition, excavation and construction works; and
 - h) work programme and/or timescale for each phase of the demolition, excavation and construction works;
 - i) details of measures to protect pedestrians and other highway users from construction activities on the highway;
 - j) work programme and/or timescale for each phase of the demolition, excavation and construction works;

- k) a strategy for coordinating the connection of services on site with any programme work to utilities upon adjacent land; and
- l) where works cannot be contained wholly within the site a plan should be submitted showing the site layout on the highway including extent of hoarding, position of nearby trees in the highway or adjacent gardens, pedestrian routes, parking bay suspensions and remaining road width for vehicle movements.

The development shall be carried out in accordance with the approved Construction Traffic Management Plan.

No 5: No development shall commence until a Chartered Civil Engineer (MICE) or Chartered Structural Engineer (MI Struct.E) has been appointed to supervise the construction works throughout their duration and their appointment confirmed in writing to the Local Planning Authority. In the event that the appointed engineer ceases to perform that role for whatever reason before the construction works are completed those works will cease until a replacement chartered engineer of the afore-described qualification has been appointed to supervise their completion and their appointment confirmed in writing to the Local Planning Authority. At no time shall any construction work take place unless an engineer is at that time currently appointed and their appointment has been notified to this Authority in accordance with this condition.

- The reasons given for the conditions are:

No 4: To minimise the impact of construction works upon highway safety and nearby residents' enjoyment of their properties in accordance with the Subterranean Development SPD and policies CT1 and CL5 of the Core Strategy.

- No 5: The details are considered to be material to the acceptability of the proposal, and for safeguarding the amenity of neighbouring residential properties and to comply with the Subterranean Development SPD and policy CL2(g) (ii) of the Core Strategy.
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Decisions

Appeal A

1. The appeal is allowed and the approval Ref CON/16/06407 given to the details pursuant to condition No 4 of a planning permission Ref PP/13/06229 given on 23 December 2013, namely a Construction Traffic Management Plan (CTMP) (Revision 2 - January 2017 and Supplementary Combined CTMP – January 2017).

Appeal B

2. The appeal is allowed and the approval Ref CON/16/06356 given to the details pursuant to condition No 4 of a planning permission Ref PP/13/06270 given on 15 January 2014, namely a CTMP (Revision 2 - January 2017 and Supplementary Combined CTMP – January 2017).

Appeal C

3. The appeal is allowed and the approval Ref CON/16/06412 given to the details pursuant to condition No 4 of a planning permission Ref PP/13/06234 given on 23 December 2013, namely a CTMP (Revision 2 – January 2017 and Supplementary Combined CTMP – January 2017).

Procedural Matters

4. The three cases are linked in terms of the main issue and their locational proximity. Also, the appellant is the same for each case. I have, therefore, dealt with the appeals in a single decision letter. For ease of reference, I have referred to the different cases as Appeals A, B and C, as set out in the headers. Although I have dealt with each appeal on its individual merits, to avoid duplication I have considered the proposals together in this decision.
5. Each application sought approval pursuant to condition 5, which relates to confirmation that a professional structural engineer had been appointed to supervise the works. The appellant has confirmed that these details have now been approved to the satisfaction of both parties. Hence condition 5 is not addressed within either appeal statement. Consequently, I have determined the appeal on the basis that the outstanding matter of contention between the parties relates to condition 4.
6. Included with appellant's final comments is a copy of the Council's combined appeal statement for the three appeals, dated 8 May 2017, which the appellant obtained from the Council's website. This Statement had not been received by the Planning Inspectorate within the required timescale. In the Appellant's view, the Council's statement "has not been submitted in accordance with the Rules (Regulation 14 of the 2009 Regulations). In that context the Appellant would be entitled to ignore the statement found on the LPA's website and to argue that there has been no attempt by the LPA to defend its decisions". In response, the Council advised that its failure to send the appeal statement was an administrative error. The appellant has seen the Council's statement and has had the opportunity to comment on it, albeit by chance. Therefore, I am satisfied that the appellant has not been prejudiced and I have taken the Council's statement into account in my consideration of the appeals.
7. The appellant has submitted further information with the appeal documentation that was not before the Council when it made its decisions. This includes updated CTMPs for each site with carriageway dimensions clarified, updated skip and concrete delivery plans with dimensions added, and details of temporary bay closures. A Supplementary Combined CTMP, dated January 2016, was also submitted. The Council and other interested people have had the opportunity to comment on the appeal documentation and I am satisfied that they have not been prejudiced by the submission of the additional information. Therefore, I have taken it into account in my consideration of the appeal.
8. I have been informed by the appellant that condition 4 of each planning permission has now been discharged. I have been provided with copies of the approved CTMPs and the relevant decision notices. Irrespective of this, the appellant has indicated a wish for the appeals to continue. Under s.78(1)(b) of the Town and Country Planning Act 1990 (the Act), a person can appeal any refusal for consent required by a condition imposed on a grant of planning permission. There is nothing in s.78 which says that an appeal is invalidated if the local planning authority subsequently approves the discharge of the condition. Consequently, I have determined the appeals on the basis of the evidence before me.

9. Notwithstanding the discharge of condition 4, the condition is in the form of a pre-commencement condition. It states that: "No development shall commence until a Construction Traffic Management Plan has been submitted to and approved in writing by the local planning authority". The condition requires the development to be carried out in accordance with the approved details. The planning permissions are treated as expiring when the development they permit would conflict with the first condition of each permission, namely that it take place "before the expiration of three years from the date of this permission". The date in question is:
 - a) For 2 Marlborough Street this may be implemented at any time before the 23 December 2016.
 - b) For 5 Marlborough Street: this may be implemented at any time before the 15 January 2017.
 - c) For 6 Marlborough Street: as for 2 Marlborough Street, any time before the 23 December 2016.
10. As explained above, following the Council's refusal on 7 November 2016, further applications were made for approval of CTMPs, with an overarching CTMP as requested by the Council, for all properties. The applications were approved on 17 February 2017.
11. The appellant has provided a legal opinion that sets out why the works are considered to have properly implemented the permission. S.56 of the Act provides development is begun on the earliest date that a "material operation" is carried out. This is defined by s.56 and includes: (a) any work of construction in the course of the erection of a building; (b) the digging of a trench which is to contain foundations, or part of the foundations, of a building. The appellant submits that the works undertaken and photographed include works which fall within either (a) or (b) or both.
12. The appellant has provided evidence of certain works that were carried out at each property before the date the planning permissions were due to expire. The works involved some excavation and underpinning in the location required to construct the basement in each case. In addition to photographs of the work, I have been provided with a site inspection record from the Building Inspector, dated 14 December 2016. On the basis of this information, I am satisfied that the works in each case are more than 'de minimis' and fall within the statutory definition of material operations. The Council has not provided any evidence to dispute the appellant's argument and, on the basis of the information before me, it can be taken that the underpinning would, in principle, amount to an implementation of the permission in each case.
13. However, the fact that condition 4 was not discharged at the time the works were carried out is significant and this forms the basis of the Council's opinion that the works are not lawful. In response, the Appellant refers to the Whitley principle, which derives from the Court of Appeal judgement in *FG Whitley & Sons Co Ltd v Secretary of State for Wales* [1992] 64 P.& C.R. 296. The Whitley principle is essentially that a permission is controlled by, and subject to, its conditions and therefore operations carried out in contravention of conditions cannot properly be described as commencing the development authorised by the permission. There are certain exceptions to this, as

established in case law. The one relevant to this case being that if a condition requires an approval before a given date, but the developer has applied before that date for approval, and that approval is subsequently given so that no enforcement action can be taken, work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development. It does not matter if the subsequent approval was given after the deadline.

14. As explained above, the evidence before me shows that the works in each case constitute material operations and that they took place before the deadline for commencement in condition 1 of the planning permissions. Moreover, the applications for the discharge of condition 4, which have now been approved by the Council, were made before the respective deadlines for commencement. The appellant states that the works were carried out in accordance with the approved scheme and there is no evidence from the Council to the contrary, or that it would be reasonable to take enforcement action in the circumstances. The Council has advised that it considers the development to be unlawful but there is very limited evidence to substantiate this claim. Therefore, in accordance with the Whitley exception, I conclude that the permissions were lawfully implemented.
15. As set out above, I am required to determine the appeals before me and I now address the merits of the schemes and whether the details should be approved to discharge the conditions.

Main Issue

16. The main issue is whether the proposed CTMPs demonstrate that the construction of the development would not have an adverse effect on highway safety.

Reasons

17. The appeal properties are three-storey townhouses, located within a terrace of similar properties. Marlborough Street is a relatively short two-way street within a predominantly residential area.
18. The Council states that the main points of concern are set out in the relevant decision notices and the informative(s) detail the Council's argument. This acknowledges that individually the CTMPs submitted for the three developments are sound and would generally be compliant with local policy. However, to ensure there is full co-operation and that a proper programme for construction traffic is considered whilst all three developments take place, the Council requested an overarching CTMP to ensure that the cumulative impact of the construction works is properly mitigated. The informative goes on to state specific areas of particular concern, which include: (i) drawings must show the available road width when vehicles or skips are present; (ii) there is a need to maintain a clear 3.0 metre carriageway width for passing vehicles; (iii) swept paths may be required to demonstrate that other vehicles are capable of turning when larger construction vehicles are present; (iv) the applicant must ensure that access to garages is not unduly blocked. Also, other developments in the area must be identified to highlight any potential conflict.

19. An overarching CTMP has been submitted, which specifies that the development of Nos 5 and 6 would be combined as a single construction contract. Each CTMP is based on the Council's preferred template and the measures addressed cover all areas specified in the original condition and in the informative(s) of the refusal notice. In relation to the carriageway width, there are occasions when a 3.0 metre carriageway for passing vehicles would not be achieved. However, this would be a relatively infrequent occurrence. Also, the information on other development in the area is unlikely to be up to date, however, there is no evidence that there would be significant conflict due to construction works taking place in the wider area.
20. I have also considered the approved CTMPs compared with those before me. The main difference is that the later approved CTMPs prohibit the storage of materials, plant or skips on the road and require concrete to be mixed on-site. This would require additional vehicle movements associated with spoil removal, but would eliminate the need for the delivery of ready mixed concrete and parking bay suspensions. The approved schemes also indicate that smaller vehicles would be used.
21. Whilst I appreciate that the Council is likely to have had valid reasons for negotiating the amendments to the CTMPs, this has not been clearly explained. There is very limited information as to why the Council resisted the permanent siting of waste skips or plant, the delivery of ready mixed concrete, in addition to the other matters as set out above, other than carriageway width. However, the appellant's swept path diagram shows that there would be no conflict between vehicles during excavation and construction. Moreover, the Council maintains in its appeal statement that "It is recognised that individually should the projects be built out in isolation at different times to each other, the CTMPs [subject of these appeals] would not cause harm to pedestrian, cycle, vehicular and road safety". Overall, there is very limited evidence before me to counter the appellant's statement and evidence provided therein, which demonstrates that the schemes could be safely managed in accordance with the appeal CTMPs, should the implementation of the developments coincide.
22. I have considered the comments submitted by an interested party, insofar as they relate to the matters before me, and I find that concerns in relation to access and parking would be addressed by adherence to the CTMPs.
23. To conclude on this issue, I find that the CTMPs demonstrate that the construction of the development would not have an adverse effect on highway safety, in accordance with Policies CT1 and CL7 of the Local Plan,¹ which seek to ensure that traffic and construction activity do not cause unacceptable harm to pedestrian, cycle, vehicular and road safety.

Conclusion

24. For the reasons given above, the appeals are allowed.

Debbie Moore

Inspector

¹ Royal Borough of Kensington and Chelsea Consolidated Local Plan, July 2015