



Appeal Decision

Site visit made on 10 December 2019

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 10 January 2020

Appeal Ref: APP/N5090/C/19/3229880

Garages to the Rear of 1-12 Gloucester Court, Golders Green Road, London NW11 9AA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Joseph Fried of ZAS Investments Ltd against an enforcement notice issued by the Council of the London Borough of Barnet.
- The enforcement notice was issued on 18 April 2019.
- The breach of planning control as alleged in the notice is without planning permission, the conversion of the existing garages into 2 no. self-contained flats with associated refuse storage and amenity space, not in accordance with the approved plans of planning permission reference 16/1936/FUL dated 30.06.2016.
- The requirements of the notice are:
 1. Demolish the buildings as shown outlined in Plan 1;
 2. Permanently remove all constituent materials resulting from the works in 1 above from the property.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (f) of the 1990 Act as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld in the terms set out below in the Formal Decision.

The appeal on ground (b)

1. For an appeal to succeed on ground (b), the appellant must show on the balance of probability that the matters alleged in the notice have not occurred as a matter of fact. The arguments advanced under ground (b) are related to the Council's reasons for issuing the notice and, as such, are more appropriately considered under ground (a).
2. Crucially, the appellant accepts that the alleged breach has occurred and so the appeal on ground (b) must fail.

The appeal on ground (c)

3. In order to succeed on a ground (c) appeal, the appellant must show on the balance of probability that the matters alleged do not constitute a breach of planning control. The appellant claims that planning permission was granted for the development and I am referred to previous permissions/applications; references 16/1936/FUL¹ and 18/0779/FUL².

¹ Conversion of existing garages into 2 no. self-contained flats with associated refuse storage and amenity space, approved subject to conditions on 30 June 2016.

² Conversion of existing garages into 2 no. self-contained flats with associated refuse storage and amenity space, refused 21 April 2019.

4. The appellant accepts that the development has not been constructed in accordance with planning permission reference 16/1936/FUL. The Council explains that application reference 18/0779/FUL was submitted to regularise the unauthorised development. That application was recommended for approval, subject to the completion of a satisfactory planning obligation. No obligation was submitted and, therefore, a refusal of planning permission was issued.
5. Contrary to the appellant's claims, planning permission has not been granted for the matters alleged and the development constitutes a breach of planning control. Hence, the appeal on ground (c) must fail.

The appeal on ground (a) and the deemed planning application

Preliminary Matters

Planning Obligation

6. The Council is seeking a planning obligation to enable an amendment to the Traffic Regulation Order and to contribute towards the associated monitoring costs. This is to mitigate any adverse impacts of on-street parking resulting from the development. The appellant has submitted a Unilateral Undertaking with the appeal, under Section 106 of the 1990 Act as amended, which is intended to address the Council's concerns. I have considered whether the S106, as submitted, can be relied upon to deliver its intended obligations.
7. A unilateral undertaking is where the appellant/landowner and any other relevant parties enter into an obligation unilaterally, without the local planning authority. A unilateral undertaking can only bind the parties who make it and their successors in title. It cannot bind the local planning authority since they are not party to it. The obligation as drafted seeks to bind the Council, although I note the Council has not signed the document. This is an anomaly that would need to be addressed.
8. The background, as set out in the draft S106, identifies the appellant as having a long leasehold interest in the land, yet the obligation does not bind the freeholder. An obligation will not be enforceable against successors in title of those who were not a party to it. Hence, all those with current interests such as freehold, leasehold and mortgagee interests will usually need to be a party to the deed. For example, if a freeholder who was not party to the obligation repossessed the property or site, they could implement any extant planning permission without being bound by the planning obligation. I appreciate the risk of this happening may be low, but in the absence of any clear information on this matter I must take a precautionary approach.
9. The Council states that the highways and monitoring contributions set out in the agreement differ from that which would normally be sought. By inference, the Council indicates that the obligation would not address the matters relating to parking provision in its reasons for issuing the notice.
10. Moreover, the obligations as set out in the Schedule apply on implementation of the planning permission, although the relevant application/permission is not identified. This clause is not drafted robustly and would lead to difficulties should the Council seek to enforce the obligations.

11. As a result of the above identified anomalies and uncertainties, and the Council's rejection of the financial obligations, the S106 Unilateral Undertaking cannot be relied upon to achieve its intended effect. I conclude, therefore, that the document, as submitted, cannot carry any weight.

Amended Plans

12. The appellant has submitted plans with the appeal (refs HD911/7001 Rev C dated 12/2017 and HD911/7002 Rev C dated 12/2017), which I am advised reflect the development as built. For the avoidance of doubt, I have based my decision on these plans and not those submitted with application reference 18/0779/FUL, which have not been supplied with the appeal in any case.

Implementation of the Approved Scheme

13. When reliance is placed on an existing permission, it is necessary to show that the relevant permission has been commenced and not lapsed. It is possible to commence a development for the purpose of section 56 of the 1990 Act as amended, and thereby meet a deadline forming a condition of the planning permission, and then later to deviate from the permitted works in a manner that later becomes an enforcement issue without retrospectively altering the fact that the commencement of the development has occurred for s.56 purposes.
14. However, in this case, operations have been carried out in breach of a condition requiring the prior approval of details. The Courts have held that if the development contravenes such conditions it cannot be properly described as commencing that authorised by the permission. There is no evidence that the pre-commencement condition has been properly discharged. Therefore, I must conclude that the planning permission ref 16/1936/FUL has not been implemented and has lapsed, as of 30 June 2019.

Main Issues

15. The terms of the deemed planning application are derived from the allegation, hence, planning permission is sought for the conversion of the existing garages into 2 no. self-contained flats with associated refuse storage and amenity space, not in accordance with the approved plans.
16. The main issues are the effect of the development on: (i) parking provision; (ii) the living conditions of neighbouring residents and (iii) the character and appearance of the area with regard to the provision of facilities for refuse and recycling and amenity space.

Reasons

Parking Provision

17. The development would provide two self-contained flats, each with one bedroom. There is no parking provision to serve the development, as built, in contrast with the approved scheme which included a garage with space for two vehicles. The plans before me show the garage space as a storage area with a single entrance door and two windows on the front elevation that would render it inaccessible to vehicles.
18. As set out above, the Council is seeking a planning obligation to mitigate on-street parking within the Controlled Parking Zone (CPZ). I understand that the

mitigation would be "future occupiers of the development would be exempt from applying for CPZ permits", in order to meet the requirements of Policy DM17 2.ii of the Local Plan: Development Management Policies (2012) (the Local Plan).

19. Despite the policy, the need for the planning obligation is not clearly explained by the Council and it has not been shown that it would meet the tests as set out in paragraph 56 of the National Planning Policy Framework (the Framework)³. However, I have already explained that the S106 Unilateral Undertaking before me cannot be relied upon to achieve its intended effect. I therefore need to consider whether the development would give rise to any adverse impacts due to additional demand for on-street parking in the vicinity of the site.
20. The site is accessed off Gloucester Gardens, which is subject to a parking restriction extending along Golders Green Road. The restriction limits on-street parking to resident permit holders between 11am-midday and 2-3pm Monday to Friday. At the time of my site visit, around midday on a weekday, it was not apparent that the area was subject to parking stress. However, I saw that the predominant development in the immediate vicinity is apartment buildings with limited dedicated parking. Moreover, the CPZ indicates demand for parking is in excess of supply.
21. I appreciate that the houses further along Gloucester Gardens have driveways but, nonetheless, I consider it probable that the area is subject to parking stress in the evenings when residents are at home. This situation is confirmed by residents, one of whom describes driving around the area at night to secure parking on a regular basis. The appellant disputes this account, but the residents are best placed to know their local area and the type of problems encountered.
22. The appellant argues that the approved scheme was not subject to a planning obligation. The garages shown on the plans would not have served the development as, I am advised, they were in separate ownership. The appellant also claims that the site has been subject to several planning appeals and permissions, none of which raised highways matters as a concern. An application at Woodstock Avenue, nearby, is also referenced where a lower parking requirement was accepted. However, the full balance of considerations that informed those decisions is not before me and I am unable to judge the extent to which those applications or appeals were comparable. The appellant draws my attention to the comments of the Council's highways advisor, raising no objections, but these were in relation to the previous scheme and are not directly applicable.
23. I acknowledge that the Council intended to grant planning permission for the development and, from the limited information I have, it seems that the planning obligation would have restricted the occupants of the development from obtaining a resident's permit. Hence, this would not have prevented the residents from parking in the evening, when I consider the parking stress would be most likely. Nevertheless, I have had due regard to the comments of local residents to which I attach significant weight.

³ That it is necessary to make the development acceptable in planning terms; it is directly related to the development; and is fairly and reasonably related in scale and kind to the development.

24. Despite the appellant's assertions, it has not been shown through objective analysis that there is sufficient on-street parking capacity to serve the development. In my judgement, the lack of dedicated parking would have an adverse impact on the local area in terms of parking provision, contrary to Policy DM17 of the Local Plan, which concerns parking management.

Living Conditions

25. The appeal site lies to the rear of residential development which fronts onto Gloucester Gardens and Golders Green Road. I understand that it was formerly occupied by a row of 11 domestic garages. The development at the site has been erected pursuant to a planning permission for two self-contained flats. However, the main parties accept that the development differs from the approved plans. The differences include a higher ridge and lower eaves height, which results in a roof with a steeper pitch. The approved flat-roofed garage has been built with a pitched roof and is laid out as a store room with windows front and rear. Also, the amenity space between the two units is smaller than that approved.
26. For the avoidance of doubt, the appellant and the Council have agreed the following dimensions from measurements taken on site: ridge height 5.04m; eaves height at rainwater pipe 2.61m or 2.47m to the underside of the soffit. The Council states that the approved ridge and eaves heights are 4.7m and 3.3m respectively.
27. The Council is concerned that the development will evolve in such a way as to be detrimental to the living conditions of adjoining occupiers. The approved scheme is subject to a condition that requires the layout of the units to be retained as constructed. Although the reasoning for this condition is not fully explained, I understand it was to prevent the conversion of the roof space to provide additional residential accommodation. A further condition sought to restrict the use to self-contained units only, excluding other residential uses. As explained above, these conditions cannot apply to the development as built because the previous planning permission has not been implemented. However, if I were to grant permission for the development sought under the deemed planning application, I would be able to impose appropriate conditions to address the Council's concerns. This would not overcome the objections of residents, however, which relate to broader issues.
28. Neighbouring residents are concerned, among other things, that the development is imposing and intrusive when viewed from the rear bedrooms of the first and second floor flats; the additional windows on the front elevation increase the perception of being overlooked, the development obstructs light and there would be increased noise and disturbance from the use of the amenity areas.
29. The development is sited relatively close to the rear of the existing development at Gloucester Court and does not appear to achieve the standard 21m separation distance between properties with facing windows to habitable rooms, to avoid overlooking, as sought by the Council's Residential Design Guidance: Supplementary Planning Document (SPD) (2016). I appreciate the rear of the flats on Gloucester Court is not entirely private at present, nonetheless, the introduction of windows to main habitable rooms, as sited, is likely to lead to a material loss of privacy.

30. While overlooking could be alleviated to a certain extent through imposing conditions requiring obscure glazing and non-opening windows, the perception of being overlooked is a valid consideration which would not be addressed by conditions. I also saw from my site visit that the building has an imposing appearance which is likely to affect the outlook from the rear windows of main habitable rooms serving the neighbouring flats. In addition, the development lies to the south-east of the flats fronting Gloucester Gardens and I consider it likely that levels of daylight and sunlight to the rear of the ground floor flats has been impacted.
31. I have been directed to apparently approved plans for a similar development (approved in 2013)⁴, which showed a building with a steep mono-pitched roof. The appellant indicates this approval would have had a greater impact than the scheme as built and shows the Council's concerns about the roof height are unfounded. However, that scheme was not built and the permission may well have lapsed. The Council's reasons for granting that scheme are not available to me and I cannot simply assume that a previous permission makes the scheme before me acceptable.
32. Finally, while I acknowledge the residents' concerns about noise and disturbance associated with the use of the amenity areas, the limited size and siting of the garden areas is such that any nuisance is unlikely to be material, especially when taking account of the previous use of the site as garages.
33. I find that the siting of the development, combined with the relatively steep roof pitch and resulting mass of the building, and the numerous windows, has impacted on the living conditions of the occupiers of the neighbouring flats at Gloucester Court with regard to loss of outlook, daylight, sunlight and privacy. This would be contrary to Policies DM01 and DM02 of the Local Plan and the Council's adopted SPD, which seek to secure high quality development that protects residential amenity.
34. The planning approval ref 16/1936/FUL is a relevant consideration which I have taken into account. However, for the reasons explained above, the permission has lapsed. Moreover, the Council's reasons for granting planning permission appear to stem from successive approvals at the site. The original site analysis and assessment against relevant policies has not been provided. I must consider the scheme on the evidence available and make a judgement against the policies without making assumptions. The resolution to grant application reference 18/0779/FUL is also relevant, but the scheme differed from that before me and was virtually identical to the 2016 approval. The resolution carries limited weight, therefore.

Character and Appearance

35. The Council is concerned about the lack of a scheme for a refuse and recycling strategy. If I were to grant permission for the deemed planning application, this matter could be addressed through the imposition of a suitably worded planning condition. I note the appeal decision⁵ where an Inspector found a condition would not be necessary but this seemed to relate to the siting of bins, as opposed to a management scheme which is sought in this case.

⁴ Variation of conditions pursuant to planning permission Ref F/00031/13: Partial demolition and conversion of existing garages to the rear of Gloucester Court into 2 no residential units. Alterations to include new front wall, windows and door with a new roof (Ref F/02342/13 dated 12 September 2013).

⁵ Ref: APP/N5090/W/15/3078171 dated 15 December 2015.

36. The amenity space would be approximately 12sqm per unit, including the bin storage area. The reduced amenity space would accord with the requirements of Policy DM02 of the Local Plan, which seeks a minimum of 5sqm per habitable room. The space provided is not unreasonable and is reflective of other development in the area.
37. I conclude, therefore, that the development would not have an adverse effect on the character and appearance of the area with regard to waste disposal and amenity space. It would accord with Policy CS14 of the Core Strategy (2012), Policies DM01 and DM02 of the Local Plan and the Council's adopted Sustainable Design and Construction SPD (2016), which seek to secure high quality development that reflects its surroundings.

Conclusion

38. I find that the scheme under construction would not be in accordance with the development plan and planning permission should be refused. It has not been shown that material considerations, such as previous approvals on the site, exist to warrant reaching a different conclusion in this instance.
39. I have considered whether there is an obvious alternative short of demolition. Such an alternative would be the development that was approved in 2016. The enforcement notice would be upheld but the requirements varied so that the development would be altered to accord with the previously approved plans. However, as set out above, I am not in possession of the full balance of considerations that informed the Council's decision and I cannot be satisfied that such a development would comply with the policies before me. Moreover, I am not of the opinion that the notice could be varied with the necessary degree of precision, given the discrepancies between the approved plans and the development as built.
40. For the reasons given above I conclude that the appeal on ground (a) should not succeed.

The appeal on ground (f)

41. Section 173(4) of the 1990 Act as amended indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first is to remedy the breach of planning control which has occurred. The second is to remedy any injury to amenity which has been caused by the breach. In this case, the purpose of the notice is to remedy the breach of planning control.
42. The appellant indicates the requirements are excessive and it should be sufficient to revert to the 2016 or the 2018 approvals. Firstly, there is no 2018 approval as this application was ultimately refused.
43. As explained above, the 2016 permission has lapsed and so a requirement to make the scheme comply with that planning permission would not remedy the breach of planning control. The statutory purpose behind the notice can only be achieved by compliance with the requirements. Therefore, the appeal on ground (f) must fail.

Conclusion

44. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Formal Decision

45. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Debbie Moore

Inspector