



Appeal Decision

No site visit

by Simon Hand MA

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

Decision date: 31 March 2020

Appeal Ref: APP/N5090/X/19/3240096

157A & 157B Holden Road, London, N12 7DU

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Choice Place Ltd against the decision of the Council of the London Borough of Barnet.
 - The application Ref 19/4021/192, dated 22 July 2019, was refused by notice dated 25 September 2019.
 - The application was made under section 192(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is to confirm that planning permission ref: 18/1845/FUL granted 4th July 2018, can be implemented in accordance with all the approved drawings.
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Decision

1. The appeal is dismissed.

Reasons

2. Planning permission was granted for the demolition of Nos 157A and 157B and their replacement with a three storey building containing 6 flats. The site is sloping and sits between adjacent buildings at No 157 and No 159. The planning permission was subject to conditions, one of which was number 1, that "*The development hereby permitted shall be carried out in accordance with the following approved plans:*". All the relevant plans are included in the list, which for this appeal include P.03 Rev B which shows proposed elevations, P.04, which shows the street scene and P.06 Rev A which shows the proposed building within a topographical survey of the site and its surroundings.
3. The problem is that while the proposed building is shown drawn to its correct height in all three plans, in the street scene plan (P.04), where the proposed building is shown sitting between its neighbours, the neighbouring buildings are shown as too large. With the slope of the ground shown and allowing for all three buildings to be excavated into their plots, the proposal appears to be slightly taller than No 157, which looks as if it is downhill, but lower than No 159 which is uphill. This is made clear on both the street elevation views from the front and the side. The existing buildings have a similar relationship, although they are slightly lower in height than the proposal. The effect of the errors in scale are that the proposal will actually be taller than No 159 and significantly taller than No 157.

4. The question is therefore, whether the planning permission can be implemented lawfully. There is no doubt that the planning permission refers solely to the building to be erected and it would seem the building to be erected is shown accurately on all the plans. However, the plans are included within condition 1 which requires the development to be carried out in accordance with those plans. The issue is therefore could the Council enforce against a breach of that condition if the development were to go ahead?
5. Three legal opinions have been provided, two for the appellant and one for the Council. The Council's advice is that yes, they can enforce and would be likely to be successful if they did. The basis for this is that this is a case where the meaning of the condition can only be ascertained by considering extrinsic evidence. It is clear that the relationship of the proposal to its neighbours was of considerable importance to the Council when reaching its decision and so the street scene drawing is a "dominant drawing". The development would be contrary to that drawing and so in breach of the condition.
6. The appellant's first advice was a cautious, no, they cannot enforce. The building is shown accurately on all the drawings and the planning permission relates only to the building proposed. The neighbouring buildings are not under the control of the appellant and the condition cannot be construed as incorporating the retention or dimensions of the neighbouring buildings into the planning permission. For example if the neighbour received planning permission for a loft extension that raised the ridge height it could not then be argued the appellant's permission was no longer implementable.
7. The second opinion is similar, but rather more forceful. The proposed building is shown accurately on all the drawings, the streetscene drawings are illustrative and the neighbouring buildings are outside the control of the appellant.
8. In my view the starting point is that when interpreting a condition it should be asked what a reasonable reader would understand the words to mean¹. In this case it clear to me the development should be built in accordance with the plans. At its simplest this is impossible because to build it in accordance with P.03 and P.06 the building will not look like the building shown in P.04. In other words the plans are inconsistent. The condition doesn't require the development to be in accord with some of the plans, or parts of the plans, but with the approved plans, and I think it reasonable to imply the word "all" there, again on the basis that is what an ordinary reading of the condition implies.
9. Starting from this point, it could be argued that the P.04 is merely illustrative, the buildings either side could change shape or size or even be demolished, but that seems to me to be rather missing the point. Firstly, P.04 is clearly not illustrative, it is not a simple sketch purporting to show a view, but is an allegedly scale drawing with the heights of the neighbour at No 159 drawn on to specifically compare to the proposal. Secondly, whether the neighbours can change is irrelevant. The drawing shows the proposed building in a relationship to the neighbours at the time the application was made regardless of any theoretical future changes. That relationship should have been replicable on site on the date the permission was granted and it was not.

¹ Trump International Golf Club Scotland Ltd v The Scottish Ministers [2015] UKSC 74

10. If we delve further into the extrinsic evidence to see if there is anything else to suggest that reliance on P.04 would be excessive or in some way unreasonable then it becomes clear, for the reasons given in the Council's opinion, that the streetscene drawing was important in the determination of the application, which was only allowed by the committee by a narrow margin. Furthermore it is only by detailed analysis of various spot heights across several of the drawings that the errors are revealed. The Council should be able to rely on accurately scaled drawings, especially when the drawing in question is important to determining the acceptability of the proposal.
11. One of the appellant's opinions refers to *Burhill Estates*², but that is a 1992 case where a barn that was associated with a planning permission for a new dwelling was destroyed in a storm. Could the dwelling still be erected? The Court found it could as the plans showing the adjacent barn were illustrative and did not qualify the permission. In the current appeal the plan in question is not merely illustrative and is included within the permission thanks to condition 1.
12. There is some discussion as to other remedies that may be open to the Council, but that is not relevant to the narrower question before me of whether the planning permission can be implemented in accordance with all the approved drawings. For the reasons given above I do not consider that it can.

Simon Hand

Inspector

² *Burhill Estates Ltd V Woking* (unreported 29 July 1992)