



Appeal Decisions

Site visit made on 5 May 2021

by Helen O'Connor LLB MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 07 May 2021

Appeal A Ref: APP/K5600/W/20/3260484 60 Hornton Street, London W8 4NU

- 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 Mr Shahriar Tadjbakhsh against the decision of The Council of The Royal Borough of Kensington & Chelsea.
 - The application Ref CON/20/02138, dated 9 April 2020, sought approval of details pursuant to condition No 4 of a planning permission reference PP/18/02198, granted on 15 June 2018.
 - The application was refused by notice dated 24 July 2020.
 - The development proposed is described on the decision notice as 'Variation of condition 2 (approved plans) of planning permission 16/03553 allowed under appeal ref: APP/K5600/W/17/3173181 to allow minor extension to basement; reduction in footprint of side and rear extensions at ground floor level; repositioning of light wells, front entrance and single parking bay at ground floor level and skylights to main roof; removal of brick shed to the corner of Pitt Street and Hornton Street; demolition and rebuilding of north-south wall between entrance and side garden; and enhanced landscape proposals'.
 - The details for which approval is sought are revised tree planting proposals to those approved in the landscaping plan under reference CON/18/03676.
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Appeal B Ref: APP/K5600/W/20/3260502 60 Hornton Street, London W8 4NU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Mr Shahriar Tadjbakhsh against the decision of The Council of The Royal Borough of Kensington & Chelsea.
- The application Ref PP/20/02139, dated 9 April 2020, was refused by notice dated 24 July 2020.
- The application sought planning permission for a replacement dwelling house described as 'Variation of condition 2 (approved plans) of planning permission 16/03553 allowed under appeal ref: APP/K5600/W/17/3173181 to allow minor extension to basement; reduction in footprint of side and rear extensions at ground floor level; repositioning of light wells, front entrance and single parking bay at ground floor level and skylights to main roof; removal of brick shed to the corner of Pitt Street and Hornton Street; demolition and rebuilding of north-south wall between entrance and side garden; and enhanced landscape proposals' without complying with a condition attached to planning permission Ref PP/18/02198, dated 15 June 2018.
- The condition in dispute is No 4 which states that: *'No development shall commence until a scheme of landscaping, to include all existing trees and shrubs and proposed trees shrubs and paths and their surfacing materials, has been submitted to and*

approved in writing by the local planning authority, and the development shall only be carried out and maintained in accordance with the details so approved.'

- The reason given for the condition is: *'To protect the appearance and amenity of the area and to accord with policies of the development plan, in particular policy CR6 of the Consolidated Local Plan.'*
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Decision

1. Appeal A is dismissed.
2. Appeal B is allowed and planning permission is granted for a replacement dwelling house - Variation of condition 2 (approved plans) of planning permission 16/03553 allowed under appeal ref: APP/K5600/W/17/3173181 to allow minor extension to basement; reduction in footprint of side and rear extensions at ground floor level; repositioning of light wells, front entrance and single parking bay at ground floor level and skylights to main roof; removal of brick shed to the corner of Pitt Street and Hornton Street; demolition and rebuilding of north-south wall between entrance and side garden; and enhanced landscape proposals at 60 Hornton Street, London W8 4NU in accordance with the application Ref PP/20/02139 dated 9 April 2020, without compliance with condition number 4 previously imposed on planning permission Ref PP/18/02198 dated 15 June 2018 and subject to the conditions set out in the attached schedule.

Application for costs

3. An application for costs was made by Mr Shariar Tadjbakhsh against the Council of the Royal Borough of Kensington & Chelsea in relation to each appeal. These applications will be the subject of separate Decisions.

Preliminary Matters and Background

4. The appeal site has a complex planning history which includes permission granted on appeal¹ for a replacement house in a modern style. Subsequently a variation to plans approved under the original permission was permitted under planning reference PP/18/02198. Condition 4 of that permission required a scheme of landscaping to be agreed with the Council prior to the commencement of development. In addition to the discharge of details under other conditions, a landscaping scheme was agreed under reference CON/18/03676 in 2018 (hereafter referred to as the 2018 landscaping plan) which discharged condition 4. It is stated that development commenced under application PP/18/02198 on 8 October 2018 and I have not seen evidence to the contrary.
5. Subsequently, there have been three further planning permissions² granting other variations to the plans approved under condition 2 of PP/18/02198, with the most recent being granted at appeal in July 2019. Nevertheless, the appeals before me do not relate to those separate consents, rather they relate to condition 4 of permission reference PP/18/02198.
6. The approved 2018 landscaping plan included new tree planting adjacent to the western boundary with Hornton Street. This comprised two semi-mature silver birch trees near the corner with Pitt Street and a series of five ornamental pear

¹ Appeal reference APP/K5600/W/17/3173181, planning reference PP/16/03553

² Referenced PP/18/07591; PP/18/07502 and PP/18/07579, appeal reference APP/K5600/W/19/3226320

trees³ along the boundary. The appellant wishes to revise the approved tree planting with fewer trees of different species. The submitted plans for both appeals show new tree planting⁴ along the western boundary substituting the approved trees with a semi-mature false acacia tree (*Robinia pseudoacacia* 'Frisia') on the corner and three semi-mature Maidenhair trees (*Ginkgo biloba*) along the boundary. There is generally no dispute between the parties that planning conditions to secure and implement a landscaping scheme which includes appropriate tree planting is necessary and reasonable to make the proposal acceptable in planning terms. Rather the dispute is in relation to the details of the scheme.

7. Although they are procedurally different, both the appeals before me seek a similar objective, namely, to secure the agreement for revised new tree planting details as outlined. Appeal A seeks the written approval of an alternative landscaping scheme under condition 4 of PP/18/02198, whereas appeal B seeks to vary the wording of condition 4 of PP/18/02198 to require that the development is carried out in accordance with the revised tree planting details.

Main Issues

8. The main issues are:

- i. In relation to appeal A, whether the proposals submitted address the requirements of condition 4 of PP/18/02198, and;
- ii. In relation to appeals A and B, what the effect of the proposed changes to tree planting would be on the character and appearance of the area and whether they would preserve or enhance the character or appearance of the Kensington Conservation Area (CA).
- iii. In relation to appeal B, what the effect of the proposed changes to tree planting would be on the living conditions of future occupants of the development having particular regard to overshadowing.

Reasons

Requirements of condition 4

9. Condition 4 of planning permission PP/18/02198 required the written agreement of a scheme of landscaping expressly covering proposed trees before development commenced at the site. It goes on to stipulate that the development shall only be carried out and maintained in accordance with the details so approved. As already outlined above, the 2018 landscaping plan addressed the requirements of condition 4.
10. My consideration of appeal A is limited in scope in considering whether the submitted details meet the requirements of the condition. There is no provision to reconsider the planning permission, the wording of the condition or discuss whether the condition meets the necessary tests for conditions as appeal A is not one against the condition itself.

³ Proposed Landscape Plan, drawing No: HS_CON71; NT1 Pyrus Calleryana Chanticleer 4m+ (Ornamental Pear); NT2 Betula Pendula Dalecarlica 6-7m (Silver Birch)

⁴ Andy Sturgeon Design, Tree Proposals, dated 24.3.20

11. Condition 4 is a pre-commencement condition. Due to the wording used there is no scope for flexibility on that point, nor that the details agreed prior to the commencement of development must be implemented. Furthermore, there is no dispute between the parties that permission under reference PP/18/02198 has commenced.
12. Consequently, irrespective of the merits of the substance of the revised tree planting details, the submission can no longer comply with the timing requirements of condition 4. On that basis, I must conclude that the details submitted under appeal A do not address all the requirements of condition 4 and the appeal must fail. It follows that there is no need to consider the merits of appeal A any further. Therefore, the remaining main issues are only relevant in relation to appeal B.

Character and appearance

13. The site lies within the CA, the significance of which is mostly derived from the architectural quality and coherence of the urban houses and mansion flats built in the latter half of the 19th Century. The presence and number of mature trees visible from the public domain noticeably soften the appearance of the densely built up area and therefore, they contribute positively towards the character and appearance of the CA. I have a statutory duty⁵ to pay special attention to the desirability of preserving or enhancing the character or appearance of the CA.
14. The appeal site is on a prominent corner plot which accommodates a recently constructed replacement dwelling. Its modern form and detailing depart from the prevailing traditional, ornate terraces and provides an interesting contrast. The planning history before me indicates that mature trees were an important feature within the grounds of the former house, and some have been retained as part of the recent development. The approved 2018 landscaping plan included new tree planting comprising two silver birch and five pear trees near the western boundary. Their proximity to the street would add greenery, soften the appearance of the built form and generally enhance the street scene. In the event that both the appeals before me were unsuccessful, condition 4 would require the implementation of the 2018 landscaping plan. Therefore, it is highly relevant for comparison purposes with the appeal scheme.
15. In comparison to the 2018 landscaping plan, the revised tree planting proposals reduce the overall number of trees along the western boundary from seven to four. Given the relatively limited area available to accommodate the trees, there is no dispute between the parties that a reduction in the density of trees would be an improvement in terms of their future resilience and providing a more comfortable space for the specimens planted. Essentially, the main parties disagree as to whether the species proposed would be suitable for the space considering their mature size, lateral spread and rate of growth. The greatest disparity is in relation to the suitability of the proposed false acacia tree on the corner of Hornton Street and Pitt Street.
16. Policy CR6e of the Royal Borough of Kensington and Chelsea Local Plan, September 2019 (LP) requires new trees to be suitable species for the location and to be compatible with the surrounding landscape and townscape. Section 2.3.2 of the Trees and Development, Supplementary Planning Document, April

⁵ Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990

2010 (SPD) elaborates further and sets out the relevant factors when planning a tree planting scheme. This includes that adequate space should be allowed for trees to reach their mature height and spread, that they should complement the surrounding architecture and backdrop, and avoid causing nuisance to neighbours or structural damage to property.

17. The false acacia tree proposed would introduce a large single tree into the corner of the site which would give it prominence in the street scene. Its bright yellow green foliage would contrast attractively with the colour of the brick used on the replacement dwelling.
18. Furthermore, the data provided in relation to different tree species from the Royal Horticultural Society, Trees and Design Action Group and Urban Forest Ecosystems Institute⁶ confirms that the height of the mature tree would be similar to a silver birch. A comparison between the two species regarding the spread at maturity is less clear cut with the sources conflicting as to whether a false acacia tree would have a smaller crown spread than a silver birch. However, both are described as large trees with an open crown. North American research indicates that the silver birch has the larger spread. The balance of evidence before me suggests that the lateral spread of a single false acacia tree is likely to be smaller than two silver birch trees in a broadly similar location.
19. In addition, the growth rate information indicates that both the species would take between 20-50 years to reach their ultimate height with greater annual growth indicated for the silver birch. Accordingly, this would not support the view that the false acacia tree would require regular heavy pruning that would cause the tree to be lopsided and unsightly, or in any event, to a significantly greater extent than the two silver birch trees already approved.
20. The Council bases its concerns upon its general experience of false acacia trees across the borough. Nevertheless, no specific evidence has been provided. Based on the substantive information before me, there is little basis to suppose that the proposed false acacia tree would be significantly more problematic in encroaching on the building than the trees approved in the 2018 landscaping plan.
21. Correspondence⁷ between the main parties reveals that there was broad agreement that planting three *Ginkgo biloba* trees using the smaller cultivated variety 'Princeton Sentry' would be acceptable, which is emphasised by the appellant as part of their case. Based on the species information provided, the size of that variety would be of a broadly equivalent size to the ornamental pear trees already approved whereas otherwise the *Ginkgo biloba* tree is described as a massive tree in the information provided.
22. Photographs⁸ provided demonstrate that both species of proposed tree are evident in the public realm in the vicinity of the appeal site. Therefore, they would be compatible with the surrounding townscape.
23. Taking these factors together, I am satisfied that the proposed revisions to the tree planting would fulfil the guidance in the SPD and make a positive

⁶ Exhibits XII-XIV, Appellant's Appeal Statement

⁷ Emails included in Exhibit XI, Appellant's Appeal Statement

⁸ Pages 13-14 Appellant's Appeal Statement & pages 5-6 Andy Sturgeon Design, Tree Proposals, dated 24.3.20

contribution to the character and appearance of the area, including the significance of the CA. Moreover, the reduction in density of trees relative to the approved 2018 landscaping plan would be an improvement.

24. The evidence before me suggests that there has been a genuine difference of opinion between competent tree professionals. However, it also shows that the tree proposals have been carefully thought through and are backed up with research. Given that trees are living organisms, individual specimens, even within the same species will inherently differ to an extent, which may affect their size and form. In turn these characteristics will be affected by factors in the environment and future maintenance regime. Accordingly, whilst the species of tree selected is important, it is only one component of the overall planting scheme. The selection of the individual specimens and diligent attention to maintenance are at least equally important. Therefore, the appellant's strong aesthetic preference for the false acacia tree has some relevance in that it provides positive motivation to ensure the disputed tree survives and thrives.
25. This is further reinforced by condition 5 of planning permission PP/18/02198 which requires the replacement of trees if they die, are removed or become seriously damaged or diseased within five years of planting. Moreover, as the site is within the CA, there are further controls on works which may be undertaken in relation to trees.
26. I have had regard to the representations received which generally encourage tree planting that would provide longevity whilst quickly establishing a tree canopy along the western boundary. Whilst some concerns are raised that the false acacia may be susceptible to disease, there is little evidence to show that this would be to a notably greater extent than other tree species.
27. Accordingly, I find that the revised tree planting proposed would make a positive contribution to the character and appearance of the area and as such would enhance the character and appearance of the CA. It follows that I find no conflict with policy CR6 of the LP which, amongst other things, requires new trees to be of a suitable species for the location and compatible with the surrounding townscape. Consequently, there would be no conflict with policy CL1 of the LP which, amongst other matters, requires development to respond to the local context.

Living conditions

28. The Council raises concerns that the size and growth rate of the proposed false acacia tree would be likely to result in poorer living conditions to future residents of the adjacent dwelling that could increase pressure to remove the tree. However, as already outlined this is not borne out by the evidence before me which suggests that the situation in this regard would be unlikely to be materially different from the approved 2018 landscaping plan.
29. Moreover, the tree would be within the grounds of the dwelling whose future occupants would be likely to be responsible for its maintenance and to which the planning conditions and controls over works to trees already mentioned would apply.

30. The evidence before me does not show that there would be significant overshadowing to other nearby residents. In addition, the representations received generally encourage maximising the height and canopy of trees.
31. Therefore, there is little basis to show that the proposed tree planting would have an unacceptable impact on the living conditions of future occupants of the development having particular regard to overshadowing. Consequently, it would not conflict with the criteria in policy CL5 of the LP which seeks to ensure a good standard of living conditions.

Conditions

32. Planning Practice Guidance (PPG)⁹ explains that the original planning permission (in this case PP/18/02198) will continue to exist whatever the outcome of an application under section 73 of the Town and Country Planning Act 1990 (appeal B in this case). The conditions imposed on the original permission still have effect unless they have been discharged. However, to aid clarity, decision notices for the grant of planning permission under section 73 should set out the conditions imposed on the new permission, and restate the conditions imposed on the earlier permission that continue to have effect.
33. The original permission had 15 conditions. I have adjusted the first condition to reflect the date that the original permission was implemented and to be consistent with the approach taken in appeal reference APP/K5600/W/19/3226320 to which my attention has been drawn. Furthermore, the final condition related to demolition of the former dwelling which has since taken place. Accordingly, there would be no planning purpose served by my restating it. The Council have suggested 14 conditions, which reflect that some conditions have subsequently been discharged and had details agreed. It is appropriate to reflect that in restating the conditions.
34. The appellant has requested that I impose conditions like those imposed on the subsequent s73 application approved at appeal under reference APP/K5600/W/19/3226320, in particular the varied list of drawings approved under that separate application. In granting permission under section 73 there is power to impose new conditions, but this is not unlimited. PPG advises that it can be done provided the conditions do not materially alter the development that was subject to the original permission and are conditions which could have been imposed on the earlier planning permission.
35. The original planning permission in this instance is reference PP/18/02198 not APP/K5600/W/19/3226320, and so fulfilling the appellant's request would conflict with the PPG advice. Furthermore, the appeal decision granted separate planning permission in its own right. Had the appellant chosen to do so, he could have applied to vary the conditions on that consent. He did not do so, and I am not aware that I have a general power to otherwise consolidate subsequent planning permissions which made different material alterations to the scheme before me. As such, the plans listed in condition 2 of the original permission should remain the same.
36. Returning to the central issue concerning appeal B in this case, it would be appropriate to remove the original pre-commencement condition 4 of PP/18/02198. It is replaced with wording which secures the revised tree

⁹ Paragraph: 040 Reference ID: 21a-040-20190723

planting proposals as well as the other parts of the 2018 landscaping scheme previously approved under application CON/18/03676. The variety of *Ginkgo biloba* trees to be planted has been specified as this reflects the smaller size of the cultivated variety which would be more suited to the limited space available.

37. Finally, I have amended the wording of the Council's suggested condition relating to the Considerate Constructors Scheme to reflect the degree of construction that has already occurred at the site, as it would make little sense in these circumstances for it to be a pre-commencement condition.

Conclusion

38. For the reasons set out above, I conclude that appeal A is dismissed.
39. In relation to appeal B there are no material considerations that indicate the application should be determined other than in accordance with the development plan. For the reasons given above I conclude that appeal B should succeed. I will grant a new planning permission without the disputed condition but substituting it with a revised wording and restating those undisputed conditions that are still subsisting and capable of taking effect.

Helen O'Connor

Inspector

Schedule of conditions

- 1) The development permitted (PP/18/02198) was implemented on 08/10/2018.
- 2) The development shall not be carried out except in accordance with the details shown on submitted plans Site map. Location plan. HS_P: /01, /02, /03, /04, /05, /06, /07, /08, /09, /10, /11, /12, /40, /41, /42, /43, /44, /45, /46, /47, /47A, /48, /49, /50 and /51.
- 3) The remainder of the development shall be carried out in accordance with the tree protection details approved under ref CON/18/03676.
- 4) The remainder of the development shall be carried out in accordance with the new tree planting proposals in Tree Proposals prepared by Andy Sturgeon Design dated 24 March 2020. The three Ginkgo biloba trees shown on page 4 of the proposals shall be the 'Princeton Sentry' variety. Except for the new tree planting, the landscaping scheme shall be carried out in accordance with the details otherwise approved under ref CON/18/03676.
- 5) All tree and shrub planting forming part of the plans and details approved through this planning permission shall be carried out in the first planting and seeding season following the first occupation of the development or the completion of the development whichever is the sooner. Any trees or shrubs which, within a period of five years from the first planting and seeding season referred to above, die, are removed, or become seriously damaged or diseased, shall be replaced in the next planting season with others of similar size and species.
- 6) For the duration of works the tree(s) existing on the site at the date of this permission (with the exception of those already benefiting from consent for felling, lopping, or pruning) shall be protected so as to prevent damage above and below ground, and no tree shall be lopped, topped, or felled, or root pruned, without the prior written approval of the local planning authority.
- 7) The roof of the extension forming the subject of this planning permission shall not be used at any time as a terrace.
- 8) No water tank, lift motor room, or other structure or appliance, shall be erected upon the roof of the extension hereby approved.
- 9) The remaining works on site shall be completed in accordance with the Construction Traffic Management Plan (CTMP) approved under ref CON/18/03702, on 30/07/2018, or in accordance with any revised CTMP as may be submitted and approved under this condition.
- 10) For the remainder of works connected with the development a Chartered Civil Engineer (MICE) or Chartered Structural Engineer (MI Struct.E) shall be retained to supervise the construction works throughout their duration and their appointment confirmed in writing to the Local Planning Authority.
- 11) The lead contractor, or the site, shall be signed to the Considerate Constructors Scheme (CCS) and its published Code of Considerate Practice, and the details of (i) the membership, (ii) contact details, (iii) working hours as stipulated under the Control of Pollution Act 1974, and (iv) Certificate of Compliance, are clearly displayed on the site so that

they can be easily read by passing members of the public, and shall thereafter be maintained on display throughout the duration of the works forming the subject of this permission.

- 12) The Sustainable Urban Drainage System (SuDS) submitted under parent planning permission ref. PP/18/01298 shall be fully implemented and maintained thereafter.
- 13) The development shall be completed and maintained in accordance with the details approved on 22/08/2018 under ref CON/18/03689, with regard to external materials, windows, doors, gate, railings and site drainage.
- 14) No cables, wires, aerials, meter boxes, flues, ducts, grilles or pipework other than black rainwater pipes, shall be fixed to any elevation facing a highway.