



Appeal Decision

Hearing Held on 28 September 2021

Site visit made on 29 September 2021

by Zoë Franks Solicitor

an Inspector appointed by the Secretary of State

Decision date: 22nd OCTOBER 2021

Appeal Ref: APP/N5090/C/21/3267195

Former No.70, High Street, Barnet, EN5 5SJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by 70 High Street, Barnet Limited against an enforcement notice issued by the Council of the London Borough of Barnet.
 - The enforcement notice, numbered ENF/1191/20, was issued on 15 December 2020.
 - The breach of planning control as alleged in the notice is without planning permission the unauthorised demolition of an existing building and the construction of a three storey replacement.
 - The requirements of the notice are:
 - 1 Demolish the building in its entirety;
 - 2 Rebuild the building to its original prior to demolition, specificationsThe replacement building:
 - 1) Must match that shown in drawing No. 02 850/01 Rev C from planning application N03832F/02, with the building not to exceed a height of 8.4 metres when measured adjacent to No.72 High Street.
 - 2) Must match in all external respects the size, design, and specifications of the original building
 - 3) Must comply with any requirement imposed by any enactment applicable to the construction of buildings
 - 4) May differ from the demolished building only in any respect which, if the demolished building had been altered in that respect, would not have constituted a breach of planning control.
 - The period for compliance with the requirements is 8 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
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Decision

1. The appeal is allowed on ground (g), and it is directed that the enforcement notice be varied: by the deletion of 8 months and the substitution of 12 months as the period for compliance. Subject to these variations 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.

Ground (c)

2. To succeed on the appeal on this ground the appellant must show that the matters stated in the notice do not constitute a breach of planning control. The

- appellant's case is that the development has been built in accordance with the plans approved under the discharged Condition 3 of permission reference 15/0438/FUL ('the Original Permission'). These plans were specifically carried forward into permission reference 19/3026/S73 ('the Section 73 Permission') and the appellant argues that the development was first built in accordance with the Original Permission and then in accordance with the S73 Permission, so that both permissions were implemented. The appellant accepts that the development is not built in accordance with some of the approved plans on the Original Permission which show the relative heights of the adjoining properties. However, it is the appellant's case that there is a permission capable of implementation, through the detailed plans showing the spot levels of the land on the discharge of Condition 3, and that the development is therefore lawful.
3. The Council's case is that neither permission was capable of implementation due to the irresolvable inconsistencies in the approved plans, and that in any event the building is larger than that which would be approved even if accepting the most benevolent of interpretation of the permission (i.e. only the plans approved pursuant to Condition 3). The Council relies on the Choiceplace case¹ as authority that the development must be capable of being implemented in accordance with the approved drawings which includes implementation in a manner which replicates the street elevations.
 4. The parties accept that the street elevations submitted as part of the Original Permission show a stepping down in the ridge heights of the buildings from No. 72, to the appeal development at No.70 and then again to No.68. These elevation drawings, which were part of the approved plans on the Original Permission, show the proposed development to be of an extremely similar height as the building that it would replace. This is not disputed by the appellant. These plans were not purely illustrative but purport to be drawn to a specified scale.
 5. Condition 3 on the Original Permission required:
 - a) No development shall take place until details of the levels of the building(s), road(s) and footpath(s) in relation to the adjoining land and highway(s) and any other changes proposed in the levels of the site have been submitted to and approved in writing by the Local Planning Authority.*
 - b) This development shall thereafter be implemented in accordance with the details as approved under this condition and retained as such thereafter.*
 6. Two drawings were submitted by the appellant to discharge this condition, SK11 and SK11.1. Only SK11.1 was included as an approved drawing on the discharge of condition reference 18/3827/CON, but this drawing alone contains contradictory information. The appellant states that the levels shown on plan SK11.1 are replicated in the 'as built' development, and that the proposed cross-section on that drawing shows the height of the building as built from the existing levels shown on the topographical site plan. However, drawing SK11.1 also shows the line of the existing building at the same height as the ridge height of the proposed development on the cross-sectional element of the drawing. It is therefore not possible to build the development in accordance with all of the information submitted and approved pursuant under Condition 3 on this one drawing.

¹ Choiceplace Properties Limited v SSHCLG, [2021] EWHC 1070 (Admin)

7. Condition 3 was not the only condition to be discharged at that time. Plans were also submitted to discharge Condition 4 on the Original Permission which related to the materials to be used. Plan SK-12A, which, is also an approved plan on the discharge of permission notice reference 18/3827/CON, shows the proposed front and rear elevations. Whilst I accept that this plan was not submitted to discharge the levels condition (Condition 3), it was submitted and considered at the same time and clearly shows the continuous 'stepping down' in the roof heights from No.72 to the development to No. 68. This is another example of how it would not have been possible to build the development in accordance with all of the approved plans.
8. The Section 73 Permission specifically carried forward Plan SK11.1 as an approved plan under its own condition 3 and the same issues regarding its implementation therefore also apply to this permission.
9. I heard detailed evidence during the hearing regarding the measurements of the development as built when compared against plans SK11.1. It was clear from my site visit and from photos submitted as part of the appeal that the development as built is clearly much higher than as shown compared to the neighbouring buildings on the various street elevations and comparative drawings submitted in the three applications.
10. Whilst the appellant accepts that in general terms the development is higher than the building that it replaced, and that there are inconsistencies in the approved plans, they argue that both the Original and Section 73 Permissions were nevertheless capable of implementation and that factually this is what happened. The appellant argues that, taking account of the caselaw² the permissions should only be considered as void if they can't be given any sensible meaning and that any ambiguities should be resolved by the reader where possible. They argue that the facts here are different to those in the Choiceplace case as approved drawing SK11.1 does provide the specific measurements in relation to the spot levels of the surroundings. The appellant's case is that this resolves any ambiguity which existed on the plans and that SK11.1 was also carried forward into the Section 73 Permission so applied equally in relation to that permission.
11. The Council's case is simply that Choiceplace is quite clear that a permission cannot be implemented if it is not possible to build the development to all of the approved plans. The Council argues that it applies in this appeal as neither the Original nor the Section 73 Permission can be replicated on site because of the discrepancies in the approved plans and drawings
12. Taking into account the caselaw, the submissions made and received during the course of the appeal, the approved plans and my observations from the site visit I do not find that the differences in the various approved plans can be reconciled. The depicted relationship with the adjoining buildings as shown on the "Existing - Proposed Elevations" and the "Proposed Front Elevation and Street View" drawings should have been capable of replication on the site at the time permission was granted, but was not.
13. The discharge of a condition should not lead to a materially different development from that which was granted by the permission itself. This would

² *Trump International Golf Club Scotland Limited v the Scottish Ministers* [2015] UKSC 74 and *Lambeth LBC v SCLG & Aberdeen Asset Management* [2019] UKSC 33

be the outcome in this case if the plans submitted pursuant to Condition 3 were taken as permitting the much higher development than that initially granted and would not be to take a purposive approach when considering the permission in line with the caselaw. It is also relevant that that it is not only the ridge height of the development which is different to that shown on the elevation drawings under the Original Permission, the levels of each floor have also altered substantially, as is clearly evident from the heights of the front windows when viewed from the street. The development overall is therefore materially different to that as shown on those drawings. Allowing the levels measurements on drawing SK11.1 to take precedence over all of the other approved drawings which show a building of a substantially lower height cannot be to give a sensible interpretation of the permission overall.

14. Even if it were possible to resolve the ambiguities between the various approved plans in the way suggested by the appellant, there is also a glaring inconsistency in plan SK11.1 itself which shows the measurements of the building from street level but also shows the height of the existing building as the same as the proposed ridge height which is just not correct. This means that the single drawing on which the appellant wishes to rely, for both the Original and the Section 73 Permission, cannot be replicated on site.
15. Neither the Original Permission nor the Section 73 Permission were capable of being implemented and the demolition of the building was therefore also unauthorised development due to the location of the building within the conservation area. For these reasons, the appeal on ground (c) does not succeed

Ground (a) and the deemed application for planning permission

16. The application for permission deemed to have been made is for the demolition of the existing building and construction of a three storey building i.e. the 'as built' building at the time that the notice was served.
17. The main issues in the ground (a) appeal are the effect of the development on: the character and appearance of the area and the Wood Street Conservation Area; and the living conditions of neighbouring residents of 72 High Street.
18. The development is located next a busy Y-shaped junction on the High Street in Chipping Barnet which has a mix of shops, pubs and food outlets and other uses including the college, church and dance school. It is opposite St John the Baptist Church, around which the junction is formed, and as such is in a prominent location within this narrower locality and readily viewed from many points on the roads and pavements.

Character and appearance

19. The High Street is within Character Area 1 of the Wood Street Conservation Area which is described as having a "Market town feel" and "Buildings that are mainly two or three storeys with a mixture of vernacular architecture, form, detailing and materials demonstrating the area's organic growth characteristic of English market towns" with "a lively roofscape".³ The conservation area is significant predominantly in terms of its historic and architectural interest, and the statutory duty requires that special attention shall be paid to the

³ Wood Street Conservation Area Character Appraisal Statement (adopted July 2007), pages 29 and 31

desirability of preserving or enhancing the character or appearance of that area.⁴

20. There are several listed buildings in the immediate vicinity of the development namely St John the Baptist Church, Tudor Hall and No.66 High Street and to meet the statutory duty in relation to these the decision maker shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.⁵ The expert heritage evidence submitted by the appellant concludes that the development has a neutral impact upon the setting of these listed buildings and preserves their significance.⁶ Neither the Council nor the interested parties have disputed this in relation to the listed individual buildings (nor indeed the locally listed building at No.68) although they are of the view that the development causes harm to the significance of the conservation area, in large part due to the lack of stepping down in the height of the rooflines. I do not find that the significance of the various listed buildings in the vicinity has been harmed by the development.
21. The development is three storeys, the top storey being contained within a mansard roof. The development is unoccupied but the ground floor has been constructed for a commercial use with residential to the 2 upper floors. When viewed from both Wood Street and the High Street to the front, the development is evidently higher than No.72. The windows on the first floor of the development are at a higher level than the first floor windows on No.72 despite the fact that the street level slopes in the opposite direction towards No.68. This appears incongruous and the building looks too high overall when compared to No.72.
22. The relationship of the development to No.68 is even more dominant as the exposed brick gable towers over the much smaller two storey building. There is also an extremely clumsy relationship with the chimney of No.68 which is now dwarfed by the much higher gable wall. I accept that there are other exposed gables on other buildings in the area, but in this case the gable is extremely large and overbearing in appearance and bulk in the context of the adjoining No.68. The exposed gable and comparative height can be viewed from most directions on the junction, other than if approaching from the west along the High Street, but the views along the High Street from the east can be seen at quite some distance due to the slope and curve in the road layout.
23. When standing closer to the development, the building feels and looks overly large in terms of its height and bulk in its surroundings and ill-proportioned when seen in comparison to its adjoining neighbours. This awkwardness in the relationships is exacerbated by the use of the materials. The brickwork element at the first floor is overly extensive and highlights that the floor levels are very different to what would be expected when compared to its neighbours (which includes taking account of the general slope towards No.68).
24. The development does therefore cause material harm to the character and appearance of the area. Harm is also caused to the Wood Street Conservation Area to which I give considerable importance and weight, and I accept that it is less than substantial in terms of paragraph 199 of the National Planning Policy

⁴ Section 72(1), Planning (Listed Buildings and Conservation Areas) Act 1990

⁵ Section 66(1), Planning (Listed Buildings and Conservation Areas) Act 1990

⁶ Proof of Evidence of Haig Dalton, paragraph 4.11

Framework 2021. The appellant argues that the less than substantial harm to the conservation area should be weighed against the public benefit of the provision of additional residential accommodation. I accept that there is some public benefit, but the Original Permission as granted provided the same number of additional residential units which indicates that it would be possible to provide the additional residential use in other ways, and so I give it limited weight. In any event, the benefit of the additional residential accommodation would not outweigh the harm that I have found to the character and appearance of the area and the significance of the Conservation Area.

Living conditions

25. The Council also stated that the development is detrimental to the residential amenity of the neighbouring occupiers of No.72. The appellant's case is that the Original Permission and the Section 73 Permission had been acceptable in regard to this issue and that there was no difference with the development as built and therefore relied on the Daylight and Sunlight Report submitted with those applications.
26. The Council's position is that the increase in the height of the development would lead to an unacceptable impact on a habitable room in No.72 due to reduced light and outlook. However, the Council did not produce any further details about this or provide a comparison with the development if built to the height of the original building. I was able to visit the internal and external parts of the rear of the building during my site visit and I do not think that any additional harm would have been caused to the living conditions of the occupiers of No.72 by the additional height at the back of the building. The Council are not arguing that the development is any closer in terms of depth of the new building and did not provide any evidence to contradict the Daylight and Sunlight Report previously submitted or to say why it would not apply in this case. For those reasons I do not find that the development causes harm to the living conditions of the occupiers of No.72.

Conclusion on Ground (a)

27. For the reasons set out above, I find that the development causes harm to the character and appearance of the area and to the character of the Wood Street Conservation Area. This is contrary to the aims of Policy CS5 of the Barnet Core Strategy 2012 and Policies DM01 and DM06 of the Development Management Policies (which form part of the development plan for the area) and which seek to create high quality places and respect local context, character and heritage. The development is therefore contrary to the development plan and in the absence of any material considerations of sufficient weight to overcome this conflict, I conclude that the appeal on ground (a) and the deemed application for planning permission should be dismissed.

Ground (f)

28. To succeed on this ground the appellant must show that the steps required by the notice to be taken exceed what is necessary to remedy the breach of planning control, or as the case may be, to remedy any injury to amenity which has been caused by any such breach. In this case the requirements are to demolish the development and reinstate what was there prior to the works taking place.

29. The appellant's case is that an obvious lesser step that should be permitted in this case (as part of the ground (a) appeal) is the demolition of the development without the reinstatement, and that the original building on the site was a detracting building within the conservation area. The Council and the interested party felt that the original building did not have a negative effect on the street scene, whatever the wider problems more generally with the condition of it. The appellant did not submit any evidence from its heritage expert regarding this, and the building condition report which was included as an approved document in the Original Permission concludes that the building is dilapidated and that remedial works "will be prohibitively expensive" and that the front elevation "may have to be rebuilt entirely". However, it does not, and was not intended to, provide an assessment of the building's impact on the significance of the conservation area.
30. The Council also stated that they would not have granted permission solely for the demolition of the original building without a replacement building and that the purpose of the notice was to restore the land to its last lawful position. This shows that the purpose of the notice was to remedy the breach of planning control.
31. The requirement to reconstruct the building as it was before is not unreasonable and does not exceed what was necessary to remedy the harm of demolition i.e. part of the breach of planning control. The lesser step of demolishing the development would remove the harm caused by it but would not remedy the harm caused by an empty site within the street scene in the conservation area.
32. The appeal on ground (f) therefore fails.

Ground (g)

33. The issue is whether the period allowed for the remedy is reasonable. Given the extent of the works and the ongoing effects of the Coronavirus Pandemic the 8 months period for compliance is not reasonable to allow for the demolition of the development and reinstatement of the previous building. I have taken into account the ongoing harm being caused by the development and I find that the 20 months requested by the appellant is also not reasonable. However, given the nature and extent of the works and the potential legal consequences if the requirements are not fulfilled, I find that extending the period to 12 months would be proportionate. I also note that the Council have indicated that they are aware of their discretion under section 179 of the 1990 Act.
34. For the reasons given above I conclude that a reasonable period for compliance would be 12 months, and I am varying the enforcement notice accordingly, prior to upholding it. The appeal under ground (g) succeeds to that extent.

Zoë Frank's

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Richard Turney	Of Counsel
He called S Jodieri of 70 High Street Barnet Limited	Appellant
Haig Dalton	Chilcroft Heritage Planning
Ajay Pervi	Richmond Design and Build
Anthony Allen	Allen Planning Limited

FOR LONDON BOROUGH OF BRENT COUNCIL:

James Gould	Senior Planning Enforcement Officer
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INTERESTED PARTIES:

Gordon Massey
Ken Rowland
David Earnshaw
Robin Bishop

DOCUMENTS

- 1 Caselaw submitted by the Appellant
- 2 Full sets of approved drawings and plans in planning permission reference numbers 15/04358/FUL, 18/3827/CON and 19/3026/S73
- 3 Draft conditions submitted by the Council