



Appeal Decision

Site visit made on 7 June 2022

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 October 2022

Appeal Ref: APP/K5600/C/22/3291761

Land at 1 Cornwall Mews South, London, SW7 4RZ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Kawaljit Singh Arora against an enforcement notice issued by Royal Borough of Kensington and Chelsea.
 - The notice, numbered ENF/21/01309, was issued on 21 December 2021.
 - The breach of planning control as alleged in the notice is, without planning permission, the excavation of a two-storey basement.
 - The requirements of the notice are to:
 1. Completely infill the excavated area at the lower basement level denoted as 'pool' and shown as hatched within Appendix A below.
In carrying out the above requirement you are required to undertake the works in the following way:
 - a) The remedial works necessary to complete step 1 above shall only be undertaken via 1 Southwell Gardens;
 - b) Suspend the parking bays as necessary to ensure there is no obstruction of the highway;
 - c) Prior to the commencement of the remedial works you must appoint a Chartered Civil Engineer (MICE) or Chartered Structural Engineer (MI Struct.E) for the duration of the works and confirm their appointment in writing to the Local Planning Authority;
 - d) Fully comply with the Council's Code of Construction Practice (2019).
 - The period for compliance with the requirements is six calendar months from the effective date of the notice.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. It is directed that the enforcement notice is corrected by:
 - Deleting paragraphs 5.1.a), b) and d).
 - Renumbering paragraph 5.1.c) as paragraph 5.1.a).
2. Subject to the corrections, the appeal is allowed insofar as it relates to land hatched in black on the plan for a 4 metre deep basement and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for a 4 metre deep basement at Land at 1 Cornwall Mews South, London, SW7 4RZ and subject to the following conditions:

(i) The two-storey basement shall be infilled via No 1 Southwell Gardens to half its height under the full supervision of a Chartered Civil Engineer (MICE) or Chartered Structural Engineer (MI Struct.E) and in full compliance with the Council's Code of Construction Practice (2019) within six calendar months of the date of the failure to meet any one of the requirements set out in (a) to (f) below:

- a) Within three months of the date of this decision a Construction Method Statement in accordance with the Council's Basement Supplementary Planning Document (April 2016), shall have been submitted for the written approval of the local planning authority. The Construction Method Statement shall include a timetable for carrying out the works.
- b) Within three months of the date of this decision a scheme for the protection from sewer flooding, including timetable for implementation, shall have been submitted for the written approval of the local planning authority.
- c) If within eight months of the date of this decision the local planning authority refuse to approve the Construction Method Statement and the scheme for the protection from sewer flooding or fail to give a decision within the prescribed period, a valid appeal shall have been made to the Secretary of State.
- d) If an appeal is made in pursuance of c) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
- e) The approved Construction Method Statement and scheme for the protection from sewer flooding shall have been carried out and completed in accordance with the approved timetables.
- f) Upon implementation of the approved scheme for the protection from sewer flooding in this condition, that scheme shall thereafter be retained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

(ii) All works required by Condition (i) shall be undertaken via No 1 Southwell Gardens.

(iii) All works required by Condition (i) shall be carried out in accordance with the Council's Code of Construction Practice (2019).

3. The appeal is dismissed and the enforcement notice is upheld as corrected insofar as it relates to land hatched black on the plan and the excavation of a two-storey basement and planning permission is refused in respect of the excavation of a two storey basement at Land at 1 Cornwall Mews South, London, SW7 4RZ on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Preliminary Matters

4. The appeal form cites grounds (a), (c) and (f). However, the appellant has raised issues which relate to ground (d). The parties have had an opportunity

to consider the representations made by the appellant and I have therefore determined the appeal with the additional ground.

The Appeal on Ground (c)

5. A ground (c) appeal is that the matters alleged in the notice, namely the excavation of a two-storey basement, do not constitute a breach of planning control. The onus lies with the appellant to make his case on the balance of probabilities.
6. S55(1) of the 1990 Act provides that 'development' means the carrying out of building, engineering, mining, or other operations in, on, over or under land, or the making of any material change of use of any buildings or other land. The excavation of a two-storey basement beneath the residential property is an engineering operation and amounts to development requiring planning permission. The appellant does not seek to argue otherwise.
7. A certificate of lawful use or development (LDC) was granted by the Council on 17 September 2013 under s192 of the 1990 Act for the excavation and provision of a single-storey basement extension beneath the footprint of the appeal property¹. The Council decided that the works were permitted development under Class A (the enlargement, improvement or other alteration of a dwellinghouse) of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 as amended (the 1995 GPDO), which was in force in 2013.
8. The appellant acknowledges that the excavation extends 1.85m beyond the 4m deep basement authorised by the LDC. The Council also rightly highlight that the excavated area is not limited to the footprint of the building (as shown on the plan attached to the LDC), but is also forward of the building line, beneath the public highway. Whilst in that regard the position of the front, below ground, retaining wall may not have changed, the extent of excavation behind it has. The alleged development is therefore materially different to that granted an LDC and is not covered by it.
9. The appellant states that the extended basement works were carried out between 2013 and 2015 following the construction of the authorised basement. However, no evidence is provided to show that a 4m basement restricted to the footprint of the dwelling was constructed as a discreet entity.
10. S192(4) states that "*The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness*". Based on the evidence before me, it is more likely than not, that before the operations described in the LDC were begun, the appellant carried out different operations, namely the 5.85m development and excavation beneath the road, which do not form part of the LDC granted. The start of those works cannot properly be considered to be the beginning of the 4m excavation. What actually began amounted to a different operation. Consequently, the benefit of the LDC has been lost and there is no conclusive presumption of lawfulness.
11. The appellant further argues that the additional excavation works may also have been permitted development. However, paragraph A.1(c) of the 1995

¹ Application reference: CL/13/04405

GPDO states that development is not permitted by Class A if the part of the building enlarged, improved or altered would be nearer to any highway which bounds the curtilage of the dwellinghouse than the part of the original dwellinghouse nearest to that highway. Paragraph A.1(d) states that development is not permitted if the part of the building enlarged, improved or altered would be within 2m of the boundary of the curtilage of the dwellinghouse and would exceed 4m in height.

12. Even if the alleged excavation could be considered to comply with limitation paragraph A.1.(c), on the basis that the below ground retaining wall remains in the same position as that of the original dwellinghouse, being within 2m of the boundary of the curtilage of the dwellinghouse and 5.85m in height, it would have been in breach of paragraph A.1(d) of Class A, and, as such, would not have been permitted development.
13. In any case, there is little evidence that the works were carried out between 2013 and 2015 when the 1995 GPDO was in force². The Council states that it saw a double basement being excavated after being advised in January 2021 of a large number of construction vehicles accessing the site via Cornwall Mews. At that time, the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the 2015 GPDO) would have been in force.
14. Class A of the same also provides, subject to limitations and conditions, that the enlargement, improvement or other alteration of a dwelling house is permitted development. However, the alleged development would fail to meet the limitations of paragraph A.1.(e) in that the section details show that the enlarged part of the dwellinghouse extends beyond the front wall which forms the principal elevation of the original dwellinghouse.
15. Furthermore, a Direction under Article 4(1) of the 2015 GPDO came into force on 28 April 2016 in respect of Class A of Part 1 of Schedule 2 in so far as it relates to the enlargement, improvement or other alteration of a dwellinghouse by way of basement development. The effect of the Article 4 Direction is that the permission granted by Article 3 of the 2015 GPDO shall not apply to such development and that such development shall not be carried out unless planning permission is granted by the Council³. A retrospective application for *"excavation of a basement one storey beneath the single storey basement already constructed, to form a swimming pool"* was submitted on 6 July 2021 but was refused on 13 December 2021⁴. The alleged development does not therefore benefit from a grant of express planning permission.
16. Accordingly, the appellant has not demonstrated to the required standard of proof that the alleged development was not in breach of planning control. The appeal on ground (c) fails.

The Appeal on Ground (d)

17. An appeal under ground (d) is that at the time the enforcement notice was issued, it was too late to take enforcement action. In order to succeed on ground (d), it is for the appellant to demonstrate, again on the balance of

² In an appeal on ground (c), whether the alleged development is permitted development falls to be considered against the version of the General Permitted Development Order which was in force when the alleged development took place.

³ Even if as argued by the appellant the alleged development was carried out prior to confirmation of the Direction, it would not have been permitted development for the reasons explained.

⁴ Application ref: PP/21/04413

probabilities, that the alleged development was substantially completed four years before the date of the enforcement notice. The material date in this case is 17 December 2017⁵.

18. As noted above, part of the appellant's case is that the works were carried out between 2013 and 2015. However, I have little or no evidence to that effect. That timeline is also contradicted by the Council's Building Control site notes which refer to ongoing work during the period between October 2016 and July 2021.
19. It has not therefore been demonstrated, to the required standard of proof, that it was too late to take enforcement action. The appeal on ground (d) fails.

The Appeal on Ground (a)

Main Issues

20. The main issues are:

- whether the alleged development complies with:
 - the Royal Borough of Kensington and Chelsea Local Plan, September 2019 (LP) Policy CL7 and Basement Supplementary Planning Document (SPD); and
- the effects of the alleged development on:
 - the living conditions of neighbouring residents;
 - surface water and sewer flooding;
 - highway and pedestrian safety; and
 - the structural stability of nearby buildings, including the mews arch which is a Grade II listed building.

Reasons

Policy and SPD compliance

21. Criteria b of LP Policy CL7 requires all basement development to not comprise more than one storey. LP paragraph 22.3.52 explains that "a 'single storey' is one that cannot be subdivided in the future to create additional floors. It is generally about 3 to 4 metres floor to ceiling height but a small extra allowance for proposals with a swimming pool may be permitted."
22. At 5.85m in height, as stated by the appellant, the excavated area is clearly high enough to be able to be subdivided to create two floors. That was borne out at the time of my site visit when the basement was arranged over two storeys. The appellant explains that the dividing floor splits the void into a 2.7 metre upper basement with a 2.6 metre sub-area to accommodate a pool and plant. Nevertheless, the additional 1.85m amounts to a significant percentage increase to the depth of the basement, rather than a "small extra allowance" for the provision of a swimming pool. I appreciate that a pool requires the space for a drain, pumps and other plant but it is not shown that the full height of the basement space is required.

⁵ S171B(1) of the 1990 Act

23. Although criteria b of LP Policy CL7 states that exceptions to the requirement that all basement development to not comprise more than one storey may be made on large sites, paragraph 22.3.56 clarifies that these "*will generally be new developments located in a commercial setting or of the size of an entire or substantial part of an urban block*"⁶. *They should be large enough to accommodate all the plant, equipment and vehicles associated with the development within the site and offer more opportunity to mitigate construction impacts and carbon emissions on site.*" A modest, end of mews property does not therefore meet that exception.

24. The alleged development is therefore in conflict with criteria b of LP Policy CL7, and the Basements SPD, which provides more detailed guidance and advice on the policy. Changing the height of the dividing floor as suggested by the appellant, would not overcome those conflicts.

25. Further relevant criteria of Policy CL7 are considered below.

Living conditions

26. The appeal property is located in a densely developed location at the end of a mews and also adjacent to or in close proximity to properties on Gloucester Road and Southwell Gardens. In such a location, the construction effects of basement development have the potential to significantly affect the living conditions of occupants through noise, vibration, dust, construction traffic, parking suspensions and general disturbance.

27. Criteria l of LP Policy CL7 requires all basement development to ensure that construction impacts are kept to acceptable levels for the duration of the works. The preamble to the Policy⁷ explains that "*restricting the size of basements will help protect residential living conditions in the borough by limiting the extent and duration of construction and by reducing the volume of soil to be excavated. Large basement construction in residential neighbourhoods can affect the health and well-being of residents with issues such as noise, vibration and heavy vehicles experienced for a prolonged period. A limit on the size of basements will reduce this impact.*"

28. The appellant states that construction works are complete, save for 50% of the floor slab and decorative works. The Council refer to further works including basement dig, structural works, fit out and the construction of a swimming pool. However, s177(1) of the 1990 Act only allows for a grant of planning permission for the whole or part of the matters stated in the enforcement notice as constituting a breach of planning control, which in this case is the excavation of a two-storey basement. Any further works beyond that, including works to facilitate the provision of swimming pool in the basement, are not part of the matters and are beyond the scope of this appeal.

29. Although I have not been provided with an outstanding schedule of works, based on what I saw, the vast majority of the work associated with creating a two-storey basement has been completed. I do not doubt that getting to that point, nearby occupants would likely have experienced harm to their living conditions through noise, vibration, dust, vehicular movements and general disturbance – more so than if it were restricted to a single storey height.

⁶ The footnote to paragraph 22.3.56 states that urban blocks are generally bound by roads on all sides and can contain a mix of uses

⁷ Paragraph 22.3.53

Indeed, the Council has referred to letters of complaint received and objections to the planning application submitted.

30. Nevertheless, the vast majority of those harms have now already occurred. That is material because to fill approximately half of the basement void as required by the enforcement notice, would result in significantly greater harm to the living conditions of neighbouring occupants, than allowing the two-storey basement.
31. I note that the enforcement notice includes prescriptive measures, akin to conditions, aimed at mitigating the effects of carrying out that requirement and, I agree that because of the very tight grain of Cornwall Mews, the effect on living conditions would be less by carrying out the remedial works via Southwell Gardens. However, such a requirement is not necessary to remedy the injury to amenity caused by the breach. That is also so of the requirement to comply with the Council's Code of Construction Practice. The enforcement notice should therefore be corrected by deleting those requirements. Accordingly, the relative difference in harms would not be reduced by those mitigatory measures.
32. I therefore find a lesser degree of conflict with criteria I of LP Policy CL7 would arise from granting planning permission, compared with complying with the requirements, as corrected. I reach the same conclusion in respect of LP Policy CE6, which states, amongst other matters, that the Council will carefully control the impact of noise and vibration generating sources which affect amenity both during the construction and operational phases of development.
33. Moreover, I see no reason why a two-storey basement would, in itself, result in conflict with LP Policy CL5, which requires all development ensures good living conditions for occupants of new, existing and neighbouring buildings.

Surface water and sewer flooding

34. The site falls within the Kensington Critical Drainage Area. LP Policy CE2 requires development to address and reduce flood risk and its impacts. To deliver this, the policy requires a site-specific Flood Risk Assessment (FRA) for all development in Critical Drainage Areas. However, no FRA has been provided.
35. Policy CE2 also requires development in Critical Drainage Areas to incorporate suitable flood risk measures to account for site conditions in accordance with Building Regulations, existing guidance and the recommendations of the site-specific FRA, the Strategic FRA and the Local Flood Risk Management Strategy. Such measures should ensure buildings remain safe for occupants in case of flooding, and protection from sewer flooding through the installation of a suitable pumped device when the new development includes floors below the level of the sewer.
36. In respect of the latter, the appellant explains that a non-return valve has been installed that will lock closed in the event of a flood, together with an overflow tank. Although reference is made to the same having been approved by the Council's Building Control officers, no evidence is provided to that effect.
37. In respect of surface water, the Council acknowledge that the building footprint covers the entirety of the site, resulting in a 100% impermeable surface. As there is no change to the footprint of the above ground structure the drainage

rates would be the same. Therefore, whilst LP Policy CE2 requires a 50% reduction in the drainage rates, given the constraints of the site, the Council confirm that the drainage arrangement would be acceptable in this case. Based on the evidence before me, I find no reason to take a differing position.

38. Nevertheless, it has not been demonstrated that occupants will be protected from sewer flooding, contrary to the above requirements of LP Policy CE2 and criteria n of Policy CL7, which require, amongst other matters, basement development to be protected from sewer flooding through the installation of a suitable pumped device.

Highway and pedestrian safety

39. The appellant explains that the works were undertaken at the same time as the excavation of the basement at No 1 Southwell Gardens, which was the subject of a Construction Transport Management Plan and that the same measures were followed at the appeal property, ensuring that highway and pedestrian safety measures were in place. It is further submitted that this was overseen by the Council's Building Control officers who have been happy throughout that the construction impacts of the project have been properly mitigated.
40. That is contradicted by the Council in its reference to complaints being received over a large number of construction vehicles accessing the site via Cornwall Mews South, at all hours of the day, including weekends. That would have been potentially harmful to highway and pedestrian safety, as well as inconvenient, given the restricted (single vehicle) width of the mews and that to reach No 1, vehicles would need to pass directly in front of the front doors and accesses of all of the other dwellings twice (in and out).
41. However, I am again mindful that the vast majority of the work relating to the matters have now been completed and no evidence has been provided of any incidences of personal injury collisions or similar. Moreover, complying with the notice would result in a greater number of vehicular movements and associated potential harm than those likely associated with the completion of the two-storey basement.
42. The appellant has also confirmed that remaining decoration works would be undertaken via 1 Southwell Gardens. Given the contrasting characteristics of Southwell Gardens, that would be preferable in highway safety terms. That is also evidently preferable to the Council in that it has confirmed that it would have wished to have been able to impose a condition restricting vehicular movements serving the construction of the basement via the mews.
43. In the circumstances, I am satisfied that subject to a condition requiring that any remaining works in respect of the alleged matters would be via Southwell Gardens, unacceptable harm to highway and pedestrian safety would not arise. It follows that I do not find conflict with criteria k of Policy CL7 which seeks to ensure that traffic and construction activity do not cause unacceptable harm to pedestrian, cycle, vehicular and road safety, significantly increase traffic congestion, nor place unreasonable inconvenience on the day-to-day life of those living, working and visiting nearby.

Structural stability

44. A further reason for issuing the enforcement notice is that in the absence of a construction method statement (CMS), it has not been demonstrated that the

- excavation of the basement safeguards the structural stability of existing and nearby buildings.
45. I accept (specifically from a planning perspective), that working within the parameters of the LDC would not have triggered a requirement to submit information in accordance with the Council's Basement SPD. However, I have found that before the operations described in the LDC were begun, the appellant carried out different operations and the LDC was lost.
46. The appellant states that the impacts of construction have already been mitigated to the satisfaction of the Council's Building Control officers. The appellant's initial grounds of appeal also referred to an appended CMS to explain the construction methodology that was followed (consistent with that followed in relation to No 1 Southwell Gardens). However, that was not provided. A later statement of case refers to a comprehensive suite of construction documentation, including Basement Impact Assessment, equivalent to that contained in a CMS.
47. The letter dated 15 September 2022 from the Council's Building Control Department records site notes for building control application BN/16/05199 for the period between October 2016 to July 2021. That appears to at least partly support the appellant's submission that Building Control regularly inspected the works as they were taking place and were satisfied, save for the one unsatisfactory result recorded. Nevertheless, the most recent recorded site visits over 2021 refer to requests for information including structural calculations, design specification, a revised underpinning sequence and revised existing and proposed plans. That is reflected in the letter dated 11 October 2021 from the Council's Building Control Department requesting Part A Building Regulations documentation, including a basement CMS.
48. The appellant has provided evidence of his email response of 19 October 2021, which refers to the basement CMS being '*included in the Calcs*'. Although there is dispute as to whether the Council's Building Control officers received information sent via a Dropbox link in that email, it appears uncontested that hard copies have been sent and received. However, the Council say that those will not be entirely assessed until the planning status is determined.
49. I sympathise that does not assist the appellant now. Nevertheless, the situation before me is that, even though various plans and documents have been submitted, it is not shown that the Council's Building Control Department are satisfied with the same. Moreover, whilst at least some of the relevant information may be provided over a number of documents, a CMS in the form envisaged by the Council's Basement SPD has not been provided. Consequently, compliance with criteria m of LP Policy CL7, which requires basement development to be designed to safeguard the structural stability of the existing building, nearby buildings and other infrastructure, has not been demonstrated.
50. It is confirmed that the appeal property is not listed. Consequently, there is no conflict with criteria f of Policy CL7 which requires basement development not involve excavation underneath a listed building.
51. The rusticated semi-circular arch at the entrance to the mews is a Grade II listed building. However, the appeal property is located at the opposite end of the mews. Given the intervening distance, it is unlikely that the excavation of

the basement has had a direct effect on the structural integrity of the arch. Moreover, as the basement works are internal, there is no effect on its setting.

52. Nevertheless, the arch is of restricted width and it is therefore reasonable to conclude that increasing the frequency of larger construction vehicles passing through it in turn increases the risk of collision and other damage to the structure.
53. Although I saw that the superstructure stonework to the arch has been damaged, on the basis of the evidence before me, it is not possible for me to say how and when that occurred or that the same has been caused by the actions of the appellant. I note that the appellant has agreed to undertake necessary repairs to and refurbish the arch at his own cost but that is not a matter for this appeal.
54. Having regard to the above, I do not find harm to the significance of the listed arch or conflict with criteria f of Policy CL7 or Policy CL4, which require development to protect the heritage significance of listed buildings.

Other Matters

55. The appeal site falls within the Cornwall Conservation Area. I therefore have a statutory duty under s72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to pay special attention to the desirability of preserving or enhancing the character or appearance of that area.
56. As the works are internal, the alleged development results in a neutral effect on the Conservation Area as a whole, thereby preserving the same. Accordingly, added to my conclusion on the listed arch, I do not find conflict with criteria e of LP Policy CL7, which requires basement development to comply with the tests in national policy as they relate to the assessment of harm to the significance of heritage assets.

The Planning Balance and Alternative Scheme

57. The excavation of a two-storey basement as alleged results in conflict with criteria b of LP Policy CL7. I have also found conflict with criteria n of LP Policy CL7 and Policy CE2 in that it has not been demonstrated that occupants will be protected from sewer flooding. Similarly, it has not been shown that the basement development has been designed to safeguard the structural stability of the existing building, nearby buildings and other infrastructure, contrary to criteria m of LP Policy CL7.
58. I am mindful that policy conflict in terms of sewer flooding and structural stability would remain even if were to dismiss the ground (a) appeal. That is because the notice would allow a basement of around 3m in depth without those issues being addressed, save for the appointment of a chartered civil engineer for the duration of the works. Nevertheless, the risks are materially greater with an additional basement depth of 2.85m.
59. Having regard to the degree of completion, complying with the requirements of the notice will result in a greater degree of harm to the living conditions of the occupants of neighbouring properties and to pedestrian and highway safety than if I were to grant the planning application deemed to have been made. Those comparative benefits therefore weigh in favour of the alleged development. Accordingly, I have not found that the alleged development

- would result in conflict with criteria k and l of Policy CL7 or Policies CE6 and CL5.
60. Bringing the above together I find that the harm arising from the overall degree of conflict with LP Policy CL7, which is the most relevant policy, outweighs the above identified benefits. I therefore conclude that the alleged development is contrary to the development plan as a whole.
61. The appellant argues under ground (f) that the requirements of the notice are excessive as they include infilling part of the basement that is already lawful. However, I have found under ground (c) that the benefit of the LDC as a fallback position has been lost and there is no conclusive presumption of lawfulness. Even following compliance with the notice the appellant could not begin the 4m excavation because the removal of relevant permitted development rights via the Article 4 Direction represent a material change in circumstances.
62. Nevertheless, s173(11) of the 1990 Act provides that where an enforcement notice could have required buildings or works to be removed, but does not do so, and, all the requirements of the notice have been complied with, then, so far as the notice did not so require, planning permission shall be treated as having been granted. The main requirement of the notice is to infill the excavated area of the lower basement, equating to roughly half of its 5.85m height. The purpose of the notice is therefore to remedy the injury to amenity in that it under enforces.
63. I am mindful that a 4m basement represents an alternative scheme that is less costly and disruptive to that which would arise from the requirements of the enforcement notice. Caselaw⁸ directs that, so long as there is an appeal on ground (a), I must consider whether a modified development would be 'part of the matters' and should be permitted.
64. In my judgement, a 4m basement within the same footprint and lesser in terms of cubic volume than the alleged two storey basement can clearly be identified within the scope of the alleged matters and would properly fall within the statutory powers open to me to grant planning permission under s177(1)(a) of the 1990 Act. Moreover, because that alternative forms part of the appellant's initial grounds of appeal, all parties have had opportunity to comment on it.
65. The Council accept that the excavation of a single storey basement would be acceptable in principle. As a 4m basement would fall within the parameters of a single storey basement as defined by LP Policy CL7, the conflict with criteria b would fall away. It would also reduce the extent of remedial works and the associated harm to living conditions and highway and pedestrian safety. Moreover, such harm could be further mitigated by imposing conditions requiring the remedial works are only undertaken via No 1 Southwell Gardens and in accordance with the Council's Construction Code of Practice. For the reasons explained, the same course of action is not possible via the requirements of the enforcement notice.
66. Conditions could also be imposed requiring agreement of a CMS to address matters relating to structural stability and a scheme to ensure protection from

⁸ *Ahmed v SSCLG & Hackney LBC* [2014] EWCA Civ 566

sewage flooding. Doing so would address the above explained development plan conflict on those issues.

67. On the basis of those conclusions, the balance would clearly shift in favour of allowing a ground (a) appeal for a 4m basement, which would accord with the development plan as a whole. I shall therefore make a split decision on ground (a) and grant planning permission in respect of part of the matters.

Conclusions on Ground (a)

68. For the reasons given above I conclude that the appeal should succeed in part only, and I will grant planning permission for part of the matters, namely a 4m basement, but otherwise I will uphold the notice with corrections and refuse to grant planning permission in respect of the excavation of a two storey basement. The requirements of the notice will cease to have effect so far as they are inconsistent with the planning permission which I will grant by virtue of s180 of the 1990 Act.

Conditions

69. Conditions requiring the works to be undertaken via No 1 Southwell Gardens and in accordance with the Council's Code of Construction Practice (2019) are necessary to protect the living conditions of neighbouring residents and in the interests of pedestrian and highway safety. A condition requiring approval of a CMS, as required by the Council's Basement SPD, is also necessary to demonstrate compliance with criteria m of LP Policy CL7, relating to structural stability. So too is a condition to ensure protection from sewer flooding as per the requirements of LP Policy CE2 and criteria n of Policy CL7.
70. Condition (i) includes a strict timetable for compliance because permission is being granted retrospectively, and so it is not possible to use a negatively worded condition. The sanction in the event of non-compliance is to fill the two-storey basement to half its height, which approximately equates to that required by the enforcement notice.

The Appeal under Ground (f)

71. The ground (f) appeal is that the requirements of the enforcement notice are excessive to remedy the injury to amenity caused by the breach.
72. The appellant argues that filling the basement void is excessive and unnecessary and will cause further unwanted disturbance to neighbouring properties, contrary to the Council's own policies. However, I have considered the same as part of the planning balance under ground (a) and found that the benefits are outweighed by the harm such that the alleged two storey basement is contrary to the development plan as a whole. Nevertheless, I have found under ground (a) that a 4m basement would be acceptable in planning terms.
73. The enforcement notice requires the infilling works to be carried out in a certain manner. An enforcement notice can include steps akin to conditions but, as stated, requiring the remedial works to be undertaken via No 1 Southwell Mews and in compliance with the Council's Code of Practice, aren't necessary to remedy the injury to amenity caused by the breach. I shall therefore delete those requirements. For the same reason and because it is covered by other legislation, I shall also delete the requirement to suspend the

parking bays as necessary. However, structural stability is part of how the land was before the excavation took place, so it will have to be returned to a structurally stable state, albeit at a 4m depth. Hence, it is reasonable and necessary to require the input and supervision of a chartered engineer.

74. The appeal on ground (f) succeeds.

Richard S Jones

INSPECTOR