
Appeal Decision

Site visit made on 23 November 2022

by Roy Curnow MA BSc(Hons) CMS MRTPI

An Inspector appointed by the Secretary of State

Decision date: 13 December 2022

Appeal Ref: APP/N5090/C/22/3293801

Land at 31 St Marys Road, London NW11 9UE

- The appeal is made under section 174 of the Town and Country Planning Act 1990 ('the Act') as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr M Baum against an enforcement notice issued by the Council of the London Borough of Barnet ('the Notice').
 - The enforcement notice, numbered ENF/1186/21, was issued on 18 January 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the creation of raised decking, and a hot tub feature, including the erection of a wooden screening/fencing structure to the rear of the site.
 - The requirements of the notice are: 1 Demolish the raised decking including the decking steps and installed hot tub feature; 2 Demolish the boundary wooden fencing structure to the rear of the property; and 3 Permanently remove all constituent materials resulting from the works in 1 and 2 above from the property.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) (c) (e) and (f) of the Town and Country Planning Act 1990 as amended.
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Decision

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

Reasons

2. 31 St Marys Road ('No 31') is a two-storey property that has been horizontally divided into flats. The development that has been carried out is located in No 31's rear garden and relates to a flat on the property's ground floor.

The Notice

Ground (e)

3. An appeal made under this ground is that copies of the enforcement notice were not served as required by section 172 of the Act. Amongst its terms, s172(2) sets out that a copy of an enforcement notice shall be served — (a) on the owner and on the occupier of the land to which it relates; and (b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.
4. The Appellant's case is that the enforcement notice was served on 'the occupiers', and he believes the Notice should be addressed to specific persons. Nowhere in his brief submission on this ground does he make the case that others who should have been served with the Notice were not.

5. Appendix 3 to the Council's statement is an email that is said to be to the Appellant and, as this has not been challenged, I take it to be the case. In this, the Council set out that, as an application for the retention of the development has not been made, an enforcement notice would be issued. It asks the Appellant whether any other persons should receive a copy of the Notice if issued. Although I acknowledge there was no legal obligation for him to do so, the Appellant did not respond to this.
6. For its part, the Council says that it undertook a search of the Land Registry and served copies of the Notice on a named person at two addresses, 'The Owner' at No 31, 'The Occupiers' at No 31 and a mortgage company. This showed that Mr Baum was not a registered freeholder or leaseholder of the property.
7. There are limits to how far the LPA need go in identifying the owners, occupiers and persons having an interest in the land. From the evidence before me, I find that the Council acted reasonably when issuing copies of the Notice.
8. Addressing a copy of the Notice to 'the Occupiers' was simply part of a wider strategy that was intended to ensure that all interested parties received a copy. I have been given no indication that this was not successful. The Appellant was clearly not prejudiced by the Council's actions, having made a timely appeal.
9. From the evidence before me, I find that the Notice was served in accordance with s172(2) of the Act.
10. The other part of the Appellant's Ground (e) case is that no plan was attached to the Notice, despite referring to one in which the land was supposedly shown edged and hatched black. The Council puts this down to a problem with its mapping system when the Notice was issued. The Appellant considers this renders the Notice "flawed, and legally challengeable".
11. Whilst section 172 of the Act sets out the powers to issue a Notice and s173 sets out its required contents and the effects of a Notice, neither refers to the need for a Plan. However, Regulation 4 of Part 2 to The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 sets out 'Additional matters to be specified in enforcement notice'. Amongst these is (c) that states that a Notice shall specify 'the precise boundaries of the land to which the notice relates, whether by reference to a plan or otherwise'.
12. Thus, a Notice would not be invalid in the absence of an accompanying Plan. The test is whether the boundaries of land, referred to in section 2 of the Notice, were sufficiently precise for a recipient to identify the land it referred to. I find that they were and the Notice is neither invalid nor a nullity by reason of the lack of an attached Plan.
13. As the description of the allegation and the land to which the Notice relates was precise, recipients of the Notice would be aware of what was being enforced against and where this was the case. Therefore, I find that the lack of an attached plan caused no prejudice.
14. For the reasons given, above, the Ground (e) appeal fails.

Ground (c)

15. An appeal under Ground (c) is that that the matters alleged in the Notice (if they occurred) do not constitute a breach of planning control. This is a legal ground of appeal where the onus lies with the Appellant to make his case on the balance of probability.
16. The Appellant sets out that the development is 'permitted development' by virtue of Class E of Part 1 of Schedule 2 to The Town and Country Planning (General Permitted Development) (England) Order 2015 (the 'GPDO'). Amongst other things, this Class allows for the provision within the curtilage of the dwellinghouse of (a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure.
17. Class E sets out the criteria that a development must accord with to be considered to be permitted development, and thus not requiring an application for planning permission to be made. The Appellant rehearses these and states that the development does not breach any of the criteria and that its height accords with the terms of The GPDO Technical Guidance document. Although he has not submitted a copy of this document, I take it to be the Government's publication, 'Permitted development rights for householders - Technical Guidance', September 2019. This non-statutory document gives an explanation of the rules on permitted development rights for householders.
18. The rights in Class E relate to dwellinghouses only, so the initial matter to be assessed is whether No 31 is a dwellinghouse. Article 2(1) of the GPDO sets out that, for the purposes of Part 1 of Schedule 2, including Class E, the term 'dwellinghouse' does not include a building containing one or more flats, or a flat contained within such a building.
19. No 31 has been divided into flats, and the Appellant's address on the appeal form is given as 'GFF', or ground floor flat. Therefore, the permitted development rights in Class E do not apply.
20. From what I have seen and the written submissions, I find that planning permission was required for the development. It has not been granted and, therefore, there has been a breach of planning control. Therefore, the Ground (c) appeal is dismissed.

Ground (a)

21. The Ground (a) appeal in this case is made on the basis that planning permission ought to be granted for the breach of planning control stated in the notice.
22. I consider the Main Issues to be:
 - The effect of the development on the living conditions of the occupants of 33 St Marys Road ('No 33') with particular reference to privacy and outlook; and
 - The effect of the proposed extension on the character and appearance of host building and the surrounding area.

Living Conditions

23. The rear gardens serving properties on this side of St Marys Road lie at a lower level than the buildings. The decking runs for the majority of the width of the rear of No 31, from a point on the boundary with 29 St Marys Road to a point very close to the boundary with No 33. It is at a higher level than the garden, to which it is linked by a flight of steps.
24. From what I could see at my site visit, there seemed to have been some form of 'terrace' at the rear of the building at No 31 prior to the creation of the decking. Although I could not be sure of its precise dimensions, it was at a lower level than that of the decking that is the subject of this appeal and appeared to be smaller than it. The Appellant says that there has been decking at the property for over 10 years. However, I have been given no evidence in support of this statement and cannot be sure if it was the case. If it was, I have no information of its form and position compared to what is now present. As such, I give this very little weight in my assessment.
25. Even without the decking that has been constructed, there was a high degree of inter-looking and overlooking between Nos 31 and 33. This is inevitable, to a degree, in terraced properties; however, this is exacerbated here as No 33 has a window on the side of a rear ground floor projection that looks directly to No 31. I could not see how the room was used from within the appeal site. The third party occupant of No 33 states that it is a bedroom, while in his final comments the Appellant says he "understands" there is no bedroom at the rear of No 33. Given that the Appellant understands this to be the case and the occupant of No 33 states that it is a bedroom I find, on the balance of probability, that it is a bedroom. Even if this is not the case, it is clearly a habitable room.
26. People using the area of decking towards No 33, including around the hot tub, are able to look into its side window. The actual and perceived overlooking and consequent loss of privacy has a significant adverse effect on the living conditions of that property's occupants. I take the point that people actually in the hot tub would not be able to look in through the windows, but they would when on the decking in this area getting in and out of the hot tub.
27. The lower part of the fence that has been erected on the decking at its end close to No 33 is at a height similar to a pre-existing fence. Thus, this has no adverse effects on the living conditions of the occupants of No 33. However, there is a higher length of fence that has been erected to mitigate the effects of overlooking in this area. In this respect, it succeeds. However, it is of a height that, when allied to its proximity to the side window of No 33, has a significantly adverse effect on the outlook from the room served by the window. Given its position to the north of the window, it does not affect sunlight entering the room.
28. For the above reasons, I find that the development has a detrimental effect on the living conditions of the occupants of No 33. It is, therefore, contrary to the terms of Policy DM01 of Barnet's Local Plan (Development Management Policies) Development Plan Document September 2012 ('DMP'). Amongst other things, this states that all development should represent high quality design which demonstrates high levels of environmental awareness. I take this to include an awareness of a site's immediate environment, including neighbours' living conditions, which the development does not demonstrate. The development does not deliver appropriate outlook, privacy and amenity as

required by Policy D3 of the London Plan 2021 ('LP') and chapter 7 of the Barnet Local Plan Supplementary Planning Document: Residential Design Guidance October 2016 ('SPD'), with which it conflicts.

29. The Notice refers to LP Policies D7 and D10. As these relate to Accessible Housing and Basement Development, respectively, they are not relevant to the matter before me.

Character and Appearance

30. There is no strong unifying character to the rears of properties on this side of St Marys Road. I saw that additions and changes had been made to the dwellings, including a variety of outbuildings and other alterations.
31. The area of decking, with its hot tub, extends from the rear of the property to a relatively limited degree. Neither it, its fencing nor its short flight of steps linking it to the lower garden area, appear as bulky and obtrusive elements in the townscape. Although it runs much of the width of the property, it is a subservient element. It is a form of development that is commonplace in residential areas. Whilst the screen fencing that has been erected might be seen from other properties, it is not overly high and is made from materials that are appropriate to its setting.
32. The development represents an appropriate response to local character and distinctiveness, which it respects, and, as such, represents good design. For the reasons given above, it does not cause harm to the character and appearance of the host property nor the wider area. Therefore, it accords with the terms of LP Policy D3, Barnet Core Strategy Policies CS1 and CS5, and DMP Policy DM01.

Other Matters

33. There is no evidence to show that the hot tub poses a danger by reason of being a fire hazard, and this is not a matter that the Council pursues. A third party states that there is a noise nuisance from the use of the decking and hot tub. However, this is not a matter covered by the Notice and, although allegedly reported to the Council's environmental health team, I have insufficient evidence to find that noise generation should form a reason for refusing the development. Reference has also been made to harm from multi-coloured lights on the structure. Again, this is not mentioned by the Council and I did not see these when I visited the site.
34. Mention has been made by third parties of a sauna building at the bottom of the garden. I saw a building in that area, but as this is not referred to in the Notice, I cannot comment on it.

Ground (f)

35. An appeal under this Ground is made on the basis that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. In this case, I find that the reason for issuing the Notice is to remedy the breach of planning control.

36. The Appellant's case is that the requirements of the Notice are wholly excessive and that much less excessive steps might be taken. He cites a reduction in the area of decking and the provision of an alternative means of screening the development. I have not been provided with any drawn details of what this might entail, but it is put forward that it might be addressed through the use of a condition requiring the approval of the Council.
37. In response, the Council state that the purpose of the Notice is to "discontinue the unlawful use of the land or have the land restored to its condition before the breach took place". This is wrong, as there has been no material change of use, and should have referred to the removal of the unauthorised development, as it does in the Notice. The Council goes on to say that the requirements are not excessive and the 'tweaks' that are proposed would not remedy the breach.
38. Having not been given details of what the two steps proposed by the Appellant might entail, I cannot assess whether they might overcome the harm that is identified in the Notice. Were I to agree to a condition without an understanding of what might be undertaken, the result could be a form of development that continues to cause harm.
39. For the reasoning given above, the Ground (f) appeal fails.

Conclusion

40. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Roy Curnow

Inspector