



Appeal Decision

Site visit made on 10 January 2023

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 February 2023

Appeal Ref: APP/A5840/C/22/3293847

The ground and basement floors of 96 Friary Road, London SE15 1PX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeal is made by Mr Mohammed Vaseem against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The notice, numbered 19/EN/0104, was issued on 13 January 2022.
 - The breach of planning control as alleged in the notice is without planning permission the excavation and extension of the basement and the material change of use of the Property to a residential dwelling within the C3 use class ("the Unauthorised development").
 - The requirements of the notice are to:
 - 5.1 Remove all fixtures and fittings from the basement;
 - 5.2 Remove all electricity, plumbing connections, pipes and wires from the basement;
 - 5.3 Remove access to, and fill in, the excavated basement;
 - 5.4 Arrange the ground floor of the Property in accordance with the approved plans and comply with the terms (including conditions and limitations) of planning permission referenced 16/AP/0124 (attached at Appendix 2); and
 - 5.5 Permanently remove from the Property any materials and debris resulting from the carrying out of steps 5.1 to 5.4 above.
 - The period for compliance with the requirements is: six (6) calendar months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) 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 varied at section 5, sub-paragraph 5.3 by the insertion of the words 'to the extent it was prior to the breach', so that it reads 'Remove access to, and fill in to the extent it was prior to the breach, the excavated basement'.
2. Subject to the variation above, 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.

Preliminary Matters

3. The Southwark Plan 2019-2036 (the SP) was adopted in February 2022, following the issue of the enforcement notice. The notice refers to the policies of the emerging plan and the Council has referred to and provided copies of the adopted plan and those policies it considers of relevance through this appeal. I am satisfied that the appellant has therefore had the opportunity to consider the policies of the adopted plan.

Ground (c)

4. An appeal under ground (c) is made on the basis that that the matters stated in the notice (if they occurred) do not constitute a breach of planning control. The main thrust of the appellant's case under ground (c) is that the basement works are an interior alteration which do not change the external appearance of the building and so do not constitute development for the purposes of the Act.
5. Section 55 of the Act sets out the meaning of development as the carrying out of building, engineering, mining and other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 55(2) goes on to say the carrying out for the maintenance, improvement or other alteration of any building of works which (i) affect only the interior of the building, or (ii) do not materially affect the external appearance of the building, and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground.
6. The works which have been carried out comprise the alteration of a building by providing additional space in it underground. It is therefore not exempted from the definition of development by section 55(2)(a). The excavation and removal of the ground and soil, and the works of structural support to create the space for the basement are in my view building operations. Indeed, structural alterations of or additions to buildings are specifically identified within this Act as being "building operations".
7. Planning permission 16/AP/0124 permitted the change of use of the Property from a hair salon (A1 use class) to a self contained studio flat (C3 use class) at ground floor level only. Condition 1 attached to the permission requires that the development is carried out in accordance with the approved plans. The works which have been carried out are not in accordance with the approved plans and are not authorised by the planning permission.
8. Thus, since the works are development which is not authorised by a planning permission, planning permission is required for the development carried out and the appeal under ground (c) must fail.

Ground (a)

9. The appeal under ground (a) is made on the basis that planning permission ought to be granted for the matters stated in the notice.

Main Issues

10. The main issues of the appeal are whether the appeal scheme:
 - Provides a satisfactory level of accommodation for occupants and future occupants of the dwelling with respect to light, ventilation and outlook; and
 - Provides sufficient amenity space for occupants of the dwelling;
 - Would be safe from flooding; and
 - Ensures the safety of all building users with respect to fire safety.

Reasons

Living conditions: light, ventilation and outlook

11. The appeal building comprises a living area and kitchen area to the front of the building, within the area labelled 'Studio' on the proposed floor plans and a bathroom and bedroom to the rear, with the bedroom located within the area labelled 'Kitchen' on the proposed floor plans. The frontage of the building has been modified, broadly in line with the proposed plans, though the design of the main window is different. The appellant states that the basement would be used for storage/utility purposes and the number of occupants would not change from that approved.
12. The basement is accessed via stairs from the living area and comprises a generous space, which I shall refer to as 'The Space' and a bathroom with a shower. Although some light may enter The Space from the stair well, there is no window to the basement and so users would need to rely on artificial lighting. Limited items appeared to be stored in The Space during my visit and the space was carpeted and decorated with sockets and lighting. Occupants wishing to use the bathroom need to pass through The Space.
13. Policy P15 of the SP seeks a high standard of quality of accommodation for living conditions and the provision of acceptable levels of natural daylight by providing a window in every habitable room, amongst other things. The 2015 Technical Update to the Residential Design Standards (2011) (the SPD) also states that all habitable rooms should have access to natural daylight.
14. Given the substantial size of the room, I consider it highly unlikely that it would solely be used for storage. It is far more likely to be used as habitable space and since there is living space on the ground floor, I consider it is highly likely it would be used for sleeping. While current occupants may not use The Space in this way, it would not be appropriate, in my view, to seek to control the use of the basement via condition, since it would be very difficult to monitor and require an intolerable degree of supervision.
15. Policy P15 of the SP states that development should achieve a floor to ceiling height of at least 2.5 metres for at least 75 per cent of the Gross Internal Area of each dwelling to maximise natural ventilation and natural daylight in the dwelling. Policy D6 of the London Plan 2021 (the LP) has a similar requirement. While the requirement in the National Space Standards is 2.3m rather than 2.5, both the SP and the LP have been published since and are therefore relevant to the appeal before me.
16. It was confirmed during my visit that the height of the basement measures around 2.31m in height. The Council has provided measurements of the basement, which suggest the room and the bathroom measure approximately 21 square metres (sqm) in total. The ground floor is estimated to measure just under 50sqm, resulting in a total floor space, including the stairwell of just over 74sqm. Based upon these estimations, the appeal scheme does not comply with the minimum floor to ceiling heights required by policy P15 of the SP or policy D6 of the LP.
17. Due to the lack of natural daylight and the limited height of the basement, I consider occupants are likely to be reliant on artificial lighting and find the room oppressive, with no meaningful outlook. This is harmful to the living

conditions of existing and future occupants and contrary to policy P15 of the SP and the SPD, the requirements of which are set out above. It is also contrary to policy D6 of the LP, which seeks housing development of high quality design, with adequately designed rooms and which provide sufficient daylight and sunlight.

Amenity space

18. Although not specifically raised by the Council in its appeal statement, the Council has identified the lack of amenity space within its reasons for issuing the notice. The appellant points out that no outdoor space would be provided as part of the approved scheme and this should not be an issue now, since the basement floor is intended to be used for a non-habitable use. However, as set out above, I consider it highly likely The Space would be used as a bedroom. As a result of the works to the basement, the property is therefore likely to accommodate a greater number of people than the approved scheme.
19. Policy P15 of the SP seeks to secure the provision of private amenity space and states that units containing two or less bedrooms must provide 10sqm of private amenity space. Policy D6 of the LP states that a minimum of 5sqm of private outdoor space should be provided for 1-2 person dwellings and an extra 1sqm should be provided for each additional occupant. Although the consented scheme does not require the provision of external amenity space, the provision of an additional bedroom would increase the need for outdoor amenity space compared with the approved scheme, particularly for things like the drying of clothes and outdoor play space.
20. The appellant has drawn my attention to a number of open space sites within the vicinity of the site, including Bells Gardens, Bird in Bush Park, Brimington Park and Leyton Square recreation Ground. Whilst I note that there is open space within walking distance of the site, such provision would not afford occupants of the appeal site private amenity space for activities like hanging out washing. The appeal scheme therefore fails to comply with policies P15 of the SP and policy D6 of the LP, the requirements of which are set out above.

Flood risk

21. Policy P68 of the SP seeks to ensure that development is safe and resilient to flooding and sets out that finished floor levels should be set no lower than 300mm above the predicted maximum water level where they are located within an area at risk of flooding. Policy D11 of the LP states that development proposals should maximise building resilience and minimise potential physical risks, including those arising as a result of flood.
22. The appellant states that the appeal site is located within Flood Zone 2, and both the enforcement notice and the officer report state the property is located within Flood Zone 2. Although the Council advise in its appeal statement that the National Flood Map for Planning records the site as within Flood Zone 3, it confirms that its records detail the site as within Flood Zone 2.
23. The Planning Practice Guidance (PPG) identifies Flood Zone 2 as land having between a 1% and 0.1% annual probability of river flooding; or land having between 0.5% and 0.1% annual probability of sea flooding. Zone 3a is identified as land having a 1% or greater annual probability of river flooding; or Land having a 0.5% or greater annual probability of sea.

24. The appellant has submitted a Flood Risk Assessment (FRA) in support of the appeal, which states that the site benefits from a level of defence associated with the Thames Barrier up to 0.1% AEP which provides protection against fluvial and tidal flooding. This supports the position that the appeal site is in Flood Zone 2 and I shall therefore consider it on this basis.
25. The National Planning Policy Framework (2021)(the Framework) advises that a site-specific flood-risk assessment should be provided for all development in Flood Zones 2 and 3. The Framework goes on to advise that development should only be allowed in areas at risk of flooding where, in light of this assessment, it can be demonstrated that (b) the development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment; (d) any residual risk can be safely managed; and (e) safe access and escape routes are included where appropriate, as part of an agreed emergency plan.
26. The Framework also sets out the need to carry out certain tests, the Sequential Test, which aims to steer new development to areas with the lowest risk of flooding from any source, and the Exception Test. The Council confirms it considers that the Sequential Test does not apply given the development is the change of use of an existing building and I concur with its conclusion in this regard. However, the Council advises that the Exception Test does apply, and that the development is not minor development, as defined in the PPG. The appellant disputes that the Exception Test applies in this case but, nevertheless has considered whether the appeal scheme would comply.
27. Although the appeal scheme comprises a change of use, the allegation also includes the excavation and extension of the basement. The works were carried out as part of the conversion to residential use and do not constitute householder development. They are therefore not exempted from applying the Exception Test. Annex 3 of the Framework identifies basement dwellings as 'Highly Vulnerable' and the PPG states that the Exception Test is required in Zone 2 for Highly Vulnerable development. I therefore consider the Exception Test is required in this case.
28. To pass the Exception Test it should be demonstrated that (a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall. Both elements of the Exception Test should be satisfied for development to be permitted.
29. The appellant asserts that the appeal scheme complies with part (a) of the Exception Test because it increases social provision through the delivery of housing in a sustainable location close to local services and transportation links. However, were I to uphold the notice, compliance with the approved scheme would also result in the provision of a dwelling. Although the basement could be utilised as a bedroom, and so could accommodate a greater number of people, any additional benefit would be very modest.
30. The FRA concludes that during the 0.1% AEP surface water flood event (climate change surrogate) the site could flood to a depth of up to 600mm and therefore, finished floor levels should be set 600mm above the existing ground level. While the FRA concludes this is not feasible, the finished floor levels are

well below the predicted maximum water level, contrary to policy P68 of the SP.

31. The FRA sets out measures in order to keep risk to a minimum, however, it is not clear whether these measures identified in paragraph 13.2 of the FCA have been implemented or whether it would be possible to implement them retrospectively. While I note that a pump has been installed in accordance with the requirements of building control, I am therefore not persuaded, on the evidence before me, that any residual risk can be safely managed.
32. In my view, the development fails to provide wider sustainability benefits to the community that outweigh the flood risk to occupants. Furthermore, it has not been demonstrated that the development would be safe for its lifetime taking account of the vulnerability of its users. The appeal scheme does not therefore satisfy the requirements of the Exception Test.
33. Given the likelihood the basement would be used for sleeping, I consider the risks posed by flooding to existing and future occupants to be wholly unacceptable. The appeal scheme therefore conflicts with policy P68 of the SP, policy D11 of the LP and the Framework, the requirements of which are set out above.

Fire Safety

34. Policy D12 of the LP seeks to ensure fire safety and sets out criteria against which development proposals will be assessed, including information on space provision for fire appliances and assembly points, on passive and active safety measures, on construction products and materials, means of escape and evacuation strategy and access and equipment for firefighting. The Council has provided me with the Fire Safety Policy D12(a) London Plan Guidance pre-consultation draft document. Although the document is in draft form, it provides an indication as to the sort of information that should be submitted in support of the policy.
35. The appellant has provided a completion certificate for a domestic watermist system, which was installed in the property in December 2020. A Fire Safety Statement (FSS) has also been provided, which sets out the provision of smoke alarm and carbon dioxide systems in kitchen and escape corridors and the use of 'a brick cavity wall buildup' in external wall construction. However, the document provides very limited details of the construction of the property.
36. Whilst the FSS states that the means of escape is to be fully compliant with the latest building regulations, it is not clear how means of escape would be achieved from the basement in the event of a fire on the ground floor or what measures would be put in place to ensure occupants could escape via the main stair well. While Friary Road may be wide enough for emergency vehicles, it is not clear how the users of a development, including users of the basement, would move to a safe location in the event of an emergency.
37. Thus, for the reasons given above, I consider it highly unlikely that the appeal scheme achieves the highest standards of fire safety, contrary to policy D12 of the LP, the requirements of which are set out above.

Ground (a) conclusion

38. For the reasons given above, I find the appeal scheme conflicts with the development plan as a whole and there are no material considerations which indicate that the decision should be taken otherwise in accordance with the development plan.

Ground (f)

39. An appeal under ground (f) is made on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, 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.
40. Section 173(4) of the Act sets out the purposes of a notice are (a) remedying the breach by making any development comply with the terms of any planning permission, by discontinuing any use of the land or by restoring the land to its condition before the breach took place or (b) remedying any injury to amenity which has been caused by the breach. It is clear from the wording of the notice, that its purpose is to remedy the breach.
41. The appellant states that the basement, to a certain depth, was existing. As such, it is unreasonable to require the whole basement to be filled in and access removed. Access to the basement is gained from the living area, with a stair well created next to the front window. However, no such features are shown on the approved plans, or the existing floor plan submitted in support of planning application 16/AP/0124. It is not clear whether access to the basement was previously provided and if so, where it was located.
42. The appellant has provided a number of photos which appear to show some sort of space filled with debris. Pipework and cables can be seen in the pictures. The appellant has provided a cross section which indicates the height of the basement would have been approximately 1.5m. Although it is not clear exactly where the photographs were taken, I have no reason to doubt there was some sort of void beneath the ground floor of the retail unit.
43. Given the evidence, which points towards there having been a void previously, I consider it would be excessive to require the basement to be completely filled in. The Council suggests varying the notice so that the requirement to fill the basement in to the extent it was prior to the breach. Such a variation would make compliance with the notice less onerous but would still remedy the breach. I therefore consider there would be no injustice to either party by varying the notice in this way.
44. The appellant suggests there is also no reason why fixtures, fitting and utility connections need to be completely removed. However, from the evidence provided, including photographs, it seems highly likely that the fixtures, fittings and utility connections which are currently *in situ* have been installed to facilitate the breach. It is therefore not excessive to require their removal.
45. For the reasons given above, I consider the appeal under ground (f) should succeed in part and I shall vary the notice as set out above.

Conclusion

46. For the reasons given above, I conclude that the requirements of the notice are excessive to remedy the breach of planning control. I shall vary the enforcement notice prior to upholding it and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended. The appeal on ground (f) succeeds to that extent.

M Savage

INSPECTOR