



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/22/3301111

9 Culloden Close, London SE16 3JH

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Lee Yin Cheuk against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The notice, numbered 21/EN/0257, was issued on 16 May 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a dwellinghouse shown for identification purposes in the location hatched blue on the attached plan ("the Unauthorised Development").
 - The requirements of the notice are to:
 - 5.1 Demolish the Unauthorised Development, which for the avoidance of doubt includes any foundations;
 - 5.2 Restore the Land to its previous state of landscaped garden and;
 - 5.3 Remove from the Land and properly dispose of all detritus and waste arising from compliance resulting from the carrying out of steps 5.1 and 5.2 above.
 - The period for compliance with the requirements is: Six (6) months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (c) 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.
-

Decision

1. It is directed that the enforcement notice is varied at section 5, after the third requirement, 5.3, by the insertion of the word 'OR' and the insertion of a fourth requirement, 5.4, which says 'alter the works to comply with the terms of planning permission reference 20/AP/2239 dated 16 October 2020 including the conditions subject to which that permission was granted.'
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 appellant initially ticked ground (a) only on the appeal form, however, it has since been confirmed they also wish the appeal to proceed under ground (c). I have also raised matters concerning the requirements with the parties, which I shall deal with under a ground (f) below.

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. In an appeal under ground (c), the burden of proof is firmly on the appellant to make their case, on the balance of probabilities.

5. Planning permission reference 20/AP/2239 was granted on 16 October 2020 for the construction of a new two-storey, two-bedroom house with associated amenity space, cycle and refuse storage. The main thrust of the appellant's case under ground (c) is that what has been built is within the terms of the planning permission.
6. The Council state that the house is 1 metre wider than permitted at the front elevation and 2.7m from the rear boundary rather than 4m as shown on the approved plans. While the appellant suggests the deviations are more limited, it is not disputed that the building has not been constructed in accordance with the approved plans. The appellant states they had a long wait to discharge condition 3 attached to the planning permission, during which time the foundations collapsed.
7. Although the collapse of the foundations may have caused issues during the construction of the dwelling, it has clearly not been built in accordance with the approved plans. The dwelling which has been built is significantly closer to the boundary with No 7 Fallow Court and, as a result, is materially different to the dwelling which was approved under 20/AP/2239. Consequently, it is development for which planning permission is required and the appeal under ground (c) must fail.

Ground (a)

Main Issues

8. The main issues of the appeal are:
 - The effect of the appeal scheme on the living conditions of neighbouring occupants, with regard to outlook, daylight and sunlight and privacy; and
 - Whether the appeal scheme ensures the safety of all building users with respect to fire safety; and
 - Whether the appeal scheme makes satisfactory provision for social rented and intermediate homes.

Reasons

Living conditions

9. The appeal site comprises a two-storey end of terrace dwelling. The appeal property is located within Culloden Close, but is adjacent to properties in Fallow Court, a similarly designed series of terrace properties. As set out above, the appeal property has been constructed so that it is closer to the boundary with No 7 Fallow Court than the building approved under planning permission 20/AP/2239.
10. The Council advise the appeal building is approximately 2.7m from the neighbouring property, rather than 4m as approved. The appellant suggests the building was building is only 467mm wider than the approved scheme, and the depth is 15mm shorter internally. However, even if there is limited internal difference, from my inspection of the site I consider the exterior of the building has been constructed substantially closer to the boundary than 4m.

11. The 2015 Technical Update to the Residential Design Standards Supplementary Planning Document (SPD)(2011) advises that development should seek to minimise overshadowing or blocking of light to adjoining properties. The document provides guidance on 'sunlight tests' which should be used where any part of the proposed development lies to the south of the affected window of the neighbouring property, between due east and due west.
12. The appeal building is located to the south west of No 7 Fallow Court, which has windows, including patio doors, which are broadly perpendicular to the boundary fence. The Council states that the approved scheme was assessed and granted planning permission based upon the 25 degree method set out in the SPD and that there was only a slight transgression of this line, such that the impact on daylight and sunlight was considered acceptable.
13. The appellant has provided me with no evidence to show that the building as constructed would not have an adverse effect on sunlight for occupants of the neighbouring property. Given the location of the property in relation to No 7 Fallow Court and its proximity to windows in the rear elevation, I consider the development is highly likely to have resulted in a loss of sunlight which occupants of No 7 Fallow Court would find unacceptable. Furthermore, the appeal scheme, due to its height and proximity to the rear of No 7, appears a dominant feature and creates a sense of enclosure which users of the rear garden of No 7 are likely to find overbearing, particularly given the design of Fallow Court, which means that the rear garden is already partially enclosed.
14. Although a number of the windows have now been obscured, from the evidence it appears that they were not at the time the notice was issued. Under a ground (a) appeal, I must consider the works which had been carried out at the time the notice was issued. Clear glazed windows would enable views towards No 7 Fallow Court, which occupants of the property are likely to find intrusive. It would, nevertheless, be possible to secure the retention of the glazed windows by condition, which would, in my view, address concerns regarding privacy and overlooking. This would ensure there is no harm to living conditions arising from overlooking and no conflict with policies P15 and P56 of the Southwark Plan 2019-2036 (adopted 2022)(the SP) which both seek to protect amenity.
15. Notwithstanding my findings in relation to privacy, I consider the appeal scheme results in an unacceptable loss of sunlight and is an overbearing structure which creates a harmful sense of enclosure for occupants of No 7 Fallow Court, contrary to policy P14 of the SP, which seeks adequate sunlight for new and existing residents, amongst other things, and policies P15 and P56 of the SP the requirements of which are set out above. It is also contrary to policy D6 of the London Plan 2021 (the LP) which seeks to secure sufficient sunlight to new and surrounding housing, amongst other things.

Fire safety

16. 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.

17. The appellant states that a Fire Safety Statement will be provided, however, no such document has been submitted in support of the appeal to date. It is not clear from the evidence, or from my inspection of the site, whether the property has been designed to incorporate features which reduce the risk to life and the risk of serious injury in the event of a fire, including passive and active fire safety measures or whether it is possible to retrofit such features. It would not be appropriate to secure a scheme by condition, since this may necessitate works which require planning permission.
18. Consequently, I consider it highly unlikely that the appeal scheme would achieve the highest standards of fire safety, contrary to policy D12 of the LP, the requirements of which are set out above.

Provision for social rented and intermediate homes

19. Policy P1 of the SP states that development that creates 9 homes or fewer must provide the maximum amount of social rented and intermediate homes or a financial contribution towards the delivery of new council social rented and intermediate homes with a minimum of 35% subject to viability.
20. Although planning permission has previously been granted at the site for a dwelling, the Southwark Plan 2022 has since been published which requires provision to be made. Since the appeal scheme requires planning permission, and there is no guarantee the appellant would choose to implement the approved scheme, I do not consider it should be exempted from complying with the policy. I have no evidence to show that provision has been made in line with Policy or that it would not be viable to make such provision.
21. Thus, I find the appeal scheme conflicts with the requirements of policy P1 of the SP, the requirements of which are set out above.

Other Matters

22. The Council has referred to policy P13 of the SP and policy D4 of the LP in its enforcement notice. However, although the policies seek to deliver good design, they deal principally with the need to protect character and appearance. The Council has not raised concern regarding the effect of the appeal scheme on the character and appearance of the area in its enforcement notice, rather its concerns relate to the effect of the appeal scheme on living conditions. I do not therefore consider these policies are directly relevant to the appeal scheme before me.
23. The Council has also referred to policy IP4 in its enforcement notice, which sets out the circumstances in which the Council will take enforcement action. While I note the policy, it does not relate to the Council's reasons for taking enforcement action and so is not relevant to my consideration of the appeal scheme.

Ground (a) Conclusion

24. 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)

25. 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.
26. 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.
27. Although the appellant has not appealed under ground (f), I have a duty to check whether any steps are excessive for the purposes of the enforcement notice. As set out above, planning permission has previously been granted at the site for the construction of a dwelling. Since the planning permission was granted on 16 October 2020, it is still capable of implementation. I raised with the parties whether the notice should be varied to enable the appellant to comply with the terms of the planning permission.
28. I note the Council's concern as to whether it would technically be possible to reduce the size of the existing house in a manner that would be significantly short of demolition. However, it is a matter for the appellant to determine whether it is feasible and economically viable to comply with the terms of the planning permission.
29. Since the planning permission is extant and compliance with the planning permission would also remedy the breach, I consider it is reasonable to vary the notice to give the appellant the choice of demolishing the appeal scheme and restoring the land or altering the works to comply with the terms of planning permission reference 20/AP/2239 dated 16 October 2020 including the conditions subject to which that permission was granted. I shall therefore vary the notice accordingly.

Conclusion

30. For the reasons given above, I conclude that the requirements of the notice should be varied to give the appellant the option of altering the works to comply with the terms of planning permission reference 20/AP/2239 dated 16 October 2020. 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.

M Savage

INSPECTOR