



Appeal Decision

Site visit made on 23 March 2023

by A M Nilsson BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 May 2023

Appeal Ref: APP/N5090/W/22/3305737

Fletcher Court, 1-3 Joslin Avenue/Charcot Road, London, NW9 5HB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Article 3(1) and Schedule 2, Part 20, Class AA of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the Order).
 - The appeal is made care of Mr Stuart Minty of SM Planning against the decision of London Borough of Barnet.
 - The application Ref 21/6753/PNV, dated 22 December 2021, was refused by notice dated 9 March 2022.
 - The development proposed is upward extension to create 44 additional dwellinghouses with associated cycle store and external fire escape.
-

Decision

1. The appeal is dismissed.

Preliminary Matters

2. I have taken the description of development from the Council's Decision Notice as this is more precise.
3. Article 3(1) and Schedule 2, Part 20, Class AA of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (the Order), permits development consisting of works for the construction of up to two additional storeys of new dwellinghouses immediately above the topmost storey on a detached building which is in a mixed use combining a use falling within Class C3 (dwellinghouses) together with one or more uses within Class A1 (shops), Class A2 (financial and professional services), Class A3 (restaurants and cafes) or Class B1(a) (offices) or as a betting office, pay day loan shop or launderette.
4. Article 3(4) of the Order outlines that nothing in the Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order.
5. As detailed within the Order, development under Class AA is permitted subject to the condition that before beginning the development, the developer must apply to the local planning authority for prior approval. The local planning authority may refuse the application where it considers that the proposal does not comply with the limitations or restrictions that are applicable to such permitted development.

6. The provisions of the Order require the local planning authority to assess the development proposed solely on the basis of a limited number of considerations. The Council consider that due to a condition imposed on the original planning permission, the proposed development would be contrary to Article 3(4) as set out above. The Council also raised concerns in respect of the impact on the amenity of the existing building and neighbouring premises including in relation to outlook and privacy, and the transport and highways impacts of the development.
7. Development plan policies and the National Planning Policy Framework (the Framework) can be considered relevant in prior approval cases, but only insofar as they relate to the development and prior approval matters. I have proceeded on this basis.

Main Issues

8. The main issues are whether or not prior approval should be granted, having particular regard to 1) the restrictions of the Order and 2) the impact on the amenity of the existing building and neighbouring premises.

Reasons

Restrictions of the Order

9. The building subject to the appeal was granted planning permission¹ subject to the condition that, notwithstanding the provisions of any development order made under Section 59 of the Town and Country Planning Act 1980 (or any Order revoking and re-enacting that Order) the building(s) hereby permitted shall not be extended in any manner whatsoever without the prior specific permission of the local planning authority.
10. The reason for the condition was to ensure that the development does not prejudice the character of the locality and the enjoyment by existing and/or neighbouring occupiers of their properties. The condition is also named as 'Restriction of Permitted Development – Extensions' in the committee report.
11. It is not in dispute between the main parties that the incorrect reference to the Town and Country Planning Act 1980 is a typographical error and should read the Town and Country Planning Act 1990.
12. As set out above, Article 3(4) of the Order outlines that nothing in the Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part 3 of the Act otherwise than by this Order. In this case, it therefore follows that were the proposed development to be contrary to the condition as imposed, it would not be permitted development.
13. The Courts have held that an imposed planning condition must be construed objectively; not by what the parties may or may not have intended at the time but what a reasonable reader construing the condition in the context of the permission as a whole would understand.
14. In this appeal, whether or not the proposed development would run contrary to the imposed condition rests on whether or not the granting of prior approval constitutes '*the prior specific permission of the local planning authority.*'

¹ Planning Application Reference H/00342/09

15. I have been referred to *Dunnett v SoSCLG*². In that case, the planning condition at issue specified the use of the authorised building and stated that it shall be used 'for no other purpose whatsoever without express planning consent from the local planning authority first being obtained'. The reason for the condition was 'In order that the Council may be satisfied about the details of proposal due to the particular character and location of this proposal.'
16. The High Court held that the wording of the condition was sufficient to restrict permitted development rights. The Court explained the basis for its conclusion, that the second part of the condition (which stated 'and for no other purpose whatsoever without express planning consent from the local planning authority first being obtained'), was judged, is designed to, and does, prevent the operation of the Order.
17. The wording in the condition that is pertinent to this appeal differs insofar that it refers to the 'prior specific permission' of the local planning authority as opposed to the 'express planning consent' of the local planning authority in the *Dunnett* case. The appellant's view being that the very nature of granting prior approval would constitute the 'prior specific permission of the local planning authority' and thus not be contrary to the condition or Article 3(4) of the Order. Despite the difference in wording, there are clear similarities.
18. The first part of the condition relevant to this appeal makes specific reference to the 'development order' with the second part outlining that the building shall not be extended in any manner whatsoever without the prior specific permission of the local planning authority. A reasonable reading of the condition is that those extensions permitted by a development order should not be carried out without the specific permission of the local planning authority. To accept the provisions of the Order and proceed with prior approval would be contrary to the condition as it would be first based on the permission that had been granted by the Order as opposed to a specific permission of the local planning authority.
19. The condition was imposed prior to the current form of the Order, which includes the ability to apply for prior approval for developments like that proposed. The Council, therefore, could not have foreseen or accounted for the current prior approval process in their wording of the condition.
20. In *Dunnett*, the Court held that whilst 'express planning consent' might, in other circumstances, include planning permission granted directly by the Order, this was excluded by the requirement that the consent be granted from the local planning authority. The prior approval mechanism did not constitute the grant of planning permission under the Order as this was granted by the Secretary of State.
21. Therefore, in the current appeal, to permit the development to proceed as permitted development would circumvent the requirement that the prior specific permission of the local planning authority is obtained, even if that process includes the requirement to obtain prior approval. This is not least because the ultimate consent will have been granted by the Order, with the local planning authority subsequently considering the proposed development on a limited number of criteria. This would not therefore constitute their specific permission. I also note that the name of the condition in the committee report

² *Dunnett v SoSCLG* [2017] EWCA Civ 192; [2016] EWHC 534 (Admin)

is 'restriction of permitted development – extensions' further outlining its intention.

22. The appellant's case refers to the fact that the condition does not specifically refer to 'planning' permission, merely stating 'permission'. It is not in dispute that the granting of prior approval is not a planning permission as the 'permission' is granted by the Order, not the local planning authority. The Council's case has highlighted that the word 'permission' is used interchangeably with the words 'planning permission' in the Act³ and the Order, where it is used to refer to planning permission and not prior approval. It is therefore reasonable in this case to construe the reference to permission of the local planning authority to mean planning permission. The inclusion of the word 'specific' adds weight to the argument that it refers to planning permission and not prior approval.
23. Furthermore, were I to accept the appellant's argument that the words 'specific permission of the local planning authority' includes the granting of prior approval, this would not only rely on the permission granted by the Order, which the condition excludes, it would merely repeat the requirement on the developer meaning the condition is superfluous.
24. The appellant's case sets out that the reason for the condition, that being to ensure that the development does not prejudice the character of the locality and the enjoyment by existing and/or neighbouring occupiers of their properties, would not be compromised due to the relevant matters for consideration in the prior approval process. This does not however overcome the conflict with the condition itself, even if the reason alludes to matters that may be considered under the prior approval process. I also consider that the condition goes beyond merely giving the Council the 'final say' on extensions as has been suggested. The decision on any future extensions is a specific permission of the Council which would be something more than a 'final say'.
25. The appellant's case also suggests that the failure to specifically refer to relevant subsections of the Act or the Order itself results in the condition being imprecise and thereby contrary to the requirements on imposing conditions as set out in paragraph 55 of the Framework. It would not be within the confines of this appeal to remove or vary the condition, and there are other mechanisms available to the appellant to present such a case. That said, I do not consider that the lack of specific reference to the subsections of the Act or the Order itself renders the condition imprecise for the purposes of this appeal and the applicable restrictions in the Order.
26. I therefore find that having regard to the restrictions of the Order, the proposed development would not constitute permitted development and therefore should not be granted prior approval.

Impact on amenity

27. Although the Council considered that the proposed development did not benefit from being permitted development by virtue of the condition imposed on the original planning permission, they also considered that the proposed development would have an unacceptable impact on the amenity of the existing building and neighbouring premises.

³ Town and Country Planning Act 1990

28. Whilst I have concluded that due to the condition imposed on the original planning permission, the restrictions of the Order mean that the proposed development would not constitute permitted development, I acknowledge that one may take the view that the wording of the pertinent condition is open to interpretation. Despite my conclusion, I therefore intend to also consider the detailed elements of the application for prior approval.
29. The appeal building is a five storey 'L' shaped building with commercial units on part of the ground floor, with residential units above. It forms part of a wider development of the former Colindale Hospital. The appeal building sits behind Colindale Avenue where there are two-storey semi-detached and terraced houses. There is a variety of building heights both in the wider complex and in the surrounding area, although those of greatest height are primarily concentrated around Colindale station.
30. On my site visit, I was able to view the appeal building from the 7th floor of the adjacent building. This allowed me to gain an appreciation and understanding of the varying building heights and spaces between them, most specifically in relation to the appeal building and the properties on Colindale Avenue. I was also able to view the appeal building and the separation from properties on Colindale Avenue from the rear parking court.
31. Due to its current height, bulk and scale, the appeal building is a dominant feature when viewed from the rear of properties in Colindale Avenue. The proposed development would add an additional two storeys to the building, and this would significantly increase its dominance and exacerbate the current adverse situation in terms of the outlook afforded from the rear of the properties in Colindale Avenue. It would give a significantly greater and harmful sense of enclosure to the occupants of these properties. It would also, in relative terms, unacceptably increase the overlooking of properties in Colindale Avenue including their gardens from a higher level than currently exists.
32. The Council outline how the appeal building is lower in height than some of the other buildings in the wider development due to its relationship and proximity to the properties on Colindale Avenue. Whilst I have determined this appeal on its own individual merits, I accept that the relationship with the properties on Colindale Avenue would have been a consideration of the original planning application. The imposed condition considered previously would also suggest this to be the case.
33. The appellant outlines how the committee report for the original application does not state that the appeal building is limited to five stories to preserve the amenity of residents. The report does, however, outline the size and scale of the block and how this is considered to be acceptable and in accordance with the relevant development plan policies. I therefore do not consider that the specific lack of reference to five stories being 'a limit' to be a reason to justify the harm I have identified.
34. I acknowledge that the separation distance that would be maintained exceeds the 21 metres as outlined in the Sustainable Design and Construction SPD (2016). This is, however, a minimum distance that should be achieved, suggesting that there will be circumstances, like I have found in this appeal, when a greater separation distance is necessary.

35. The Council has referred to the impact the proposed external staircase would have on the amenity of residents. The appellant has outlined that the staircase would be used in emergency situations only, although the Council remain concerned about any ad hoc use that may occur.
36. The staircase would partially obscure a small number of windows both in the existing and extended part of the building. Its relatively open design would, however, maintain an acceptable level of outlook and light. In terms of the impact on privacy, I agree that a longstanding, general means of access would have the potential to cause harm to the privacy of residents. The appellant has, however, confirmed its use would be in emergency situations only and were I to allow the appeal this is a matter that could be controlled by means of an appropriately worded condition. On this basis, I do not consider that the external staircase would have an unacceptable impact on amenity in respect of privacy.
37. For the above reasons, I find that the proposed development would cause significant harm and have an unacceptable impact on the amenity of the occupiers of properties in Colindale Avenue in terms of outlook and privacy. It would be contrary to Policies CS1 and CS5 of the Barnet Local Plan (Core Strategy) (2012), Policy DM01 of the Barnet Local Plan (Development Management Policies) (2012) and Policy D3 of the London Plan (2021). Collectively, these policies require that developments ensure appropriate outlook, privacy and amenity.
38. The proposed development would also be contrary to the guidance contained within the Residential Design Guidance SPD (2016) that outlines, amongst other things, that habitable rooms and areas of private gardens close to dwellings should not be excessively overlooked and that buildings do not appear overbearing or unduly dominant.
39. The proposal would also be contrary to the Sustainable Design and Construction SPD (2016), which outlines that the privacy of existing and future development should be protected and gardens should not be significantly overlooked. Furthermore, the proposed development would be contrary to the requirement of the Framework that planning decisions should ensure, amongst other things, a high standard of amenity for existing and future users.

Other Matters

40. The Council considered that the absence of a formal agreement to restrict the access of future occupiers to on-street parking permits and to secure green travel plan measures would result in unacceptable transport and highway impacts.
41. Since the Council's decision, the appellant has submitted a completed Unilateral Undertaking (UU). The agreement secures the parking permit restriction and green travel plan measures sought by the Council. It also secures the financial contributions and monitoring fees as set out in the Council's statement.
42. The Council have considered the submitted UU and have confirmed that it was agreed with the appellant. From this response and the Council's submitted evidence I have taken this to mean that they no longer contest the reason for refusal in relation to the transport and highways impacts of the development.

Based on the information before me and the completed UU, I have no reason to form a different view.

43. The appellant outlines how the provision of 44 dwellings makes a significant contribution to housing supply, is on a previously developed site with its associated environmental, social and economic benefits associated with bringing new members to the community. This includes but is not limited to, the creation of new jobs in construction and maintenance, local economic spend contributing positively to the vitality and viability of local facilities. Other local finance considerations include new homes bonus, council tax revenue, CIL revenue to be spent on local infrastructure. The appellant considers that these are all benefits that weigh in favour of the proposed development.
44. As the application is not an application for planning permission, these matters are not, however, included in the matters for consideration as set out in the prior approval procedure. As prior approval means that a developer must seek approval from the local planning authority that specified elements of the development are acceptable before work can proceed, the decision maker cannot consider any other matters, such as the benefits set out above, when determining a prior approval application.
45. Either way, were I to take these benefits into account, they would not overcome the conflict with the restrictions in the Order due to the condition imposed on the original planning permission.

Conclusion

46. I have found that due to the condition imposed on the original planning permission, the proposal would not constitute permitted development.
47. Even if I were to have concluded that the condition imposed on the original permission did not prevent the proposal from being considered as permitted development, I have found that the proposed development would cause significant harm and have an unacceptable impact on the amenity of the occupiers of properties in Colindale Avenue in terms of outlook and privacy.
48. I therefore conclude that the appeal should be dismissed.

A M Nilsson

INSPECTOR