



Appeal Decision

Site visit made on 11 October 2023

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 13th of November 2023

Appeal Ref: APP/N5090/C/22/3313389

Land at 41 Oak Grove, London NW2 3LS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended).
- The appeal is made by Mr Nic Shaer, FGC Freehold Limited, against an enforcement notice issued by London Borough of Barnet.
- The notice, numbered ENF/1451/22 was issued on 18 November 2022.
- The breach of planning control as alleged in the notice is without planning permission, the erection of a first floor rear extension with a terrace and associated privacy screens on the roof of the existing single storey rear extension.
- The requirements of the notice are to: 1 Demolish the first floor rear extension; 2 Permanently remove the privacy screens from the roof of the pre-existing single storey rear extension (as details in the attached image); and 3 Permanently remove from the property all constituent materials resulting from the works in 1 and 2 above.
- The period for compliance with the requirements is: 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (f) and (g) 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.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with a variation in the terms set out below in the Formal Decision.

The appeal on ground (a) and the deemed planning application

1. The appeal on ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the enforcement notice (the notice), planning permission ought to be granted. Therefore, in this instance, it is that planning permission ought to be granted for the erection of a first floor rear extension with a terrace and associated privacy screens on the roof of the existing single storey rear extension as built.

Procedural matters

2. The Council's statement includes reference to Barnet Council's emerging Local Plan – Regulation 22 (the emerging LP), but no specific policies are cited. Additionally, I note that, although the emerging LP has passed its consultation stage, it is yet to be examined in public. As such, I have given it little weight.

Main issues

3. Having regard to the Council's reasons for issuing the notice, the main issues are, the effect of the development as built on i) the character and appearance of the host property and the area; ii) the living conditions of neighbours, with regard to outlook, light and privacy; and iii) the living conditions of occupants, with regard to outlook and light.

Reasons

4. The development as built comprises a first floor rear extension with an adjacent terrace, built on an existing single-storey element. The first floor extension is stated to measure approximately 3.6m in depth, 4.3m in width and 5.6m in height. It has a flat roof design, is faced in timber cladding, and incorporates a white uPVC window and white uPVC half glazed door. The door allows access to an outdoor terrace which is enclosed by timber privacy screens. The terrace is stated to measure approximately 1.9m in depth and 2.7m in width, and the privacy screens are part 1.6m and part 1m tall.

Character and appearance of the host property and the area

5. No 41 Oak Grove (No 41) comprises a two-storey, mid-terraced dwelling, constructed of painted brick with a tiled roof. At the rear it possesses an outrigger, part two-storey and part single-storey and a dormer to the roof. It includes a small frontage and modest rear garden that lies immediately adjacent to a mature tree belt and the West Hampstead Thameslink railway line. The building's lawful use is as five self-contained flats¹. Of these, Flat 3 is relevant to the development and thus the appeal.
6. The area surrounding No 41 is predominantly characterised by fairly modest, two-storey dwellings laid out in regular terraces. The properties are constructed of brick with slate or tile roofs and incorporate small frontages and rear gardens. This results in a generally uniform townscape when the properties are viewed from the main public routes through the area.
7. At the rear, from the parties' evidence and what I was able to view on my site visit, the individual properties within the terrace on this side of Oak Grove, are less consistent in their form. Whilst the majority commonly possess two-storey outriggers with similar depths creating an informal building line, they vary in form and design. Moreover, some of the dwellings also incorporate additional single-storey extensions and/or alterations, such as box dormers. As a result, the rear of the terrace within which the appeal property sits is less uniform.
8. Prior to the breach, the appeal property reflected the general pattern and characteristics of development within the area in terms of its residential use, form, design and materials at the front and rear. However, even though the first floor extension maintains the width and depth of the single-storey element upon which it has been constructed and is stepped down from the adjoining two storey outrigger, it has unduly enlarged the size, scale and massing of the rear outrigger/extension, to this fairly modest host building.
9. It has also substantially increased the depth of the two-storey component of the rear outrigger, causing it to markedly project beyond the depth of any of the two-storey outriggers to properties nearby and adversely disrupt the existing informal building line.
10. Given the outrigger's siting on the shared boundary with No 43 Oak Grove (No 43) the first floor extension also results in the development extending 600mm beyond the 3m depth normally considered acceptable in relation to two-storey extensions in the Council's Residential Design Guidance Supplementary

¹ Application Ref. 19/2853/191, Certificate of Lawfulness for Use as 5no. self-contained flats. Granted 17 June 2019

Planning Document, 2016 (the SPD)². Whilst the appellant asserts this to be a 'minor exceedance' which 'does not result in any material planning harm in terms of effects on character and appearance', in my judgement it contributes to the overall imposing bulk and dominance of the development and its harmful effects.

11. The addition of the terrace, both in terms of the creation of outdoor amenity space at an elevated level and the solid nature of the privacy screens, exacerbates the development's discordance on No 41 and in the area. Additionally, the incongruous material of timber cladding on the first floor extension and timber privacy screens, notably jars with the predominant material of brick on the host property and of brick and/or render in the area. As a result, the development as built fails to respect and assimilate well with the character and appearance of the host building and its context.
12. I acknowledge that the development is not visible from main public routes, and views from trains using the adjacent railway line are obscured to a degree by the existing tree belt. However, by virtue of its uncharacteristic size and material, it is highly conspicuous in private views from the outdoor amenity spaces of adjacent properties. In any event, its lack of public visibility does not denote a lack of harm to the character of No 41 or the area. I am also mindful that the leaf cover to the tree belt is likely to be reduced during Autumn and Winter months, potentially opening up public views to the rear of the building and the wider terrace, allowing the development's harmful effects to be observed.
13. Accordingly, I conclude that the development as built has a harmful effect on the character and appearance of the host property and the area. This does not comply with Policy CS5 of Barnet's Local Plan, Core Strategy, 2012 (BLP CS); Policy DM01 of Barnet's Local Plan, Development Management Policies, 2012 (BLP DMP); the SPD; and Policies D3 and D6 of the London Plan 2021 (the LP 2021). Together and amongst other things these policies and guidance seek to protect and enhance Barnet's character with high quality, design-led development which respects local context.

Living conditions of neighbours

14. No 41 adjoins No 43 to the south and No 39 Oak Grove (No 39) to the north. The development as built abuts the common boundary with No 43.
15. Notwithstanding that the first floor extension is stepped down in height from the two-storey outrigger at No 41, the combined height, depth, and overall massing of these components in such close proximity to the shared boundary, causes the overall structure to be overbearing and oppressive when viewed from adjacent windows in No 43's two-storey outrigger and outdoor amenity space. For the same reasons, it also results in overshadowing and a loss of light into these rooms and space. As above, this is contrary to the SPD.
16. Although the 1.6m high timber privacy screen to the terrace limits any perceived and actual overlooking into habitable rooms and the outdoor amenity space of No 43, its considerable height and solid form intensifies the consequent harmful effects identified above.

² Two storey rear extensions which are closer than 2 metres to a neighbouring boundary and project more than 3 metres in depth are not normally considered acceptable. Barnet's Local Plan Residential Design Guidance Supplementary Planning Document, 2016.

17. Given the separation distances between the rear components of the appeal property and No 39, the development does not give rise to any harmful effects to the living conditions of occupants of No 39 in terms of outlook and light. Moreover, the lack of windows in the flank elevation of the first floor extension prevents any overlooking from within No 41. However, whilst it may be that occupants of Flat 3 would typically sit rather than stand on the terrace, its elevated position, open form and short privacy screens (1m tall) undoubtedly give rise to increased levels of perceived and actual overlooking into the outdoor amenity space of No 39.
18. In the above respects the development diminishes the outlook and light or privacy currently experienced by occupants of neighbouring properties. I consider that these effects materially harm their living conditions and severely diminish the use and enjoyment of the properties as their homes.
19. I note the appellant's assertions that the breach of the 45 degree sight line is 'marginal'; the exceedance in the recommended depth in the SPD is 'minor'; that the properties benefit from relatively large rear gardens; and that internal living conditions are already affected by the existing tree belt. Nonetheless, the harm to the living conditions of neighbours as set out above is manifest, and these factors do not justify acceptance of the development.
20. Accordingly, I conclude that the development as built has a harmful effect on the living conditions of neighbours, with regard to outlook, light and privacy. This does not comply with Policies CS NPPF and CS5 of BLP CS; Policy DM01 of BLP DMP; the SPD; and Policies D3 and D6 of the LP 2021. Together and amongst other things these policies and guidance seek to reflect the National Planning Policy Framework 2023's presumption in favour of sustainable development; ensure development is of a high quality, designed to allow for adequate daylight, sunlight, privacy and outlook for adjoining and potential occupiers; and in compliance with national and local standards.

Living conditions of occupants

21. The first floor extension results in the addition of a bedroom to Flat 3 and the loss of the only window which directly served this Flat's first floor lounge. The Flat's kitchen also does not have any windows. The only windows within the Flat which receive direct light, serve the new bedroom and the bathroom.
22. I acknowledge that the new bedroom is not excessive in terms of depth and has a fairly large window and half glazed door allowing light into the space. Moreover, a window opening has been retained between the bedroom and lounge which allows borrowed light to filter through.
23. However, although this situation may be tolerable in the brighter Spring and Summer months, it is wholly unsatisfactory in the darker Autumn and Winter months, with occupants being reliant on artificial light within their main living space. That access to light within the lounge may have previously been affected by the adjacent mature tree cover does not validate the harm.
24. This layout and location of windows also severely restricts the outlook of occupants of Flat 3 from the lounge. In the above respects the standard of accommodation provided by the development is deficient and the provision of an outdoor terrace does not offset the consequent harms.

25. Accordingly, I conclude that the development as built has a harmful effect on the living conditions of occupants, with regard to outlook and light. This does not comply with Policy CS5 of BLP CS; Policies DM01 and DM02 of BLP DMP; the SPD; and Policies D3 and D6 of the LP 2021. Together and amongst other things these policies and guidance seek to ensure development is of a high quality, designed to allow for adequate daylight, sunlight and outlook for users; and in compliance with national and local standards.

Suggested changes

26. As part of the appeal on ground (f), the appellant has submitted suggested changes to the development as built which, they assert, would be 'obvious alternatives' or 'lesser steps' that would overcome the Council's planning objections and achieve the purposes of the notice with less cost and disruption.
27. Section 177(1)(a) of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended) sets out that on the determination of an appeal under section 174, the decision maker may grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates.
28. On this basis, to be considered and potentially permitted, any alternative scheme must form 'part of the matters' or achievable through the imposition of a condition on any planning permission. It is held in settled case law that whether an alternative scheme forms part of the matters is a matter of planning judgement. Differences in the design of the alleged and proposed development, plus any differences in the use of the land or building are relevant but not necessarily determinative factors.
29. The suggested changes include an increase in the height of the privacy screens to the terrace; a change to the materials used in the construction of the first floor extension and privacy screens; and the insertion of a high level/partly obscured window within the side of the lounge that serves Flat 3 (or inserting any other fenestration which is deemed necessary).
30. The proposed changes are variations in the design and materials of the development as built and the matters stated in the notice. On this basis, I consider them to be within the definition of 'part of the matters', such that I may go on to determine whether it would be appropriate to grant planning permission for this alternative scheme. Therefore, although the suggested changes have been raised in the appeal on ground (f), I have considered them as part of the appeal on ground (a).
31. No details in relation to any of the suggested changes have been provided. However, in assessing them against the same main issues, I acknowledge that they would potentially lessen some of the identified harmful effects of the development as built.
32. The increase in the height of the privacy screens would have the potential to reduce any actual overlooking into the outdoor amenity space of No 39 and the associated harm to the living conditions of its occupants due to loss of privacy.

33. Additionally, the change in material of the first floor extension and privacy screens, would possibly result in the development being more respectful to its local context and allow it to harmonise with the host property and the area.
34. Furthermore, the insertion of a high level/partly obscured window within the side elevation of the lounge to Flat 3 (or any other fenestration) would allow light into and views out from the lounge space, potentially improving the standard of the accommodation and thus the living conditions of occupants of Flat 3 with regard to light and outlook.
35. However, these suggested changes would not address the fundamental matter of the presence and form of the first floor extension, and its consequent harmful effects to both the character and appearance of the host building and the area, and the living conditions of occupants of No 43 with regard to outlook and light. On this basis, I am not persuaded that the suggested changes would overcome the Council's planning objections. Moreover, as concluded below in the appeal on ground (f) they would not achieve the purposes of the notice.
36. Drawing the above together, I conclude that the development incorporating the suggested changes would have a harmful effect on i) the character and appearance of the host property and the area; and ii) the living conditions of occupants of No 43, with regard to outlook and light. As such it would not comply with the policies and guidance referred to above.

Other considerations

37. Section 38(6) of the Planning and Compulsory Purchase Act 2004 indicates that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be in accordance with the plan unless material considerations indicate otherwise. I have found that the development as built and the development incorporating the suggested changes fail to accord with relevant policies in the development plan in the above respects. It is therefore necessary for me to consider whether there are any material considerations of sufficient weight to indicate that the determination should be made otherwise than in accordance with the development plan.
38. Upholding the notice would interfere with the existing tenants' rights conveyed under Article 8, and Article 1 of the First Protocol of the European Convention on Human Rights, as incorporated into UK law by the Human Rights Act 1998 (Article 8 and Article 1 of the First Protocol). Article 8 is the right to respect for private and family life, home and correspondence and Article 1 of the First Protocol is the right to the peaceful enjoyment of possessions including property. These are qualified rights, whereby interference may be justified in the public interest, but the concept of proportionality is crucial.
39. In this case, the interference with the existing tenants' rights under Article 8 and Article 1 of the First Protocol arises from an enforcement notice issued to the appellant under section 171 of the 1990 Act as amended. The interference with the tenants' rights in this regard is therefore lawful.
40. Achieving development which responds to and complements the character and appearance of the host property and the area, and which protects the living conditions of the building's neighbours and occupants are legitimate and well-established planning policy aims. The cumulative harm which arises as a

consequence of the development as built or the development incorporating the suggested changes is substantial.

41. Against this harm, is that upholding the notice would result in disturbance, loss of habitable accommodation for occupants of Flat 3 and/or potentially the loss of some of the tenants' homes. However, any disturbance would be temporary. Moreover, no evidence has been put before me which demonstrates that there is a paramount need for the additional accommodation built as part of the development or an overriding requirement for any of the tenants to remain in any of the flats. As such, this carries moderate weight.
42. Balancing all these factors, I consider that the interference with the existing tenants' rights under Article 8 and Article 1 of the First Protocol would be proportionate and necessary. In reaching that conclusion, I am satisfied that the protection of the public interest cannot be achieved by means that are less interfering of their rights.
43. I have had regard to my responsibilities under the Public Sector Equality Duty contained in section 149 of the Equality Act 2010. However, neither party has claimed that any of the existing tenants shares a protected characteristic. I have therefore not considered this matter further.
44. My attention has been drawn to No 51 Oak Grove which the appellant states has been developed in a similar manner to the appeal scheme. However, limited details regarding this development have been provided, and the Council has confirmed that 'no planning history is available for this two storey extension.' As such, I cannot be certain that its form, design and materials or the circumstances of its construction are comparable to the appeal before me. As such, it carries little weight in the determination of the appeal.
45. I note the letter of support from an occupant of No 43 Oak Grove and their representation that the extension has not adversely impacted on their outlook, privacy or levels of sunlight/daylight ingress in any way. However, whilst the letter is signed, it is not a statutory declaration or witnessed affidavit, which limits the weight it carries. Moreover, that the existing occupant of No 43 considers that no harm arises to their living conditions from the development does not verify that there is no harm in planning terms and I cannot be sure that any future occupant would be of the same opinion.

Planning balance and conclusion on the appeal on ground (a) and the deemed planning application, and the suggested changes

46. I have found that the breach of planning control alleged in the notice and the development as built has a harmful effect on the character and appearance of the host property and the area, as well as the living conditions of neighbours and its occupants. As such, there is conflict with relevant policies in BLP and the LP 2021 and guidance in the SPD.
47. Additionally, whilst the development incorporating the suggested changes would potentially lessen some of the identified harmful effects, in my judgement, it would not overcome all of the Council's planning objections. As such, there would still be conflict with relevant policies in BLP and the LP 2021 and guidance in the SPD.
48. I acknowledge the value of the habitable and amenity spaces that the development provides. However, achieving well-designed places with high

quality buildings and ensuring that sites are suitable for their proposed use are fundamental aims of the planning system. I have had regard to the material consideration of the implications of the requirements of the notice in relation to the rights of the existing tenants under Article 8, and Article 1 of the First Protocol, and consider that the interference is proportionate and necessary.

49. Drawing all of the above together, the development as built and the development incorporating the suggested changes is, or would be, contrary to relevant policies of the development plan. No material considerations of sufficient weight have been advanced to justify a decision other than in accordance with the development plan. Therefore, I conclude that planning permission ought not to be granted for the matters stated in the notice or for the development incorporating the suggested changes. Accordingly, the appeal on ground (a) fails.

The appeal on ground (f)

50. This ground of appeal is 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. I note the caselaw cited by the appellant under this ground.
51. The appellant submits that the complete removal of the development extends well beyond what is reasonably required to remedy any perceived impacts and has suggested amendments to the scheme. These have been considered as part of the appeal on ground (a), the conclusion of which is that the development incorporating the suggested changes would still give rise to harm which would result in conflict with relevant policies of the development plan.
52. Having regard to section 173(4) of the 1990 Act as amended and the stated requirements of the notice, it is reasonable to conclude that the purpose of the notice is to remedy the breach of planning control that has occurred by restoring the land to its condition before the breach took place.
53. If the requirements of the notice are varied so as to allow the development to remain in a modified form, the land would not be restored to its condition before the breach took place. As such, the purpose of the notice would not be achieved.
54. I therefore conclude that the steps required by the notice to be taken do not exceed what is necessary to remedy the breach of planning control but are proportionate given the purpose of the notice. Accordingly, the appeal on ground (f) fails.

The appeal on ground (g)

55. This ground of appeal is that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed. In this instance, the stated period for compliance is 6 months.
56. The appellant asserts that 6 months is unreasonable given that there will be a need for the preparation of detailed construction drawings and appointment of contractors, as well as programming of the works in relation to the tenants and their tenancy agreements. On this basis, the appellant requests a minimum of

a 12 month period for compliance and advances that a period of 18 months 'would not be unreasonable.'

57. The Council consider that any further increase to the time for compliance would result in continued harm and, in its opinion, 6 months is a reasonable time period for alternative accommodation to be found for the tenants and for the works to be carried out. Nonetheless, the Council confirms that it is happy to defer this matter to my discretion.
58. In considering this ground of appeal, there is a need to balance the public interest in securing the expeditious compliance with the notice against the private interest bound up in the development subject to the notice.
59. Reference is made by the appellant to the tenancy agreement held by tenants of Flat 3 which is stated to run to 24 August 2024. However, no copy of this or any other evidence to support an extension to the period for compliance have been provided. Nonetheless, as set out in the appeal on ground (a), I am aware that upholding the notice will interfere with the tenants' rights conveyed under Article 8, and Article 1 of the First Protocol. These are qualified rights, whereby interference may be justified in the public interest, but the concept of proportionality is crucial.
60. Consequently, I am inclined to agree with the appellant on this matter. Although, whilst I consider that a period of 6 months for compliance with the requirements of the notice is not reasonable and results in a disproportionate burden, I am not persuaded that a period of 18 months is reasonable given the ongoing harm I have identified. Taking all of the submissions into account, I am satisfied that the requested time of 12 months is a reasonable and proportionate response to the breach of planning control that has occurred.
61. Consequently, I conclude that the time for compliance specified in the notice falls short of what should reasonably be allowed. The appeal on ground (g) succeeds to that extent and I will vary the notice accordingly. Having regard to section 176(1)(b) of the 1990 Act as amended, I am satisfied that no injustice would be caused by varying the notice in this respect.

Conclusion

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

Formal Decision

63. It is directed that the enforcement notice is varied by:
- In paragraph 6 the deletion of the number '6' and insertion of the number '12'.
64. Subject to the variation, the appeal is dismissed and 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.

F Cullen INSPECTOR