



Appeal Decision

Site visit made on 5 December 2023

by D Hartley BA(Hons) MTP MBA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 December 2023

Appeal Ref: APP/M2270/C/22/3295788

Land at 309 Upper Grosvenor Road, Tunbridge Wells, Kent, TN4 9EY shown edged red on the attached plan

- 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 appeal is made by Mr Dean Austin against an enforcement notice issued by Tunbridge Wells Borough Council.
 - The enforcement notice was issued on 1 March 2022.
 - The breach of planning control as alleged in the notice is without planning permission the erection of a single storey residential building containing a pair of studio flats.
 - The requirements of the notice are i) dismantle the single storey residential building containing a pair of studio flats shown in its approximate position outlined in black on the attached plan and ii) permanently remove all resulting building materials, rubbish and debris from the land, arising from compliance with step i) above.
 - The period for compliance with the requirements is six 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 (the 1990 Act).
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Decision

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

Reasons

Ground (a) appeal and the deemed planning application

Background and Main Issue

2. The evidence indicates that a similar, albeit not identical proposal, was considered on appeal under s.78 of the Act on 25 May 2021¹ (May 2021 appeal). In considering this appeal, the Inspector noted that a building had already been erected on the site, although it differed from the plans submitted in terms of its position relative to the front boundary of the site, the number and position of windows, the roof overhang and different finishes for external elevations. Nonetheless, very clear judgements and conclusions were reached about this similar development as part of the dismissed appeal and, for the purposes of this appeal, I afford the comments significant weight as material planning considerations.

¹ Appeal Ref APP/M2270/W/21/3268445 for demolition of existing single storey building/conservatory and erection of a single storey studio flat with associated hard and soft landscaping.

3. The appeal is made under ground (a) which is that planning permission ought to be granted in respect of the breach of planning control alleged in the enforcement notice. I have considered the reasons for issuing the enforcement notice. In this regard, the main issues are the effect of the development on (i) the character and appearance of the area and (ii) the living conditions of occupiers of the development in respect of internal space, outlook and natural light.

Reasoning – character and appearance

4. As part of my site visit, I was able to consider the character and appearance of the area. Like the previous Inspector, I was able to see that the prevailing pattern of development in this residential environment was one which included reasonably sized dwellings sited within proportionate plots. I agree with the previous Inspector that prior to the unauthorised development taking place the appeal site functioned as an '*important visual break*'. I accept that the appeal site did include other development previously, but such development was not as imposing or out of place in the street-scene. Indeed, in height and massing terms it was not the same as can be seen on the site now.
5. When experienced from Holmewood Road and Upper Grosvenor Road, the development is seen as being squeezed and cramped within its plot, at odds with the more spacious plot sizes that are associated with the other established dwellinghouses in the locality. Its existence unacceptably departs from the otherwise welcome open relief between buildings that existed before the building was erected. Furthermore, it has resulted in an unacceptably reduced and out of keeping outside amenity space for 309 Upper Grosvenor Road.
6. Moreover, the unauthorised building has a flat roof which is not reflective of the pitched roofs that commonly prevail in the street-scene. It includes high level, narrow and horizontal shaped window openings facing the main road which are not reflective of the more proportionately sized and vertically aligned windows that exist to other dwellinghouses in the street. This harm is compounded owing to the colour and materials used on the appeal building which have a visually jarring impact.
7. For the above collective reasons, I find that an opportunity has been missed to construct a well-designed building that appropriately reflects the site's wider context. While the appellant has indicated that it would be possible to change the size of the existing windows, as per the alternative drawing submitted as part of the appeal (i.e., drawing No. 22-025-13B), this would not overcome my other concerns relating to this main issue. Furthermore, and, in any event, any such change to the design of the building would not be part of the development enforced against having regard to section 177(1) of the 1990 Act.
8. I conclude that the breach of planning control has caused significant harm to the character and appearance of the area. Consequently, it does not accord with the design, character and appearance requirements of Core Policy 4 of the Tunbridge Wells Core Strategy 2010, policy EN1 of the Tunbridge Wells Borough Local Plan 2006 (LP) and paragraph 130 of the National Planning Policy Framework 2023 (the Framework). In reaching this conclusion, I note the reference made by the appellant to 'outbuildings' not being uncommon on corner plots. However, the development is not an incidental residential outbuilding and owing to the position, scale and design of the building it has

caused significant harm to the character and appearance of the area and as detailed below, the living conditions of its occupants.

Reasoning – Living Conditions

9. As part of my site visit, I was able to experience the living environment inside the building. Only high level and narrow windows exist facing the main road and they afford very poor levels of outlook and light for occupants, even considering the installed roof lanterns. Where other windows exist, they are small and include the use of opaque glass.
10. The appellant has included an alternative scheme (drawing 22-025-13B) as part of this appeal which would provide two amended/larger windows on the elevation facing the main road. Such details also include internal alterations to the unauthorised building and a proposed one-bedroom flat instead of the existing '*pair of studio flats*'.
11. I have considered section 177(1) of the 1990 Act and do not find that the proposed amendments, as part of the aforementioned alternative scheme put forward by the appellant, to be part of the matters alleged in the enforcement notice. In terms of the alternative building, it would be materially different to that alleged in the enforcement notice in so far that it would include two large windows on the elevation facing the main road. The proposed new windows would not be part of the development enforced against. In terms of the use of the building, the alternative scheme indicates that it would be used as a one-bedroom flat and not as per the allegation in the enforcement notice, i.e., a '*pair of studio flats*'. In this regard, the alternative use of the building would not be part of the development enforced against.
12. I am not entirely certain if the appellant is also asking me to consider the alternative scheme from the point of view of alterations to the building, in the form of new windows to the elevation facing the main road, albeit in association with use of the building as flats.
13. Even if I had reached a decision that the alternative scheme was part of the matters alleged in the enforcement notice, I would not, in any event, have found that the new windows facing the main road would have overcome my concern about poor outlook and daylight for occupants of the appeal building. This is because this elevation faces partly towards the main road/pavement and partly towards a fence/hedge.
14. Given the proximity of passing traffic and pedestrians, I find that it would be necessary for curtains or blinds to be closed for long periods of time to maintain acceptable levels of privacy. Furthermore, the very close proximity of the fence/hedge would, in part, also have an unacceptably enclosing impact. In the absence of any other low-level windows within the appeal building, this would also result in a very oppressive internal living environment to the detriment of acceptable levels of outlook and daylight penetration into the building.
15. The internal space for each of the two flats is very small. The appellant appears to accept this in so far that he says, '*the 2 units are too small*'. I was able to experience the space available as part of my site visit and it is cramped. The space available for occupiers of the two flats is not conducive to providing an acceptable living environment.

16. For the above reasons, I conclude that the breach of planning control has caused material harm to the occupiers of the flats in terms of internal space, outlook and daylight. It therefore fails to accord with the amenity requirements of policy EN1 of the LP and paragraph 130(f) of the Framework.

Other Considerations

17. The evidence is that the local planning authority (LPA) cannot demonstrate a five-year supply of deliverable housing sites (4.49 years as of 11 May 2023). In this context, paragraph 11d of the Framework is engaged. The delivery of two residential units of accommodation when there is an undersupply of housing sites is a material consideration to which I afford moderate positive weight in the overall planning balance. Furthermore, the development adds positively to the house type mix and choice in the locality and occupiers of the flats would seek to support existing facilities and services in the area thereby delivering some economic benefits.
18. The appellant claims that similar development could be erected utilising Class E of Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) permitted development rights. In this regard, drawing No. 22-025-12 C has been submitted with the appeal and is referred to by the appellant as a '*2-bed annexe with no cooking facilities*'. The breach of planning control does not relate to the erection of a building that is incidental to the enjoyment of the adjacent dwellinghouse. It is not permitted development and requires planning permission. It causes significant harm to the character and appearance of the area and to the living conditions of its occupiers.
19. While it may theoretically be possible to erect some form of permitted development structure on the land, without explicit and further detail/information from the appellant about whether such development would be 'required' and used on an incidental basis (including that shown as part of drawing No 22-025-12C even if such a building did meet the height requirements of Class E of the GPDO), I cannot conclude with sufficient certainty that a building of the same height and overall dimensions could/would be erected on a permitted development basis and as a fall-back position. Such a matter could have been considered as part of the submission of an application for a lawful development certificate (LDC) to the LPA, but the appellant did not submit any such LDC decision as part of this appeal.
20. In addition to the above, it is necessary that I point out that Article 3(5) of the GPDO states that the permission granted by Schedule 2 does not apply if '*in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful*'. In other words, the existing building would not be capable of being retained as a 'permitted development' building as the building operations involved in the construction of such a building are unlawful.
21. I afford the appellant's alleged permitted development fall-back position only limited weight in decision making terms. Furthermore, and, as detailed above, I do not find that the appellant's alternative scheme for an incidental 'annexe' to be part of the matters alleged in the enforcement notice which concerns a pair of studio flats and a differently designed building. Even if a similar building could be erected on the land utilising permitted development rights, I have found that the harm caused to the character and appearance of the area

arising from the breach of planning control is significantly adverse. Such harm is a matter of overriding concern and outweighs any alleged permitted development fall-back position.

Planning balance and conclusion

22. On balance, I conclude that the adverse impacts of the breach of planning control significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. Consequently, it does not constitute a sustainable form of development. Furthermore, there is conflict with development plan policies and there are no material considerations that justify a decision which is contrary to the provisions of the development plan as a whole and the policies in the Framework taken as a whole. Therefore, the ground (a) appeal fails.

Ground (f) appeal

23. The appeal made under ground (f) 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 or to remedy any injury to amenity which has been caused by any such a breach.
24. The purpose of the notice is to remedy the breach of planning control. I have considered the appellant's alternative scheme as part of the ground (a) appeal, which proposes fenestration/design changes to the building and a different use, and have concluded that it would not be part of the matters alleged in the enforcement notice. I have also considered, as part of the ground (a) appeal, the appellant's claim that a similar building could be erected on the land utilising permitted development rights. I have concluded that any such permitted development fall-back position would not outweigh the significant harm that has been caused to the character and appearance of the area because of the breach of planning control.
25. Given the above, the requirements of the enforcement notice are not excessive. They are necessary to remedy the breach of planning control. Therefore, the ground (f) appeal fails.

Ground (g) appeal

26. The appeal on ground (g) is that the period specified in the notice in accordance with s173(9) of the 1990 Act falls short of what should reasonably be allowed.
27. The period for compliance with the requirements of the notice is six months. The appellant seeks a period of twelve months on the basis that he should be able to assume that the appeal would succeed, the occupier(s) of the site would need time to find alternative accommodation, and as more time is needed to source a contractor.
28. The six months period for compliance runs from the date of this decision and not from when the enforcement notice was issued. I have little information from the appellant about who occupies the building and on what basis. The appellant's claim that an '*estimated*' twelve months is needed to source a contractor is not reasonably substantiated. Reference is made to Covid-19, but there are now no national restrictions in place relating to this matter.

29. I do find that there would be infringement of rights under Article 8 of the European Convention on Human Rights, as incorporated into the Human Rights Act 1998, arising from the loss of homes. However, the collective planning harm that I have identified is of such weight that upholding the enforcement notice with a compliance period of six months and refusing planning permission is a proportionate, legitimate and necessary response that would not violate those persons rights under Article 8. I find that the protection of the public interest cannot be achieved by means that are less interfering of their rights.

30. For the above reasons, I conclude that the ground (g) appeal should fail.

Conclusion

31. 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 deemed planning application.

D Hartley

INSPECTOR