

Appeal Decisions

Site visit made on 4 September 2024

by M Bale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 01 October 2024

Appeal A Ref: APP/C5690/C/22/3310246

Appeal B Ref: APP/C5690/C/22/3310247

Rear of 49 Beacon Road, London SE13 6ED, also known as Land at the rear of 88-90 Nightingale Grove

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (as amended). Appeal A is made by Mr Jeffrey Lowe, and Appeal B is made by Mr Matthias Felsch against an enforcement notice issued by the Council of the London Borough of Lewisham.
- The notice was issued on 12 October 2022.
- The breach of planning control as alleged in the notice is the creation of a car park consisting of hard-standing, without the benefit of planning permission.
- The requirements of the notice are to:
 1. Remove the hard-standing, laid over the partitioned section of the land to the rear of 88-90 Nightingale Grove, as shown outlined in red on the attached plan.
 2. Make good all damage to the Property resulting from compliance with the other requirements of the notice.
 3. Remove all waste, materials, equipment, and debris from the Property resulting from compliance with the above requirements of this notice.
- The period for compliance with the requirements is: 6 months after the notice takes effect.
- The appeals are proceeding on the grounds set out in section 174(2)(a), (b), (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.

Summary Decision: The appeals are dismissed, planning permission is refused, and the enforcement notice is upheld.

Appeal C Ref: APP/C5690/W/22/3307780

Rear of 49 Beacon Road, London SE13 6ED, also known as Land at the rear of 88-90 Nightingale Grove

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by Mr M Felsch and Mr J Lowe against the decision of the Council of the London Borough of Lewisham.
- The application Ref is DC/22/126427.

- The development proposed is the use of land as communal amenity space and the installation of 4 no. electric car charging points with provision for parking, and the erection of a cycle store, all for the use of the residents of Nos. 1-5 Mitre Mews (r/o 49a Beacon Road) and Nos. 1-9 (r/o 51a Beacon Road).

Summary Decision: The appeal is dismissed.

Preliminary Matters

1. The site address has been given in slightly different forms across the various appeal documents. I have referred to the address on the enforcement notice subject to appeals A and B ("the Notice") across all appeals for consistency.
2. The entirety of the land to which the Notice relates (defined at Section 2 of the Notice as "the Property") has had a gravel surface set within a mesh frame installed upon it. 5 parking spaces have been marked out. There is a small amount of planting around the edges and an open fronted bicycle store at one end that appeared to have space to park 10 bicycles.
3. The Notice targets only the car park hard-standing. Conversely, the refused planning application, subject of Appeal C, proposes a subtly different scheme of 4 parking bays with electric vehicle charging points, a bicycle shed with space for 12 cycles and additional planting around the site boundaries.
4. In this decision, I shall deal first with grounds (b) and (c) of Appeals A and B relating to the Notice. I shall then deal with the ground (a) appeals and Appeal C together as there are a number of common issues arising, concluding separately as required. I shall then deal with ground (f) of Appeals A and B.

The Notice

5. An enforcement notice must inform the recipient with reasonable certainty what the breach of planning control is and what must be done to remedy it. If necessary, before determining the appeal, I have a duty to put the Notice in order. My powers under section 176(1)(a) of the Town and Country Planning Act 1990 as amended ("the 1990 Act") include to correct any defect, error or misdescription in the enforcement notice or, under section 176(1)(b), to vary the terms of the enforcement notice. In each case, the only test is whether the correction or variation would cause any injustice to the appellant or the local planning authority.
6. The appellant suggests that the Notice may be defective because it does not require the use for the parking of cars to cease and, therefore, does not remedy the breach of planning control alleged. However, the Notice does not allege a material change of use, only operational development associated with the formation of a car park. If it were to later appear to the Council that there had been an unauthorised material change of use of the land, then it would be open to them to consider serving a further enforcement notice.
7. The requirements of the Notice seek the removal of the operational development alleged. Whether they exceed what is necessary to remedy that alleged breach of planning control is a matter for the ground (f) appeals. Whether or not the breach has occurred or is properly identified is a matter for the ground (b) appeal. If it has, then the requirements as set out would

logically flow from that. Taken on its face, for the reasons given, I find that the Notice properly identifies a breach of planning control and sets out relevant steps to remedy that breach. It is, therefore, valid.

8. Nevertheless, the first requirement of the Notice refers to the 'partitioned section' of land. It appears that this relates to the fact that it has been separated from other land to the rear of 88-90 Nightingale Grove. There is no partitioning within the land identified in the Notice, only to the remaining, adjoining land parcels. The requirement clarifies that it relates to the land shown outlined red on the plan, and that clearly shows the entirety of that area.
9. The reference to the partitioned section is confusing and unnecessary. It would be sufficient for the Notice to simply refer to the hard-standing laid over the Property as that is specifically defined at Section 2 of the Notice as being the area edged red on the attached plan. No injustice would arise to either party from making such a correction as, from the evidence, the appellant has clearly understood that the Notice relates to the entire area edged on the plan attached to the Notice.

Appeals A & B on ground (b)

10. Ground (b) is that the matters alleged in the Notice have not occurred. On this ground, and ground (c), the onus of proof is on the appellant and the standard of proof required is on the balance of probabilities. The appellant suggests that the gravel surface is not a hard-standing, being loosely laid gravel on top of a grid system, all on top of former hard and soft surfaces.
11. I have not been provided with any particular definitions of a hard-standing. The permeability, consolidation, or regularity of use within residential gardens of such surfaces has not been shown to be important to deciding whether something should be deemed a hard-standing.
12. The appellant has described the former situation as being a mix of hard and soft surfaces. The current situation is a gravel and mesh construction that has provided a firm surface on which it is possible to walk or drive without sinking into the ground. It is clearly identifiable, extending across the vast majority of the Property. While that surface may not be consolidated and may have been laid atop existing surfaces, I find the description as a hard-standing to be a reasonable one that adequately describes what has happened.
13. Therefore, on the balance of probabilities, I find that the matters alleged in the Notice have occurred and the appeals on ground (b) should fail. As the term 'hard-standing' adequately describes what has happened, I shall use that terminology in the remainder of my decision.

Appeals A & B on ground (c)

14. Ground (c) is that the matters (if they occurred) do not constitute a breach of planning control. The appeals on this ground are that the hard-standing is not development, and if it is, it is 'permitted development', having being granted permission under the terms of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ("the GPDO"). The appeal on this ground is confined to the matters alleged in the Notice,

rather than the other items included within the planning application subject to Appeal C.

15. Section 55 of the 1990 Act defines development as including the carrying out of building, engineering, mining or other operations, in, on, over or under land. I have been presented with no compelling reason why the laying of the hard-standing, requiring the bringing to the site and placing of the mesh and then a, not insignificant, amount of gravel should not be considered an operation within the meaning of Section 55. Therefore, I find it more likely than not that the matters alleged do constitute development.
16. As to whether they are permitted development, the appellant suggests 4 parts of the GPDO, Schedule 2 which might permit the matters alleged.
17. Part 1, Class F permits development within the curtilage of a dwellinghouse. To be permitted, it must be for purposes incidental to the enjoyment of the dwellinghouse. While the site is former garden land to Nos. 88 and 90 Nightingale Grove, the appellant has confirmed that the individual parking spaces are to be leased to occupiers of Nos. 1-5 Mitre Mews (rear of 49a Beacon Road) and Nos 1-9 (rear of 51a Beacon Road) (the "New Dwellings").
18. The hard-standing would not, therefore, be incidental to the enjoyment of the dwellinghouse to which the land previously related, but for the use of others. It has not been shown that the hard-standing was first laid for purposes incidental to the enjoyment of Nos. 88 and 90 Nightingale Grove when it was part of their gardens. Nor is there any obvious reason why this piece of land, being used communally by a number of surrounding residents should now be regarded as within the curtilage the New Dwellings.
19. Until it was revoked, Part 7, Class G permitted hard surfaces for office buildings and Part 7, Class J permits hard surfaces for industrial and warehouse premises. In both cases, to be permitted it was necessary for the hard surface to be within the curtilage of the building. The land in question was never previously associated with the former industrial or office buildings, having been part of a residential garden and on the opposite side of the access to them. It has not been shown that, on the balance of probabilities, the land should be deemed to have been within the curtilage of industrial or office buildings at the time the hard-standing was laid, nor the live-work units now in their place.
20. Part 9, Class E relates to works within the boundary of an unadopted street and permits works for the improvement or maintenance of the street. Even if the provision of a parking area should be considered the improvement of an unadopted street, it has not been shown why the land, as a former residential garden should be deemed to be within the boundary of a street.
21. Therefore, I find, that on the balance of probabilities the matters alleged in the Notice would not have benefitted from the permission granted by the GPDO. I, therefore, find that the matters alleged do constitute a breach of planning control and the ground (c) appeals should fail.

Appeals A & B on ground (a) and Appeal C

22. Appeal C seeks permission for the use of the land as communal amenity space and the installation of 4 no. electric car charging points with provision

for parking, all for the use of the New Dwellings. The Notice alleges only the formation of a car park, but does not allege a material change of use. Nevertheless, the car park is clearly intended to enable the parking of cars on the land, and the appellants' case is based upon the effects of both the appearance of the car park and its use. Therefore, I have considered all appeals with regard to the effects arising from the formation of the car park and its use.

23. The main issues are the effect of the development on the highway network, with regard to parking provision, the effect on the living conditions of nearby residents with particular regard to noise, disturbance and air quality, and the effect of the development on the character and appearance of the area.

Parking provision

24. The London Plan 2021 ("LP") Policy T6 seeks to manage London's road network by controlling levels of parking with maximum parking standards set out at Policy T6.1. Policy 14 of the Lewisham Core Strategy 2011 ("CS") seeks a managed and restrained approach to parking provision in accordance with LP Standards. There are currently 5 parking spaces at the site (relevant to appeals A and B) and 4 are proposed in Appeal C.
25. The appellant has explained how the parking spaces would be for the use of those residents of the New Dwellings, where I understand there are a total of 14 residential units. The absence of any existing off-street parking indicates the accommodation was deemed to be in a location where, either there was no need for off-street parking or where any required parking could be accommodated on existing streets.
26. Nevertheless, even if it was appropriate to reconsider the parking provision for a development already permitted and, at least in part, constructed and occupied, the standard for residential development in this location would dictate a maximum of 3.5 spaces for 14 units. All appeals would provide for more than this and would, therefore, be in breach of the policy requirement.
27. LP Policy T6.1 indicates that developments of more than 10 dwellings should provide for disabled persons parking. However, the policy does not say that this should be in addition to the maximum parking standard referred to above. Moreover, the absence of parking for disabled persons was clearly deemed to be acceptable when the developments were permitted and there is no particular evidence of a specific need now.
28. For the above reasons, even if the parking could be restricted only to occupiers of the New Dwellings, the provision would exceed the standards set out in the LP. It would likely encourage greater car ownership and travel by private car. It would be contrary to LP Policies T1, T2, T6 and T6.1, and CS Policy 14 that seek to foster an increase in journeys by foot, reduce car ownership and limit the level of parking.

Living conditions

29. Driving vehicles on the gravel surface is likely to create some noise that may be audible to neighbouring residents, particularly in their gardens. While traffic may use the existing access in close proximity to those gardens, the lack of parking and turning opportunities means that this would likely be

limited. The parking area would likely attract vehicles that do not currently visit the site and would also be closer to some of the neighbouring gardens than the access road.

30. However, the size of the parking area would necessarily limit the number of vehicles that could use the site and, if controls could be put in place to ensure that they could only be used by the New Dwellings rather than being available to others, then the level of traffic generation and consequential noise and disturbance would not be sufficient to generate harmful disturbance.
31. The Council has advised that the site is within an Air Quality Management Area. This suggests that the area is currently of poor air quality. LP Policy SI1 sets out that development should not lead to further deterioration of existing poor air quality. CS Policy 9 supports those aims. As I have already noted, the development is likely to result in an increase in traffic to the site.
32. While Appeal C includes facilities for the charging of electric vehicles, I am unaware of any mechanism to ensure that they could only be used as such. Therefore, I find that the proposal is likely to lead to a deterioration of existing poor air quality, contrary to LP Policy SI1 and CS Policy 9.
33. By reason of the likely negative effects on air quality, I, therefore, find that, in addition to the conflict with LP Policy SI1, there would be harm to the living conditions of neighbouring residents, in conflict with DMLP Policy 33 that seeks to ensure that there is no loss of amenity for neighbouring residents from the development of backland sites.
34. The Council has cited conflicts with CS Policy 15 and Policy 30 of the Lewisham Development Management Local Plan 2014 ("DMLP"), but those policies appear to be more concerned with the appearance of development and I find no conflict with them in respect of this issue.

Character and appearance

35. The site, as former residential garden land, is surrounded by other residential gardens. However, while close to an area of traditional housing arranged around perimeter blocks, the site also sits alongside extensive backland development and large buildings that do not share this relationship to the road.
36. The site itself has no public road frontage and is not visible from the street. Other development that does not follow the road frontages is readily visible from within the site and on approach to it along the private access. The development is compatible with this surrounding planform and urban grain. The appearance of the site, while at odds to the surrounding garden environment is also seen alongside and as part of the hard surface access road that leads to it and the New Dwellings.
37. For these reasons, I find that in its existing (Appeals A and B) form, and that proposed in appeal C, it respects the character and appearance of the surrounding area. Accordingly, I find no conflict with those aims of LP Policy D4, CS Policy 15, or DMLP Policies 29, 30 or 33, which seek to promote high quality design that responds to local character and urban typologies.

Other Matters

38. I understand that there are limited opportunities for charging electric vehicles in the surrounding neighbourhood. The provision of such facilities as part of the Appeal C scheme, or secured by conditions on a successful ground (a) appeal on Appeals A and B, would promote the use of electric vehicles. However, as noted above, there is no mechanism to ensure that they can only be used by electric vehicles and no substantive evidence that there would be a net reduction in non-electric vehicles in the wider neighbourhood. It would do nothing to combat traffic levels and the wider effects on the highway network that LP Policy T6 seeks to manage.
39. The former gardens, of which the site was a part, were large and I understand beyond the size required for the occupiers of those dwellings and surplus to their requirements. The parking use makes productive and efficient use of that land. While there are no parking and servicing arrangements for the live-work units, there is no substantive evidence that this is problematic. As the use is one in conflict with the overall aims of the LP and CS, then this is not a benefit that weighs in favour of the development.
40. I understand that the historic use of the surrounding site may have generated more traffic and associated air quality impacts than that likely to be associated with the car park. However, that use has long since ceased, the site has been redeveloped and so such will not resume. Similarly, any previous ability to provide hard surfaces within the site when they were part of the gardens of Nos 88 and 90 Nightingale Grove no longer appears to be available and is a different scenario to that which has occurred and is now proposed. I, therefore, attach very little weight to these matters.
41. The Notice alleges the creation of a car park consisting of hard-standing. While it requires the removal of the hard-standing, it does not require the cessation of any parking use. However, even if the parking of cars, by itself, does not constitute a breach of planning control the lack of surfacing would likely mean that the regularity with which vehicles were moved would be less than the current situation with stable ground conditions.
42. In the appeal C scheme, external amenity space would be provided. This could, theoretically, be used for sitting out or gardening by surrounding residents, but the space would be of very limited size so the associated benefits would be very small. The covered cycle parking area would encourage travel by bicycle which is a benefit and I saw that the existing facility was being well used. However, such provision has not been shown to be reliant on the delivery of the wider scheme and would not satisfactorily mitigate the adverse effects that I have identified. I, therefore, give these matters limited weight.

Conclusion on Appeals A and B, Ground (a)

43. The development provides parking in excess of the maximum standards set out in the LP. It would encourage additional traffic to be attracted to the site and, even with conditions to secure electric vehicle charging facilities, these could be petrol or diesel powered. Such could lead to a further deterioration in air quality within the Air Quality Management Area. While the development makes an efficient use of land previously given over to large garden areas,

the use is one not supported by the development plan. A lack of harm to the character and appearance of the area and adverse impacts from noise and disturbance are neutral in the planning balance.

44. I, therefore, find that the matters alleged in the Notice conflict with the development plan. No material considerations have been shown to indicate that a decision should be made otherwise than in accordance with the development plan. Accordingly, the Ground (a) appeals should fail.

Conclusion on Appeal C

45. Despite the reduced scale of parking and provision of other beneficial components, the same harms identified in respect of Appeals A and B would arise in respect of Appeal C. I have found that the benefits arising from the other components proposed would be small, and of limited weight. Therefore, the proposal would conflict with the development plan. It has not been shown that material considerations should indicate that a decision should be made otherwise than in accordance with it. Accordingly, Appeal C should also fail.

Appeals A and B on ground (f)

46. The appeals on ground (f) are 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.
47. The Notice clearly seeks to remedy the breach of planning control because, as noted at the beginning of my decision, the steps require the removal of all matters constituted within the breach. The ground (f) appeal is, therefore, limited to whether the steps go beyond that required to remedy that breach. Whether lesser steps would remedy any injury to amenity are not relevant.
48. The allegation is a straight forward one that a car park has been created through the laying of a hard-standing. The steps require the removal of that hard-standing and, consequently the car park that has been created. It would not be possible to vary the Notice to simply prevent the parking of motor vehicles because that would be inconsistent with the matters alleged.
49. I, therefore, find that the steps required by the Notice do not exceed what is necessary to remedy the breach of planning control and the appeals on ground (f) should fail.

Formal Decisions – Appeals A and B

50. It is directed that the enforcement notice is corrected by:

In Section 5 'What you are required to do', paragraph 1:

- Delete the words "partitioned section of land to the rear of 88-90 Nightingale Grove, as shown outlined in red on the attached plan" and replace with the word "Property".

51. Subject to the corrections the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the applications deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decision - Appeal C

52.The appeal is dismissed.

M Bale

INSPECTOR