



Appeal Decision

Inquiry opened on 7th February 2012

Site visit made on 7th February 2012

by Clive Whitehouse BA(Hons) MCD MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 22 February 2012

Appeal Ref: APP/T5720/C/11/2160816 & 17
1A Leopold Terrace, Dora Road, London SW19 7EY

- 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 Victor and Mrs Oxanna Gavrilouk against an enforcement notice issued by the Council of the London Borough of Merton.
 - The notice was issued on 12th August 2011.
 - The breach of planning control as alleged in the notice is: without planning permission, erection of a block of flats consisting of four self-contained residential units.
 - The requirements of the notice are (a) permanently demolish the block of flats constructed on the land. (b) Remove all debris and waste resulting from compliance.
 - The period for compliance with the requirements is three 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 inquiry sat for 3 days on 7, 8 and 9 February 2012.
-

Decision

1. The enforcement notice is varied by substituting six months in place of three months as the time for compliance in paragraph 5. Subject to this 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.

Procedural Matter

2. Appeals on grounds (b) and (c) were withdrawn shortly before the inquiry. The appellants accept that although the existing building is very similar to a scheme for which planning permission had previously been granted, the "as built" development does not have planning permission.

Background

3. The appeal concerns a four-storey building in a corner position, attached to a terrace of modern, three-storey town houses. At the time of the inquiry the shell of the building had been completed, but it had not been glazed or fitted out internally. The development is intended to provide four two-bedroomed flats.
4. Both parties refer to the "unfortunate planning history" of the site, which has contributed to the present situation, and I consider it necessary to summarise the sequence of events at the outset. The appellants were described at the inquiry as experienced builders but it was explained that, coming from a

- different culture, they had relied on their advisors and the Council to negotiate their way through the intricacies of English planning legislation.
5. The site was previously occupied by an unusually narrow four-storey house that had been added to the end of Leopold Terrace in the 1970s. In 2005 planning permission was granted for a four-storey side extension to that house and conversion of the property into four flats. The appellants bought the site with the benefit of that permission but in 2006 submitted a planning application for a larger scheme. Planning permission for that scheme was granted in November 2006, subject to conditions (the 2006 permission), and it was again described as a "four storey side extension to existing dwelling and conversion of property into 4 self contained 2/3 bedroom flats".
 6. In 2007 the appellants completely demolished the house on the site (with the exception only of a small section of a rear wall that forms a party boundary with the garden of the neighbouring house), and the site was left in that condition for about 2 years.
 7. Shortly before the 2006 permission was due to lapse in November 2009, the appellants applied for approval of the details required by conditions (external materials, site layout and tree protection measures). The Council did not approve those details but instead informed the appellants that the 2006 permission could no longer be implemented because the original house had been demolished, and the scheme could not be regarded as an extension and conversion. The appellants were advised to submit a new application for a block of flats as a "new build" development, and in January 2010 an application was submitted with drawings showing a building of the same size, height and general design as had previously been permitted.
 8. The appellants started constructing the building whilst that application was under consideration. In June 2010 a Council Planning Officer prepared a report for the Planning Committee recommending that planning permission be granted, but the report was deferred before being considered because it had emerged that a small triangle of land that had been assumed to be part of the application site was in fact part of the garden of the neighbouring house. The 2006 permission had also included that land as part of the application site. Although that triangle of land was not of great significance to the layout in physical terms, it is one of the factors that led to the conclusion that the 2006 planning permission could not be implemented in the precise terms in which it had been granted. I note that the builders did adapt the building under construction by reducing the ground floor area to draw it away from the revised site boundary.
 9. Following the submission of the corrected application site plan, the Council re-consulted local residents more widely than it had done at earlier stages; by which time residents could see the size and forward projection of the building taking shape. This resulted in an increased level of objection. In August 2010 the Council served a Temporary Stop Notice, which halted construction work for a month, after which work resumed. Planning permission was eventually refused in June 2011 and the enforcement notice was issued in August 2011.
 10. One of the reasons given for the refusal of the application and the issuing of the notice was the detrimental effect of the building on the street scene by virtue of its bulk, scale, height and siting forward of the building line of the adjoining Leopold Terrace (the street scene issue). Following the appeal and

an exchange of pre-inquiry statements, the Council indicated in December 2011 that it would not rely on that reason at the inquiry.

11. Some work continued on the building after the enforcement notice was issued, including the application of white render to most of the external walls. The scaffolding and plastic sheeting that had enclosed the building was removed in late 2011. I will consider the deemed planning application as being for the building as it existed at the time of the inquiry.

Main Issues

12. Although the Council did not take issue at the inquiry with the size, height and forward projection of the building in the street scene, The Wimbledon Society and a Planning consultant engaged by a group of local residents submitted written and oral evidence on the point. I indicated at the inquiry that I consider that the effect of the building in the street scene remains a main issue, notwithstanding the Council's late withdrawal of its objection on that ground.
13. The second main issue is the effect of the building on the living conditions of the occupiers of 1 Leopold Terrace with particular regard to privacy, the effect on daylight and sunlight and visual amenity.
14. The third main issue is whether the deficit in the provision of private outdoor amenity space for future residents of the flats can be adequately mitigated by a financial contribution for the improvement of public open space elsewhere.
15. The Council is satisfied that the issues of on-street parking, and financial provision for education and affordable housing, which are cited amongst the reasons for issuing the notice, have been dealt with by a Unilateral Undertaking submitted by the appellants at the inquiry. For that reason I do not regard those matters as main issues. A supplementary Unilateral Undertaking was submitted shortly after the close of the inquiry to address an issue raised concerning notification of any changes in ownership and contact details.

Effect on the Street Scene

16. I will first assess the impact of the building in the street scene, based on the evidence and opinions of the parties and local residents and my own impressions. I will then assess the weight to be accorded to the planning history of the site as a material consideration in support of the existing building, before balancing all the considerations.
17. The visual impact of the development in its context inevitably involves a measure of subjective judgement, as evidenced by the differing opinions of the Council's Planning Officers at different stages. Also, it can be difficult to visualise the impact of a building accurately from standard application drawings, especially when the drawings do not show the building in its context, as was the case with the 2006 application. I have the advantage of being able to see the largely finished external appearance of the building in the street scene.
18. Development plan policies include the saved policies of the Merton Unitary Development plan (UDP). Policy BE.22 concerns the design of new development and requires that new buildings respect the siting, rhythm, scale density, proportions and local distinctiveness of the adjoining townscape. A

supplementary planning guidance note issued by the Council in 1999 for New Residential Development (1999 SPG) provides more detailed guidance. The section headed "Respecting Local Character" advises that new development should contribute positively to the character of its context, and that this requires building line continuity, expression of vertical and horizontal rhythms, regard to adjacent building heights and the use of quality detailing and materials. In respect of corner sites, the advice is that because of their visual prominence special design considerations are needed.

19. The development is described on behalf of the appellants as having an "unashamedly contemporary design" very similar to that previously approved and consistent with the mixed architectural character of the local area.
20. The development occupies an almost triangular site at the junction of Dora Road and Leopold Road. The building is one storey taller than the modern terrace to which it is attached and about 0.8m higher than shown on the 2006 scheme drawings. The flat roof design increases the bulk of the building where it rises above the pitched roof of the adjoining house. The front elevation follows the building line of Leopold Terrace for about 4m before stepping out by about 2.7m with a projecting bay and a side-facing window. The side elevation is set about 1.5m from Leopold Road, and the rear projects by 0.8m beyond the rear elevation of the house at 1 Leopold Terrace. The gable wall where it rises above the terrace is in brickwork with a small return at the corner, but otherwise the walls of the building are finished in white render. When completed the front elevation would have large windows and the upper floors would have small balconies.
21. From the submitted photographs, the four-storey house previously on the appeal site was oddly upright and narrow, but much smaller than the present building. The Council confirms that there is no objection to the loss of the original house.
22. The site is in a mixed residential area with houses ranging in style between Edwardian, inter-war semi detached and detached, 1960s terraces and modern infill development. Leopold Terrace dates from the 1960s and is finished with buff brick and a pitched roof. There is one nearby development on the opposite side of Leopold Road which bears some similarity to the appeal building. That is a staggered, three-storey development of town houses finished in white render, but it differs from the appeal building in being set well back from the road on the building line and it is less bulky, since the upper floors are recessed.
23. The older residential areas higher up the hill to the north are covered by two Conservation Area designations. The appellant draws attention to an assessment report prepared by the Council in 2007 when considering whether to extend one of the Conservation Areas. The report concluded that the area in the vicinity of the appeal site was not worthy of inclusion in the Conservation Area. In respect of the nearby section of Leopold Road (including the town houses referred to above) the report refers to the mix of post-war development and comments that "the general level of architectural interest of buildings in this area is low, in some cases very low". Whilst that is no doubt a fair assessment by Conservation Area standards, my impression of the wider area around the appeal site, including Leopold Terrace and Dora Road is that it has a pleasant, mixed suburban character.

24. The amount by which the building projects forward of the building line of Leopold Terrace in my view results in an obtrusive and unduly bulky appearance to the building. I saw that there is a distant view of central London to the north east along Dora Road, and it would appear that the forward projection is, in part at least, intended to capture that view with side-facing living room windows to the upper floor flats. The bulky impression of the building is reinforced by its height and angular flat roof design. Furthermore, the use of white render as the main finishing material is in my view excessive and at odds with the brickwork or the mix of brick and render on most nearby houses. It appears to me that the block has been designed primarily to maximise floorspace and the views from the upper floors. In my assessment this has resulted in an overly bulky building on the plot that is poorly related in terms of scale, design and materials to its surroundings.
25. Notwithstanding the Council's late withdrawal of its case on this issue, I agree with the views expressed by the Wimbledon Society and the representations made by and on behalf of local residents at the inquiry concerning the adverse visual impact of the building in the street scene.

Weight to be accorded to the Planning History

26. It was argued strongly on behalf of the appellants that they have erected a building that is almost indistinguishable from what the Council had approved in the past. It is contended that it would be unreasonable and unjust to require the building to be demolished because the Council had changed its mind, especially since the Council has changed its mind back again on the street scene issue after the notice was issued. I accept that the planning history is an important material consideration in this case.
27. It is a matter of record that the Council granted planning permission in 2006 for a scheme with a similar external appearance to the present building, albeit that some elements of the original house were to be incorporated. Correspondence shows that planning officers at the time had supported the principle of a forward projection for the extended part, in the expectation that it would allow the building "to turn the corner" in architectural terms, but my own view is that this has not been successfully achieved. I note from the submitted correspondence and 2006 decision notice that the use of white render as the external finish was never supported or approved by the Council.
28. The appellants accept that, by a combination of factors, the 2006 planning permission has lapsed and can not now be implemented. Briefly, those factors were the complete demolition of the original house; the variations between the 2006 scheme and the present building and the fact that the land under the appellants' control is smaller than was shown on the 2006 application plan. Also, the pre-commencement conditions of the 2006 permission were not fully discharged before the permission lapsed. The consequence is that the 2006 planning permission does not have the force of a fall-back position, and the Council was free to make a different judgement, as it did in refusing the similar set of plans in 2011.
29. I can understand that the appellants might have thought that the revised planning application they submitted in January 2010 would be little more than a formality, given its similarity to what had gone before, but they were nevertheless taking a risk in starting to erect the new building without planning permission. The degree of risk increased significantly when it became obvious

after the deferral of the committee report in June 2010 and the issue of the Temporary Stop Notice in August 2010 that the Council had serious reservations about the scheme. The decision to continue with construction works after that point and even after planning permission was refused and the enforcement notice was issued, puts that work entirely at the appellants' risk.

Conclusion on the Effect on the Street Scene

30. I consider that the adverse effect of the existing building on the street scene is significant and contrary to the objectives of UDP policy BE22 and the advice in the 1999 SPG. I have given careful consideration to the twists and turns of the planning history but I have concluded that the weight that can be accorded to that consideration is not sufficient to justify the retention of the building in its present form, and the continuing harm to the street scene that would result. I conclude on the first main issue that the existing building unacceptably affects the street scene.

Effect on Living Conditions of the Neighbouring Occupiers

31. The Council contends that the size and design of the building is overbearing and unacceptably affects the living conditions of the occupiers of 1 Leopold Terrace with particular reference to visual amenities and privacy. The effect on daylight and sunlight is not specifically referred to in the reasons for issuing the notice, but has been addressed by the parties. UDP policy HS1 includes the requirement to safeguard privacy and to maintain adequate daylight and sunlight.
32. There is inter-visibility at a narrow angle between the side-facing window of the front projection and the front habitable rooms of No.1 Leopold Terrace. From my site inspection, there are small areas within both the bedroom and living room which are overlooked at a distance of only about 7m from the side living room windows of the upper floor flats. If not addressed, this would cause an unacceptable loss of privacy. The appellants therefore propose to partly obscure glaze the offending windows. They estimate that it is only possible to look into the front rooms of No.1 whilst standing against the outer third of the side window and they propose to obscure glaze that part whilst leaving the inner two thirds clear glazed (so as to retain the view of central London).
33. To the rear there is a north west facing bedroom window to each of the upper flats which gives a view down into the small rear garden of No.1. The rear gardens of Leopold Terrace are not private, since each is fully overlooked from the upper windows of neighbouring houses. The new building adds to the number of overlooking bedroom windows, but it does not in my estimation significantly affect the already low levels of privacy in the back garden. The appellants have nevertheless offered to obscure glaze the north west facing bedroom windows, leaving south west facing clear glazed windows available.
34. If the development were otherwise acceptable, I consider that a planning condition could be devised that would prevent an unacceptable loss of privacy for the occupiers of 1 Leopold Terrace. However, I consider that the need to introduce areas of obscure glazing into habitable room windows within the new development is an indication of a design failure.
35. The appellants' consultants have carried out an assessment of the effect of the forward projection of the block on daylight and sunlight reaching the front habitable rooms of No.1, using the advice and methodology in the BRE

- publication "Site Layout Planning for Daylight and Sunlight". The results show that the block reduces the sunlight reaching the nearest first floor window by about 55 minutes per day (the relevant date for BRE guidance is 21st March), but the window can still receive more than 6 hours sunlight a day at that time of year, which is far in excess of the minimum standard recommended. A similar exercise has been carried out in respect of daylight. The Council does not challenge the technical assessment, and I consider that the forward projection of the block does not result in an inadequate amount of daylight and sunlight reaching the front habitable room windows of No.1 Leopold Terrace.
36. By the same methodology, the rear projection of the block by 0.8m beyond the rear wall of No.1 does not have a significant effect on daylight and sunlight to the rear-facing rooms. The block has a somewhat greater overshadowing effect of the back garden than the former four-storey house, but the orientation of the rear elevation of the terrace towards the north west is such that the back gardens already have limited sunlight except in the late afternoons. The small back garden is also shaded by evergreen trees at the corner of the appeal site and within the garden of No.1. The appellants' analysis using the Sun on Ground Indicator in the BRE guidance indicates that the garden receives more than the recommended minimum sunlight. I consider that the building does not unacceptably reduce the daylight and sunlight reaching the back garden of No.1 Leopold Terrace.
37. There is no methodology for assessing the question of overbearing appearance. From my visit, the building is only visible from within the habitable rooms of No.1 at acute angles from small areas of the rooms and I do not consider it to be overbearing in relation to the use of those rooms. From the front garden of the house the building does appear to "loom large", but I consider that there is a gradation and overlap between the perception of the building from outside the house and its wider perception in the street scene. I therefore regard "overbearing appearance" as being part of the effect of the building in the street scene, and dealt with under the first main issue.
38. I conclude on the second main issue that the building causes no unacceptable effects on the living conditions of the occupiers of 1 Leopold Terrace that could not be adequately addressed by conditions.
- Deficiency in Outdoor Amenity Space**
39. Policy HS.1 includes the objective that new residential developments should provide adequate private or communal amenity space, based on a standard for flats of 10sq.m per habitable room. Further guidance on the provision of such space is given in the Council's 1999 SPG on new residential development.
40. The development does not include any useable communal outdoor amenity space and the private space would consist of two small front patios for the ground floor flat, and balconies for the upper flats. It is common ground that the scheme is deficient in outdoor private amenity space.
41. The Council also considers the ground floor patios to be of poor quality because of their lack of privacy and position facing the road and car park.
42. There is a proviso to policy HS.1 that in high density developments where the standard can not be achieved the Council will seek to reach an agreement for a financial contribution to upgrade nearby off-site amenity space. The appellants' Unilateral Undertaking makes provision for the payment of a sum of

money for that purpose, calculated according to the Council's standard formula. The appellants draw attention to ten recent planning permissions where residential development has been permitted with an outdoor amenity space shortfall, subject to a payment for off-site upgrading of open spaces.

43. The Council considers on balance that that a financial contribution in this case would not overcome the deficiency because there are no nearby public open spaces that would be reasonably accessible to the occupiers of the flats. The two nearest public open spaces are 950m and 1000m from the appeal site, unlike the instances referred to by the appellants, where there are open spaces between 200m and 500m away. The Council refers to a number of appeal decisions where increasing emphasis has been placed on the importance of private outdoor amenity space.
44. I consider that a purpose-built block of four flats is capable of being considered as a high density development where it would be difficult to meet the desired private open space standard on site and where a financial contribution would be appropriate. The public open spaces which could be upgraded with the money offered are not conveniently located, but neither are they so distant that they would be unlikely to be used at all by future residents.
45. On this issue the planning history is also a material consideration. It is significant that the same amount of on-site amenity space was accepted as adequate in 2006 without any financial contribution and that the Council's committee report of June 2010 stated that a financial contribution would overcome the on-site deficiency of private amenity space. I consider that it would be unreasonable to make this issue an almost insurmountable obstacle at this stage.
46. Taking all the material considerations into account, I conclude on the third main issue that the financial contribution for off-site upgrading of public open spaces offered as part of the Unilateral Undertaking would adequately compensate for the deficiency of on-site private amenity space.

Other Matters

47. Some concerns have been expressed about the adequacy of car parking for the flats. The 2006 permission would have provided 3 parking spaces for the four flats and the appellants have produced a revised layout for the appeal which could accommodate four spaces, subject to the Council's agreement. The site is within a zone where on-street parking is strictly controlled and certain spaces are reserved for resident permit holders during controlled hours. The appellants' Unilateral Undertaking would prevent future occupiers from obtaining residential parking permits for on-street parking. The Council accepts, and I agree, that the combination of on-site spaces and the terms of the undertaking would prevent undue additional pressure being placed on limited on-street parking spaces.
48. Some local objections are to the principle of the development of flats, as opposed to family houses in this neighbourhood, but that is not an objection supported by the Council. The Council's Core Strategy adopted in 2011 includes policy CS8 and the objective to "seek the provision of a mix of housing types and sizes and tenures at a local level to meet the needs of all sectors of the community". The provision of flats on the site is consistent with that objective and would make a useful contribution to the need for housing.

49. The parties have agreed the level of financial contributions necessary to address the provision of affordable housing and education services, and those are included in the completed Unilateral Undertaking made under section 106 of the Act and submitted at the inquiry and the supplementary undertaking, and I take those into account.

Conclusion on the Ground (a) Appeal

50. My conclusions on the second and third main issues do not overcome the harm I have identified under the first main issue concerning the effect of the building on the street scene. I have had regard to all other matters raised. The appeal on ground (a) fails and planning permission will be refused for the development that has occurred.

Appeal on Ground (f)

51. It is contended on behalf of the appellants that, if planning permission is not granted for the building as it exists, it would be wasteful and excessive to require the whole building to be demolished, since it may be possible to alter and adapt the building in order to overcome the objections. A range of options are discussed in general terms in the appellants' evidence, including a reduction in the top floor and a reduction in the forward projection facing Dora Road. These possible alterations are described as uneconomic but physically possible without total demolition.

52. I agree that it ought to be possible to alter the building to make it acceptable, and that such a course of action would be less wasteful of resources. However, there is no agreed detailed scheme before me, which could be substituted as a requirement of the enforcement notice. The notice is clearly directed at remedying the breach of planning control and in the absence of an acceptable alteration scheme, I have no option but to uphold the requirement to demolish the building.

53. To avoid the requirement to demolish, the appellants will need to urgently prepare a scheme for alterations to the building, having particular regard to the reasons given in this decision for the refusal of planning permission for the existing building. The alteration scheme will need to be discussed with the Council and considered as a formal planning application. In the event of planning permission being granted, section 180 of the Act provides that the notice shall cease to have effect so far as inconsistent with that permission.

Appeal on Ground (g)

54. The enforcement notice requires compliance within 3 months, but the parties have agreed that it would be reasonable, if the notice is upheld, to extend the compliance period to 6 months to allow time for an alteration scheme to be prepared, formally considered and carried out. The time for compliance will be varied to 6 months.

C Whitehouse

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Jonathan Milner He called	Of Counsel, instructed by West and Partners Christopher Francis, Planning Consultant of West and Partners
------------------------------	---

FOR THE LOCAL PLANNING AUTHORITY:

Annabel Graham-Paul She called	Of Counsel, instructed by the Head of Legal Services Marcin Manikowski, Senior Enforcement Officer (Rina Odedra acted as the Council's legal representative on the morning of 7 th February due to the absence by reason of sickness of the Council's appointed barrister.)
-----------------------------------	--

INTERESTED PERSONS:

David Pincott John Rowcliffe Derek Horne	Local resident. Representing the Wimbledon Society. Planning consultant of Derek Horne & Associates representing a group of residents of Leopold Terrace, Leopold Road and Dora Road.
Michael Somerville Juliette Simpson	Occupier of the adjoining house. Local resident.

DOCUMENTS submitted at the inquiry

- 1 Statement of Common Ground
- 2 Supplementary proof of evidence and appendices of Mr Francis
- 3 Completed section 106 Unilateral Undertaking dated 8th February 2012 and
Supplementary Unilateral Undertaking dated 16th February 2012
- 4 Assessment of Unilateral Undertaking against CIL Regulations 2010
- 5 Indicative soft landscape plan.
- 6 Photograph of revised rooftop lift housing.
- 7 Copy of 2006 Planning Permission.
- 8 New Residential Development SPG (full document)
- 9 Schedule of distances from public amenity spaces.
- 10 List of conditions suggested by the Council in the event of planning
permission being granted.
- 11 Closing submissions on behalf of the Council.
- 12 Closing submissions on behalf of the appellants.
- 13 Statement by David Pincott.
- 14 Statement by Derek Horne on behalf of local residents.
- 15 E-mail from Mr W Jakubowicz
- 16 Letter from Councillor Oonagh Moulton