Appeal Decisions

Inquiry opened on 14 August 2007
Site visit made on 24 October 2007

by G P Bailey MRICS

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

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Decision date:
18th. December 2007

Appeal A: APP/T5720/C/06/2030968
59 Broadway Court, Wimbledon, London SW19 1RG

- 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 Sultanglade Limited against an enforcement notice issued by Merton London Borough Council.
- The Council's reference is 40572.
- The notice was issued on 17 October 2006.
- The breach of planning control as alleged in the notice is, without planning permission, the erection of a building for use as a dwellinghouse.
- The requirements of the notice are (a) demolish the building including the integral garage; and (b) remove all building materials resulting from the demolition of the building from the site.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended). The application for planning permission deemed to have been made under section 177(5) of the 1990 Act (as amended) also falls to be considered.

Summary of Decision: The appeal is allowed subject to the enforcement notice being corrected and varied in the terms set out below in the Formal Decision.

Appeal B: APP/T5720/C/06/2030969
61 Broadway Court, Wimbledon, London SW19 1RG

- 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 Sultanglade Limited against an enforcement notice issued by Merton London Borough Council.
- The Council's reference is 40572.
- The notice was issued on 17 October 2006.
- The breach of planning control as alleged in the notice is, without planning permission, the erection of a building and its use as a dwellinghouse.
- The requirements of the notice are (a) demolish the building including the integral garage; and (b) remove all building materials resulting from the demolition of the building from the site.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended). The application for planning permission deemed to have been made under section 177(5) of the 1990 Act (as amended) also falls to be considered.

Summary of Decision: The appeal is allowed subject to the enforcement notice being corrected and varied in the terms set out below in the Formal Decision.

Appeal C: APP/T5720/C/06/2030971
63 Broadway Court, Wimbledon, London SW19 1RG

- 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 Elan and Sea Limited against an enforcement notice issued by Merton London Borough Council.
- The Council's reference is 40572.
- The notice was issued on 17 October 2006.
- The breach of planning control as alleged in the notice is without planning permission, the erection of a building and its use as a dwellinghouse.
- The requirements of the notice are (a) demolish the building including the integral garage; and (b) remove all building materials resulting from the demolition of the building from the site.
- The period for compliance with the requirements is 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 (as amended). The application for planning permission deemed to have been made under section 177(5) of the 1990 Act (as amended) also falls to be considered.

Summary of Decision: The appeal is allowed subject to the enforcement notice being corrected and varied in the terms set out below in the Formal Decision.

Procedural Matters

1. The inquiry sat for 3 days on 14-15 August 2007 and 23 October 2007.

2. Oral evidence at the inquiry was taken on oath.

3. Sultanglade Ltd, of which Mr T Kelly is a director and Mrs B Kelly is company secretary, now owns 59 and 61 Broadway Court; Elan and Sea Ltd, of which Mr L Trajer is a director, now owns No.63. The appeals sites were developed as a single entity by KT Development Ltd, a firm now dissolved, of which Mr T Kelly and Mr L Trajer were directors.

4. At the inquiry, an application for costs was made by Sultanglade Ltd and Elan and Sea Limited against Merton London Borough Council. This application is the subject of a separate decision.

5. At the site visit, the representatives of the main parties and I were able to view the development the subject of these appeals from the rear garden and a rear ground floor window of the dwelling at 33C South Park Road, situated to the rear of the appeals site.

The Enforcement Notices

6. An enforcement notice has been served on each of the three self-contained two-storey units, numbered 59, 61 and 63, which together comprise a terrace that is also described as "phase 1". Notice A (and Appeal A) concerns No.59; Notice B (and Appeal B) concerns No.61; and Notice C (and Appeal C) concerns No.63. This terrace forms a continuation of a second terrace of three

self-contained two-storey live/work units, numbered 53, 55 and 57, permitted in October 2003, that is described as "phase 2".

7. All three notices were issued on the same date, but the description of the alleged breach in Notice A is cited as:

> "...the erection of a building *for use as* a dwellinghouse" (my emphasis).

This differs from that in Notices B and C which, in each case, is cited as:-

> "...the erection of a building *and its use as* a dwellinghouse" (my emphasis).

8. There is considerable dispute about what has happened in these cases, but the essential starting point is that the alleged breach would be the same in respect of each of the three individual properties. Put at its simplest and most neutral, it is alleged that, at or about the date of the notices, it appears to the Council that a building has been erected in breach of planning control and it appears to the Council that each unit is used as a single dwellinghouse. The alleged breach would embrace both operational development and use as a single dwellinghouse.

9. The description of the breach in Notice A could be interpreted as meaning that the alleged residential use is on-going, but equally, it could mean that there would be an intention on the part of the developer at some point in the future to use it as a single dwellinghouse. However, enforcement action could not be taken against such future intention. So, to avoid a potential ambiguity and to achieve a measure of consistency throughout the three notices, which are accepted as having been intended to relate to the same matter, the allegation as cited in Notice B and Notice C would be a more accurate description of the alleged breach than that presently cited in Notice A.

10. Whilst there is no disagreement about the powers vested in me to make such correction, a dispute arises as to whether such correction could be achieved without injustice arising to the interests of the main parties and, in particular, to those of the appellants. It is the appellants' case, underpinning the appeals made on ground (b), that the units are used as live/work units. In closing, Mr Upton for the appellants maintained that such correction could only be undertaken without such prejudice arising if it is accepted that the grounds of appeal remain the same and that planning permission could be granted for residential use, whether either wholly as residential use, or subject to conditions restricting residential use to live/work units.

11. The appellants have not adduced evidence to support Appeal A that would differ materially from that supporting Appeals B and C. In all three cases, evidence on ground (b) is directed at whether the alleged development has occurred – as a matter of fact. Evidence on ground (a) is directed at the appropriateness of both wholly residential use and use as live/work units. Evidence on grounds (c), (f) and (g) would be apt to all three appeals.

12. Hence, on the face of matters and on the evidence available, there is no reason to believe that correcting Notice A in the way I have described would have a materially injurious effect on the cases being adduced under the various grounds of appeal. Not least to get the deemed application for planning

permission on a proper footing, the allegation in Notice A will be corrected to correlate with that cited in Notices B and C.

The Appeals: Background

13. In the light of the correction to Notice A that I intend to make, the allegation and requirements in each of the notices are the same and I am therefore able to consider Appeal A, Appeal B and Appeal C taken together.

14. The Broadway is a busy main road and shopping street in Wimbledon town centre; to the rear (north) of part lies Broadway Court, a narrow mews-like street, serving the rear of the commercial uses fronting the main road, but which also providing access to residential accommodation above them. There are also a few other dwellings and commercial premises fronting Broadway Court, including those of a fitness club. In addition, the developments comprising "phase 1" (the appeals sites) and live/work units at "phase 2", carried out on land described as formerly comprising a factory and car park, have frontage to the northern side of part of Broadway Court. To the rear of phases 1 and 2 are the rear gardens of dwellings fronting South Park Road.

15. Those properties on the south side of Broadway Court opposite the appeals sites and fronting The Broadway lie within the designated Wimbledon Broadway Conservation Area.

16. In 1999, planning permission was sought for the development of the present appeals sites; in November 2000, the Council indicated that it was minded to grant permission for the *"erection of a two-storey building to provide 3 combined living/working units with integral garages"*, but subject first to the completion of a section 106 agreement; that agreement would seek to control the use within each unit in terms of occupation and floorspace. Subsequent events underpin the appeals made on ground (c).

17. In November 2001, in respect of the present appeals sites, an appeal was dismissed in respect of proposed development described as *"formation of three residential units on an existing car park site"*[1].

18. In January 2002, the development now the subject of the present appeals commenced. During the course of construction, certain changes to the external appearance of the building became desirable. In essence, the single triangular-shaped dormer window with angled cheeks sloping down from a central ridge, projecting from the plane of the rear roof slope of each unit, as originally proposed, was found to be impractical. The developer replaced those on each unit with dormer windows of rectangular form, comprising a flat roof and vertical cheeks. Two minor internal alterations were also made: a shower was added to a ground floor cloakroom and the first floor bathroom re-positioned.

The Appeals on Ground (b)

19. There can be no dispute that the building to which each of the three notices is directed has been built – as a matter of fact; it is plain for all to see. The

[1] Reference: APP/T5720/A/01/1069146

appeals on this ground centre on the Council's allegation (as I intend to correct in respect of Notice A) that each unit of the terraced building is, at or about the date of the notices, in use as a single dwellinghouse.

20. The appellants' evidence that the developer intended to provide live/work units is reflected in the 1999 planning application in the form that it was considered by the Council in November 2000. The ground floor of each unit of that scheme comprised a rear room designated as a "work area", a front room designated as an "office"; a hallway with entrance from the street serving these rooms together with a shower room/WC and staircase to the first floor; and an integral garage. The first floor comprised a rear room designated as a "living room" including kitchen fitments and at the front, two bedrooms and a bathroom/WC.

21. The record of the Council's site visit in September 2006 is not disputed. The ground floor of No.59 comprised a bedroom at the front, a bathroom with WC and a large open-plan living room furnished as such together with kitchen/ diner facilities; the first floor comprised three bedrooms and a bathroom/WC. It was found, broadly, that all three properties were similar in use.

22. As far as I am aware, there is no definition in the 1990 Act (as amended) or subordinate planning legislation of a use described as that of a live/work unit. Paragraph 78 of Circular 03/2005 refers to the extent to which the carrying-out of business activities in a dwellinghouse would amount to development, pointing out that planning permission for working from home is not usually needed where the use of part of the dwellinghouse for business purposes does not change the overall character of its use as a residence. Paragraph 79 adds that live/work units are often purpose-built premises, or purposely converted into such units and that they are clearly a mix of residential and business uses which cannot be classified under a single class within the Use Classes Order[2].

23. The terms "dwellinghouse" and "live/work unit" are descriptions of both a building and of a use. The external design and appearance of each of the three buildings the subject of the three notices in these cases would be appropriate and fitting to either use. Whether the use of each unit would be that as a dwellinghouse or that as a live/work unit would be largely determined, as a matter of fact and degree, by the character of the use undertaken. The internal layout of the building could also make a contribution to that character.

24. In terms of defining a live/work unit, the Council's *"Supplementary Planning Guidance Notes: Live/Work Developments"* (the 'live/work SPG'), adopted in 2004, merits some weight. The live/work SPG defines "live/work" as *"...the genuine and permanent integration of living and working accommodation within a single self-contained unit where the principal occupier both lives and works from the property".* It also points out that such development encompasses all design formats that combine residential and employment activities as joint activities and distinguishes such uses from "home-working".

25. It is clear that the 1999 planning application, as considered by the Council, envisaged that a substantial proportion of the floorspace of each unit,

[2] the Town and Country Planning (Use Classes) Order 1987 (as amended);

designated as "work area" and "office", would be utilised for non-residential or employment purposes or serve as common parts to both uses.

26. As a matter of fact and degree, the scale of such intended non-residential or employment use would exceed that which ordinarily would be considered as being incidental to the enjoyment of a dwellinghouse as such, hence part of a primary residential use. In other words, the character of the intended use of each unit as a live/work unit would be materially different from that whose primary use is that as a single dwellinghouse.

27. The appellants maintain that, by the terms of the various letting arrangements, each unit is let, and since construction, has always been used, as a live/work unit. Indeed, it may be the case on the available evidence that from March/April 2003 when the units were first occupied, use as live/work units has been undertaken. There is no evidence to the contrary. Whilst it might also be difficult for the appellants as freeholders to police such use as they claim, it would not be impossible to do so.

28. However, nothing is recorded in the Council's September 2006 site visit indicating the presence of equipment, furnishings, fittings or other accoutrements of a scale beyond that which might reasonably be regarded as being incidental to use as a single dwellinghouse. As a matter of fact and degree, the character of the use as found and recorded by the Council in respect of each unit is that as a single dwellinghouse and would be materially different from the character of that as a live/work unit. A material change of use has occurred in each case to use as a single dwellinghouse. Accordingly, a further change to the description of the allegation in each notice would be needed to describe the breach of control.

29. Brief reference has been made in the appellants' pre-inquiry written statement of case and in closing submissions to a potential ambiguity in the definition of live/work units arising from landlord and tenant law. However, it would not be right to import the meaning of terms from one code of legislation to another and I have given greater weight to the definitions derived from planning guidance. On the available evidence and on the balance of probabilities, the appellants have not discharged the onus upon them demonstrate that the development to which each of the notices is directed (as I intend to correct) has not occurred, as a matter of fact. The appeals on ground (b) will fail.

The Appeals on Ground (c)

30. Following the Council's November 2000 resolution to grant planning permission on the 1999 application subject to the conclusion of a s.106 agreement, it is apparent that no such agreement was subsequently signed and sealed by all the main parties. At the inquiry, in opening for the appellants, Mr Upton indicated that the appellants accepted in these cases that no decision notice containing a planning permission was issued by the Council and consequently, the erection of the building and change of use to use as a single dwellinghouse to which the notices are directed, was undertaken in breach of planning control.

31. As it is accepted that the erection of the building is unauthorised, it would also be the case that the extensive evidence pertaining to changes to the design of the dormers in the rear roof slope, subsequent to the Council's November 2000 resolution, would carry little weight in terms of the appeals on ground (c). In all of these circumstances, no planning permission has been granted for the development in question and the appeals on ground (c) will fail.

The Appeals on Ground (d)

32. The allegation in each notice (and as I intend to correct) comprises two elements: firstly, operational development comprising building operations for the erection of the structure and, secondly, its change of use to that as a single dwellinghouse.

33. Paragraph 8.15 of Circular 10/97 points out that in ground (d) appeals (among others of the "legal" grounds of appeal) where the burden of proof is on the appellant, the Courts have held that the relevant test of the evidence is the "balance of probability"; the appellants' own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make the appellants' version of events less than probable, then there is no good reason to dismiss the legal ground of appeal, providing the appellants' evidence alone is sufficiently precise and unambiguous to justify allowing such an appeal on the balance of probability. Paragraph 8.12 adds that in many cases, the appellants would be best-placed to produce information about activities taking place on the land and that some such information may be peculiarly within the appellants' knowledge.

34. To succeed on this ground, the appellants would need to demonstrate, on the balance of probability, that the building operations to which the notices are directed were, in each case and as a matter and degree, substantially completed on a date four years prior to the date of the enforcement notice; that would be **17 October 2002**. On the same bases, the appellants would need to show that each unit has been used without material interruption as a single dwellinghouse for the same period of four years. Central to the considerations in these cases is the judgement of the House of Lords in *Sage v Secretary of State for the Environment, Transport and the Regions and Maidstone BC* [2003] UKHL 22.

The erection of the building containing the three units

35. Mr Trajer was ever-present at the appeals site once construction works commenced. Mr T Kelly visited from time-to-time. Mr Kiddell, the Council's building control surveyor carried out a series of inspections throughout the course of construction to fulfil the requirements of the separate code of legislation contained in the Building Regulations 2000.

36. The Council expresses concern that the bundle of invoices and other documents, submitted by the appellants in support of their cases, demonstrate only the purchase of materials and do not, in themselves, confirm the dates of the carrying out of works or installation, as the case may be. But there is nothing that would demonstrate that they would be inconsistent with the

sequence of events described by the appellants' witnesses that find corroboration in the Council's evidence, as adduced by Mr Kiddell; Mr Amoako-Adofo, the Council's planning enforcement officer, was not able to assist as he has no first-hand knowledge of the period in question.

37. There is no dispute that construction works commenced in January 2002. The records of the Council and those of Mr Trajer show that the foundations of the building were complete at the end of January 2002 and that drainage works were virtually complete and tested towards the end of March 2002. Water was connected in March 2002 and the ground floor concrete slab was poured early in April 2002 (although an invoice for materials is dated 3 May 2002). However, by the first week in May 2002, the external walls were approaching plate level and during June 2002, the roof structure was well-in-hand.

38. Also, early in June 2002, the developer sought to alter the design of the rear dormers; a site meeting with a Council planning officer, Mr R Plume, took place on 6 June 2002. It is Mr Trajer's evidence that staircases were installed on or about 5 July 2002; an invoice is dated that day. It is also his evidence that the walls, windows (including the substituted triangular-shaped dormers) and roof structure (including tiling) of all of the units were completed by the end of July 2002. The latter finds support in the evidence of Mr Kiddell who, in cross-examination, explained that his records dated 19 June 2002 and 10 July 2002 show that the roof structure was in place, that the building was weathertight and insulation had commenced. An invoice dated 11 July 2002 from a local contractor, R & S Roofing Service, seeks payment for *"roofwork/guttering...now complete"*.

39. Indeed, Mr Trajer confirms that insulation works had commenced by 10 July 2002, by which time, plaster-boarding also had been undertaken. Plastering was completed by 12 September 2002 and coving was subsequently completed by a contractor whose invoice is dated 20 September 2002. At about this time, radiators had been installed and in answer to my questions, Mr Trajer confirmed that by 15 September 2002, the chipboard flooring laid on timber battens together with insulation works had all been carried out.

40. Moreover, both Mr Trajer and Mr Kiddell record that, on or before 17 September 2002, "second fixings" had commenced. Mr Trajer explained to the inquiry that this entailed the installation of various fittings and fitments including sockets, lights, bathroom and kitchen fittings. Sanitary fittings had been purchased on 20 September 2002, tiles on 30 September 2002 and kitchen units on 1 October 2002, being delivered on 8 and 9 October 2002. Mr Trajer avers that all these fitments were installed by 17 October 2002. Laminated-timber flooring was purchased and arrived on 15 October 2002. A reading of the gas meter at No.63, taken co-incidentally on 17 October 2002, recorded zero units having been used up to that date.

41. Thus, at the critical date on 17 October 2002, the laminated-timber flooring remained to be laid on top of the existing chipboard base – that was completed on or before 21 October 2002. But such work, rather than comprising an integral part of the construction of the building, could be reasonably regarded as akin to the final decoration of the premises carried out in November 2002.

Final "snagging" – the correction of minor faults – was also undertaken in November 2002, but again, that would be works leading to the final completion of the building and beyond the test in s.171B(1) of the 1990 Act (as amended) of being "substantially completed".

42. The Council draw attention to external works that were carried out after the critical date including the laying of paving in the rear garden area, the laying of paving blocks and the re-instatement of cobbles at the front and the erection of rear perimeter timber fencing. But as a matter of fact and degree, such works, whilst facilitating its use, would not be components necessary or required for the substantial completion of the building. It is the building which is required to be "substantially completed", not features within its curtilage.

43. In the *Sage* case, the building in question was unfit for habitation, the ground level consisted of rubble, there were no service fittings or staircase, interior walls were unlined or plastered, none of the windows were glazed and there was no guttering. In the present cases, when considered in-the-round and on the balance of probabilities, the situation at 17 October 2002 was that each of the three units in question had reached a stage of construction and finishing that, as a matter of fact and degree, it was capable of occupation, albeit with some inconvenience and disruption. The structure was externally finished, services were connected and kitchens and bathrooms installed and each unit would have possessed a character of a building that was virtually completed rather than one that was incomplete. The state of the buildings would have been materially different to, and significantly distinguishable from, the circumstances of the building in the *Sage* case.

44. Reference is made to the fact that a "completion certificate" issued by the Council on 10 December 2002, but this is a document that pertains to the requirements of the Building Regulations 2000 and would carry little weight in determining whether the building was "substantially completed" for the purposes of the 1990 Act (as amended).

45. At the critical date, as a matter of fact and degree and on the balance of probability, the building the subject of these appeals was "substantially completed" within the meaning ascribed by s.171B(1) of the 1990 Act (as amended). Inasmuch as the allegation in each of the enforcement notices concerns the erection of a building, it was too late for the Council to issue an enforcement notice when it did so. To that extent, the appeal on ground (d) will succeed. I intend therefore to correct each notice by deleting from the allegation reference to the erection of a building, to correspondingly vary the requirements by deleting steps 1 and 2, and to make other consequential corrections.

The use of the units

46. It is Mrs B Kelly's evidence that the units were first advertised, as live/work units, in December 2002/January 2003, but the first letting of No.61 did not occur until 6 April 2003. Those occupants remained until the end of 2004, thence moved to No.57 (in phase 2) which they still occupy. The unit at No.59 was first occupied from 17 April 2003. A local estate agent confirms that in August 2004, No.59 was being marketed as "live/work" space. It is Mr Traier's

recollection that No.63 was first occupied as a live/work unit at the start of 2003.

47. As I have found in the consideration of the ground (b) appeals, even if use of each of the units first commenced as live/work units, there has since been a material change of use to that as a single dwellinghouse. Although it would not be possible to pin-point the exact date when such development occurred, there would be no doubt that it was after 17 October 2002. Hence, to the extent that the appeals on ground (d) relate in each case to the change of use to a single dwellinghouse, the appeals on ground (d) will fail.

The Appeals on Ground (a) and the Deemed Applications for Planning Permission

48. At the date of the notice, the construction of each unit comprised in the building was lawful, but not so its use as a single dwellinghouse. Hence, the appeals on ground (a) and the deemed application proceed only in respect of the use of each unit as a single dwellinghouse.

Main Issues

49. The main issues in these cases are, in the light of the Council's policies, first, the effect of the scheme on the living conditions of adjacent occupiers and on future occupiers of the scheme; second, whether it would be appropriate in the public interest to safeguard the use of the premises for employment purposes; and third, the effect of the scheme on the provision of education facilities in the locality.

The Development Plan and Other Policy Provisions

50. The development plan for the locality includes the Merton Unitary Development Plan (the 'UDP'), adopted in 2003. Under current legislation, its policies no longer have effect unless "saved" by a Direction issued by the Secretary of State[3]. Of those to which reference has been made in evidence to the inquiry, UDP Policies U2, HP4 and E1 have not been saved.

51. The Council's live/work SPG is also relevant as a material consideration; so too is the Council's *"Supplementary Planning Guidance Notes: New Residential Development"* (the 'residential SPG') published in 1999. But neither now carry the full force of that attributable to a supplementary planning document. Greater weight would be attributable to the Council's supplementary planning document (the 'SPD') entitled *"Planning Obligations"*, published in July 2006.

Reasons

The First Main Issue – effect on living conditions.

52. By the policies of its UDP, the Council seeks to promote a high quality urban environment through, among other matters, securing high standards of design that will enhance the character of an area where local distinctiveness or attractiveness is lacking (UDP Policies ST.17, BE.22). New buildings will be

[3] see section 119 and paragraph 1(3) of Schedule 8 to the Planning and Compulsory Purchase Act 2004;

expected to ensure proper living conditions for all residents; to ensure good levels of privacy for occupiers of adjoining properties; to protect amenities from visual intrusion; to avoid noise; and to provide adequate private or communal amenity area to serve the needs of the particular occupants (Policies BE.15, HS.1). The Council will require a planning obligation where necessary to make a proposal acceptable in land use planning terms (Policies F.2; L.8).

53. The appeals site was formerly an area used for car parking; whether it was used incidentally to a once-adjacent commercial premises or whether it was a primary use in its own right, it is clear is that its use gave cause for concern among residents to the rear and, as recorded by the inspector in his 2001 appeal decision notice, it was part of an environment which he described as having *"...an unsavoury and run-down appearance..."* that was not an acceptable location for residential development.

54. The rear entrances and outbuildings to The Broadway properties combine to result in a discordant and haphazard appearance and other commercial buildings and uses remain in place, in addition to the dwellings of long-standing at the eastern end of the court. But since the 2001 appeal decision, changes have occurred, notably the erection of the development of live/work units comprising "phase 2" as well as the unauthorised, but now lawful, "phase 1" building the subject of these appeals.

55. These developments have eliminated the car park and some of the other features referred to by the previous inspector; nor at my site visit did I observe any significant untidiness or rubbish dumps to which he referred and which contributed to his conclusion. In the intervening years, on the balance of probabilities, there has occurred a significant improvement in the quality of the immediate environment hereabouts as the Council's policies strive to achieve and no longer would there be sound reasons on such grounds that would justify preventing residential use that would fulfil Policies ST.17 and BE.22.

56. The stated reasons for issuing the enforcement notices refer to the development being over-dominant and intrusive, but inasmuch as such concerns would relate to the presence of the building itself, they would be of no consequence because the building itself is now lawful. More relevant would be concerns arising from the impact of the presence of the rectangular flat-roofed dormer windows in the rear roof slope of each of the three units.

57. These dormer windows are not unlike, though slightly less in width than, those permitted in the scheme comprising "phase 2". Although occupying a substantial proportion of the plane of the rear roof slope, nevertheless, those of the appeals building would not be of such scale that they would be disproportionate, resulting in discordance with the design of the remainder of the building. Indeed, in cross-examination, Mr Amoako-Adofo conceded that they were consistent in design with those in "phase 2" and they could remain in their present form without significant changes and without giving rise to material harm to the living conditions of the occupants of nearby properties whether by reason of over-dominance or intrusiveness.

58. Of greater concern is the impact of the dormer windows arising from, first, the potential overlooking of adjoining properties to the rear and, consequentially,

their occupiers' perceived loss of privacy; and second, the impact of noise emanating from the use of the building as a dwellinghouse. Overlooking and loss of privacy were not, however, cited in the Council's reasons for issuing the enforcement notices. Nevertheless, such objections feature in the representations of those who occupy properties to the rear in South Park Road.

59. In order to achieve satisfactory privacy between the windows of habitable rooms and kitchens, a minimum separation distance for two-storey dwellings of 20m is sought by the Council's residential SPG. In these cases, the Council indicates that the separation distance would be about 15m. But the guidance also acknowledges that problems of overlooking could be reduced by design solutions including the use of roof lights for rooms within the roof space and, for non-habitable rooms, the use of obscured (or translucent) glazing. However, the Council's residential SPG is post-dated by current national advice on housing contained in Planning Policy Statement ('PPS') 3 (2006) which promotes the residential development of previously-developed land, in particular vacant and derelict sites, and the use of land effectively and efficiently.

60. Given the advantages of the town centre location of the site, the density of development in the locality and the lawfulness of the building itself, the use of obscured glazing in the windows of a habitable room, that is, the rear first floor rooms of the appeals building, would obviate the potential harm to living conditions of adjoining occupants to the rear arising from overlooking, without material harm to the future occupants of the appeals sites and would not be prejudicial to the implementation of the Council's policies. Moreover, in order to overcome potential overlooking arising from when the windows are opened, it would be possible and practical for the lower casements to be fitted such that they open only to provide ventilation rather than outward views. These matters could be achieved by conditions on the grant of planning permission and thus fulfil Policies BE.15 and HS.1; I understand that such solutions have been found to be practical in the "phase 2" development.

61. This would not overcome potential problems of noise affecting adjoining occupants. But in the time that these units have been occupied, there is no robust evidence that noise experience by nearby residents has emanated from the appeals sites, rather than from the use of surrounding properties which includes public houses fronting nearby roads and the use of the flat roofs by the occupants of the flats above the commercial properties in The Broadway.

62. The rear garden area of each unit is stated by the Council to be 22-25sq.m which would be significantly smaller than the minimum of 50sq.m sought in the Council's residential SPG. The Council is concerned that, in respect of what would be three bedroom accommodation such modest provision would not meet the needs of future occupants in terms, as set out in the residential SPG, of active or passive recreational activity including playspace for young children, clothes drying areas, dustbin stores and other facilities.

63. However, such standards would apply to all housing throughout the Borough and it would not be right to impose such a requirement in each and all circumstances without regard to other mitigating factors. The environment of

this locality has improved since the 2001 appeal decision to the extent that would render acceptable residential development previously considered to be unacceptable. Moreover policies of the UDP which seek to promote housing in town centres post-date that decision and guidance in PPS3 seeks some flexibility in the application of standards whilst acknowledging the importance of taking into account the needs of children by ensuring good provision of recreational areas, including private gardens. To some extent also, whether the amenity space for each unit would be sufficient to meet the day-to-day needs of the future occupants would be a matter of judgement for the future occupants.

64. Nevertheless, on balance, there remains an objection to the scheme on grounds of the limited amount of amenity space for each unit, contrary to Policies BE.15 and HS.1. But this needs to be weighed in the balance against which the acceptability or otherwise of the scheme as a whole would be adjudged. Moreover, the Council refers to paragraph 3.2.27 of the SPD which points out that if a development scheme is deficient in private amenity space, there would be a charge of £500 per 10sq.m of deficiency together with payment for children's play facilities, secured by means of a planning obligation. Policy L.8, referred to in the SPD, sets out the policy requirement for contributions.

65. In the present cases, the Council seeks payment of £375 and £2,500 respectively plus administrative fees. No such obligation has been submitted. However, an appropriate condition attached to a grant of planning permission, seeking the details of a scheme for the provision of recreational facilities to meet the needs of the development, would overcome the identified harm.

The Second Main Issue – loss of employment land

66. The Council seeks to balance the needs of new housing with a need for employment and other social and community facilities and to promote mixed use neighbourhoods and in Wimbledon Town Centre (Policies ST.10, WTC.1). On land outside designated employment areas, employment land will be protected and its loss will only be permitted in limited circumstances confined largely to circumstances where the land is in a predominantly residential area (Policies ST14, E.6), although proposals for the development of live/work units and other small-scale businesses would be considered favourably (Policies MU.4, E.7).

67. The Council also seeks to ensure that a wide range of jobs is available for local people (Policy ST.16) and to promote the vitality, viability and character of Wimbledon town centre (Policy ST.27). A town centre use or mixed use development in the town centre will be permitted subject to criteria concerning its scale and the absence of harm to the vitality or viability of the town centre (Policy TC.3). Town centre housing development should be of high density and should not conflict with other policies for town centre uses (Policy TC.7).

68. In addition, it is the Government's policy, expressed in PPS3, to ensure that housing is developed in suitable locations which offer a range of community facilities and with good access to jobs, key services and infrastructure, achieved by making effective use of land; priority for development should be

previously-developed land, whilst also acknowledging that not all such land would be suitable.

69. It is the Council's evidence that permission in this case would result in the loss of "*...approved employment floorspace*". The appeals sites had a series of planning permissions, initially made temporary, over a period of 30 years for use as a car park. Outline planning permission was granted in 1987 for an office building, but not pursued and long-expired. Planning permission was granted in 1996 for three business units with ancillary residential accommodation, but not pursued – this permission expired in 2001, but was extant at the date of the 2001 appeal decision which the inspector in that case acknowledged. Planning permission on the application submitted in 1999 live/work units has not been granted by the Council although it indicated at that time it was minded to do so, subject to completion of a s.106 obligation which has not been achieved. The building now erected on the appeals sites is lawful and has replaced the former car park use.

70. From this history, it follows therefore that, on the balance of probabilities, the appeals sites presently have no "approved" employment use, unless and until the 1999 application is pursued by means of the completion of the s.106 obligation as originally sought in 2000 and the Council re-determines, in the light of present policies, to grant planning permission. There is no evidence presently that such a course of events is to be pursued. No other evidence has been adduced as to how or in what way this land functions as employment land. Employment use would not, therefore, be "lost" as a consequence of the development in question.

71. However, it is understandable that the Council wishes to protect small "employment" sites to accommodate the needs of small businesses in the Borough. But even if weight is given to the Council's concern that the appeals sites would be potentially available for employment use, for example, in the form of live/work units, the Council has not adduced clear evidence to demonstrate that there is an identified shortage of employment land in the Borough. Moreover, in answer to my question, Mr Amoako-Adofo accepted that the UDP also seeks to encourage housing in town centres.

72. As the 2001 appeal inspector observed in respect of a former UDP, the Council's policies pull in different directions. Housing, employment and mixed uses all find support for town centre locations such as this. In the absence of any clear evidence that would demonstrate that the loss of employment land, if indeed any arises as such, would seriously undermine the objectives of the Council's policies, it would not be appropriate in the public interest to safeguard the use of the premises, as built, for employment purposes. The use for residential purposes would accord with the Council's aims of promoting housing and a mix of uses in the town centre as a contribution to the maintenance and enhancement of its character, viability and vitality.

The Third Main Issue – education facilities

73. Where new housing development will lead to a need for improved or additional education provision, such provision, or financial contributions towards the facility, will be sought and secured through the use of a s.106 planning

obligation (UDP Policy C.13). The SPD explains that new residential developments create increased pressure and demand on educational provision and a formula approach has been adopted to calculate the size of contributions, based on giving a cost per unit. In the present case, the Council seeks payment of £4,726.90 plus administrative fees. No such obligation has been submitted by the appellants.

74. There is a likelihood in three-bedroom accommodation as these units would provide that the future occupants would have children of school age, or reaching school age in future years. Having regard to advice in Circular 05/2005, particularly Annex B thereof, there is no dispute about the need for additional educational facilities, or that the balance between the provision of housing and education facilities would be a proper planning consideration. Whilst this need is an on-going problem, it would be axiomatic that further family-orientated residential development would serve only to exacerbate the deficiency in a material way, unless the necessary steps are taken commensurately to alleviate those difficulties. Such contribution as sought by the Council would be justified to go towards the costs of providing additional educational facilities in the near future.

75. The methodology used to calculate the size of the contribution is set out in the Council's SPD. I have no reason to believe that the sums sought by the Council would be excessive, inadequate or inappropriate in any material way.

76. However, unacceptable pressure on educational facilities as a consequence of residential use of the appeals sites is not referred to in the stated reasons for the enforcement notice. The SPD is attached as an appendix to the Council's pre-inquiry written statement of case, but no other reference is made to the requirements of Policy C.13 and there is no indication from the Council that it underpins an objection to the scheme. Nor is there any reference to Policy C.13 or the SPD in Mr Amoako-Adofo's proof of evidence. The matter emerges in examination-in-chief of Mr Amoako-Adofo in which he indicated that there is a concern about the need for a financial contribution to meets educational requirements. Clearly, such concerns were not taken into account in considering whether it was expedient to take enforcement action in these cases; in these circumstances, the weight attributable to such concerns is reduced.

77. Nevertheless, in the absence of a completed planning obligation, the mechanism for securing these objectives and overcoming the harm identified by the Council would only be achievable by an appropriate condition attached to a grant of planning permission. Such a condition would seek the provisions of details of a scheme for the provision of such educational infrastructure to meet the needs of the development.

Summary

78. Objections to the residential use of the building in question would arise as a consequence of overlooking and loss of privacy; the lack of sufficient amenity space; and the additional pressures that would be placed on the provision of education facilities. These objections are capable of being overcome by conditions.

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79. There is however a further consideration that would arise if the appeals made on ground (a) are dismissed and planning permission is refused on the deemed applications made under s.177(5) of the 1990 Act (as amended). The appeals on made on ground (f) would then next fall to be considered, that is, the steps required by the notice exceed what is necessary to remedy the breach.

80. Arising from the variation of the requirements of each notice as a consequence of the partial success of these appeals on ground (d), the notices will be varied by the deletion of both of the two steps set out in the requirements. Consequently, there would be no other steps required to be taken. These are cases in which the Council, having alleged that the breach of control includes the use as a dwellinghouse, does not require such activity to cease. In these circumstances, by the provisions of s.173(11), planning permission shall be treated as having been granted by virtue of s.73A in respect of development consisting of the carrying out of the activities.

81. Such permission would not be bound by any conditions; nor would a s.106 planning obligation be required to be in place prior to any such deemed permission being granted.

82. It follows that if permission is refused on the deemed application made under s.177(5) for the use of the building as dwellinghouse, nevertheless such use could be implemented by virtue of the unconditional permission granted by s.73A. This would serve to the detriment of adjoining residents whose amenities would not be safeguarded by the presence of conditions on a planning permission granted under s.177(5); likewise, the Council would not be able to secure a scheme relating to the provision of educational or open space facilities.

83. In the interests of the proper planning of the area, any objections to the scheme would be more than outweighed by the ramifications arising as a consequence of refusing planning permission on the deemed applications. There is therefore overwhelming justification for the granting of planning permission subject to conditions in each case.

84. Appeal A, Appeal B and Appeal C on ground (a) will succeed.

Conditions

85. I have considered the conditions suggested by both main parties in the light of advice in Circular 11/95.

86. There would be a need, as set out in paragraphs 65 and 77 above, for a condition that would seek the provisions of details of a scheme for the provision of educational and recreational infrastructure to meet the needs of the development. Such condition would have to be in a form acknowledging that the developments to which the permissions refer have already commenced.

87. In order to obviate overlooking and secure an appropriate level of privacy for the occupants of properties to the rear of the appeals sites, conditions requiring limitations on the extent to which the casements of windows in the rear elevation could be opened would be justified, together with the need to install

and maintain obscured or translucent glazing on the lower parts of the casements.

88. To avoid parking and resultant congestion on this narrow highway, a restriction limiting the use of the integral garage floorspace to the parking of vehicles would be necessary. And in the interests of highway safety and to avoid obstruction, garage doors should be installed and maintained such that they do not open out or obstruct the highway.

89. Live/work units would be a materially different use from that as use as a single dwellinghouse in terms of its character and function. It would not be appropriate therefore to limit occupation of a dwellinghouse to that as a live/work unit, hence no condition to that effect will be imposed.

Conclusions

90. It is clear from the representations that the description of the development in Notice A is incorrect in that it should refer to its change of use to use as a single dwellinghouse rather than "for use as a dwellinghouse". The appellant and the local planning authority agreed at the inquiry that it was open to me to correct the allegation in Notice A and, having considered the submissions made, I am satisfied that no injustice will be caused by this. The allegation in both Notice B and Notice C also need to be corrected to refer to the change of use. I will therefore correct Notice A, Notice B and Notice C in those respects, in order to clarify the terms of the deemed applications under section 177(5) of the 1990 Act (as amended).

91. For the reasons given above and having regard to all other matters raised, I conclude that Appeal A, Appeal B and Appeal C should succeed on ground (d), but only to the extent pertaining to that part of the allegation in each case that refers to the erection of a building. Accordingly, Notice A, Notice B and Notice C will be further corrected and varied accordingly.

92. For the reasons given above and having regard to all other matters raised, I conclude that Appeal A, Appeal B and Appeal C, inasmuch as they relate to the change of use to use as a dwellinghouse, should succeed on ground (a) and I will grant planning permission in accordance with the applications deemed to have been made under section 177(5) of the 1990 Act (as amended), which will now relate to the corrected allegation. Accordingly, Appeal A, Appeal B and Appeal C made on grounds (f) and (g) do not fall to be considered.

Formal Decision

Appeal A: APP/T5720/C/06/2030968

93. I direct that the enforcement notice be:-

(a) corrected by:-

(i) in the third line of the heading of the enforcement notice, the deletion of the words "OPERATIONAL DEVELOPMENT" without replacement thereof; and

(ii) in paragraph 3 of the notice and after the heading, the deletion of all of the words after the word *"the"* and the substitution therefor of the words *"change of use of the building to use as a single dwellinghouse"* ;

and

(b) varied by in paragraph 5 of the notice, the deletion of the words *"Demolish the building including the integral garage; Remove all building materials resulting from the demolition of the building from the site"* without replacement thereof.

94. Subject to these corrections, I allow the appeal and direct that the enforcement notice be quashed. I grant planning permission, on the application deemed to have been made under section 177(5) of the 1990 Act (as amended), for the development already carried out, namely *the change of use of the building to use as a single dwellinghouse* on the land at *59 Broadway Court, Wimbledon, London SW19 1RG*, subject to the following conditions:

1) The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 6 months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:

i) within 3 months of the date of this decision, details of a scheme for the provision of educational, children's playspace and open space infrastructure to meet the needs of the development in accordance with unitary development plan policies shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation;

ii)within 11 months of the date of this decision the scheme shall have been approved by the local planning authority or, if the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;

iii)if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State;

iv)the approved scheme shall have been carried out and completed in accordance with the approved timetable.

2) The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 6 months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:-

i) within 3 months of the date of this decision, a scheme for limiting the extent to which the lower casements of the windows in the rear dormer are capable of being opened shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation;

ii) within 11 months of the date of this decision the scheme shall have been approved by the local planning authority or, if the local planning

authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;

iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State;

iv) the approved scheme shall have been carried out and completed in accordance with the approved timetable.

3) Within 1 month of the date of this decision, the lower casements of the windows to the rear dormer shall be fitted with obscured glazing and they shall be maintained as such at all times thereafter.

4) The garage in the building shall be used only for the purposes of the parking of vehicles.

5) The doors of the garage shall not open out or encroach on to the highway.

Appeal B: APP/T5720/C/06/2030969

95. I direct that the enforcement notice be:-

(a) corrected by:-

(i) in the third line of the heading of the enforcement notice, the deletion of the words "OPERATIONAL DEVELOPMENT" without replacement thereof; and

(ii) in paragraph 3 of the notice and after the heading, the deletion of all of the words after the word *"the"* and the substitution therefor of the words *"change of use of the building to use as a single dwellinghouse"* ;

and

(b) varied by in paragraph 5 of the notice, the deletion of the words *"Demolish the building including the integral garage; Remove all building materials resulting from the demolition of the building from the site"* without replacement thereof;

96. Subject to these corrections, I allow the appeal and direct that the enforcement notice be quashed. I grant planning permission, on the application deemed to have been made under section 177(5) of the 1990 Act (as amended), for the development already carried out, namely *the change of use of the building to use as a single dwellinghouse* on the land at *61 Broadway Court, Wimbledon, London SW19 1RG*, subject to the following conditions:

1) The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 6 months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:

i) within 3 months of the date of this decision, details of a scheme for the provision of educational, children's playspace and open space infrastructure to meet the needs of the development in accordance with unitary development plan policies shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation;

ii) within 11 months of the date of this decision the scheme shall have been approved by the local planning authority or, if the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;

iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State;

iv) the approved scheme shall have been carried out and completed in accordance with the approved timetable.

2) The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 6 months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:-

i) within 3 months of the date of this decision, a scheme for limiting the extent to which the lower casements of the windows in the rear dormer are capable of being opened shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation;

ii) within 11 months of the date of this decision the scheme shall have been approved by the local planning authority or, if the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;

iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State;

iv) the approved scheme shall have been carried out and completed in accordance with the approved timetable.

3) Within 1 month of the date of this decision, the lower casements of the windows to the rear dormer shall be fitted with obscured glazing and they shall be maintained as such at all times thereafter;

4) The garage in the building shall be used only for the purposes of the parking of vehicles.

5) The doors of the garage shall not open out or encroach on to the highway.

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Appeal C: APP/T5720/C/06/2030971

97. I direct that the enforcement notice be:-

(a) corrected by:-

(i) in the third line of the heading of the enforcement notice, the deletion of the words "OPERATIONAL DEVELOPMENT" without replacement thereof; and

(ii) in paragraph 3 of the notice and after the heading, the deletion of all of the words after the word *"the"* and the substitution therefor of the words *"change of use of the building to use as a single dwellinghouse"* ;

and

(b) varied by in paragraph 5 of the notice, the deletion of the words *"Demolish the building including the integral garage; Remove all building materials resulting from the demolition of the building from the site"* without replacement thereof;

98. Subject to these corrections, I allow the appeal and direct that the enforcement notice be quashed. I grant planning permission, on the application deemed to have been made under section 177(5) of the 1990 Act (as amended), for the development already carried out, namely *the change of use of the building to use as a single dwellinghouse* on the land at *63 Broadway Court, Wimbledon, London SW19 1RG*, subject to the following conditions:

1) The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 6 months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:

i) within 3 months of the date of this decision, details of a scheme for the provision of educational, children's playspace and open space infrastructure to meet the needs of the development in accordance with unitary development plan policies shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation;

ii) within 11 months of the date of this decision the scheme shall have been approved by the local planning authority or, if the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;

iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State;

iv) the approved scheme shall have been carried out and completed in accordance with the approved timetable;

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2) The use hereby permitted shall cease and all equipment and materials brought onto the land for the purposes of such use shall be removed within 6 months of the date of failure to meet any one of the requirements set out in (i) to (iv) below:-

i) within 3 months of the date of this decision, a scheme for limiting the extent to which the lower casements of the windows in the rear dormer are capable of being opened shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation;

ii) within 11 months of the date of this decision the scheme shall have been approved by the local planning authority or, if the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State;

iii) if an appeal is made in pursuance of (ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State;

iv) the approved scheme shall have been carried out and completed in accordance with the approved timetable.

3) Within 1 month of the date of this decision, the lower casements of the windows to the rear dormer shall be fitted with obscured glazing and they shall be maintained as such at all times thereafter.

4) The garage in the building shall be used only for the purposes of the parking of vehicles.

5) The doors of the garage shall not open out or encroach on to the highway.

G P Bailey
INSPECTOR

APPEARANCES

FOR THE APPELLANTS:

Mr W Upton	of Counsel, instructed by Richard Buxton, Environmental and Public Law, 19B Victoria Street, Cambridge, CB1 1JP.
He called:-	
Mr L Trajer RIBA	chartered architect, director of Elan and Sea Ltd and former director of KT Developments Ltd, 15A Colinette Road, London SW15 6QG;
Mr T Kelly	director of Sultanglade Ltd and former director of KT Development Ltd, House B, The Courtyard, 38 Quill Lane, Putney, London SW5 1PD;
Mrs B Kelly	company secretary, Sultanglade Ltd, House B, The Courtyard, 38 Quill Lane, Putney, London SW5 1PD.

FOR THE LOCAL PLANNING AUTHORITY:

Mr J Lopez	of Counsel, instructed by Ms S Lauder, Civic & Legal Services, Merton London Borough Council.
He called:-	
Mr B Kiddell	building control surveyor, Building Control Section, of the same Council;
Mr S Amoako-Adofo BSc DipTP MRTPI	Principal Planning Enforcement Officer, of the same Council.

INTERESTED PERSONS:

Mr N A Burton	resident, 25 South Park Road, Wimbledon, London SW19 8RR.

ADDITIONAL DOCUMENTS PUT IN AT THE INQUIRY

1 Council's notification letter of time, date and place of inquiry and circulation list;
2 petition from adjacent residents in The Broadway and Broadway Court supporting the appellants – 16 signatures, put in by appellants;
3 bundle of 3 letters/e-mails from occupants of 55, 57 & 61 Broadway Court supporting appellants;
4 e-mail from Mr R Messent, occupier 33 South Park Road, to Council, supporting the Council, put in by Council;
5 separate copies of planning permission dated 24.10.03 re erection of 3x2-bedroom live/work units at 52-54 Broadway Court – missing from Appendix LT6 of Mr Trajer's proof of evidence, put in by appellants and by Council;

continued

ADDITIONAL DOCUMENTS (continued)

6 extract from Circular 03/2005 – Changes of Use of Land and Buildings, put in by appellants;
7 bundle of correspondence January 2002-March 2002 from/to L T Associates (Mr L Trajer) to/from Thames Water, British Gas Trading and 24seven re water, gas & electricity supplies to "car park site", Broadway Court, put in by appellants;
8 letter dated 11.9.06 from Council to Mr L Trajer, put in by Council;
9 letter dated 18.10.06 from Council to appellants' solicitors, put in by Council;
10 letter dated 31.1.07 from Allen Briegel (estate agents) to Sultanglade Ltd re marketing, put in by Council;
11 e-mails to/from Mr R Plume (ex-planning officer of the Council) from/to Council, put in by Council;
12 draft (and unsigned) statement of common ground, put in by Council;
13 Council's supplementary planning guidance notes – live/work developments, put in by Council;
14 Council's supplementary planning document – planning obligations, put in by Council;
15 Council's draft calculation notes of financial contributions, put in by Council;
16 Direction dated 24.9.07 & Supplementary Direction dated 27.9.07 from Government Office for London to Council, made under para. 1(3), Sch 8, Planning and Compulsory Purchase Act 2004 – lists of "saved" UDP policies, put in by Council;
17 lists of suggested conditions put in by the appellants;
18 guidance notes on school places for section 106 agreements, put in by the Council.

VERIFIED AND ADDITIONAL PLANS PUT IN AT THE INQUIRY

A the appeal site – Appeal A;
B the appeal site – Appeal B;
C the appeal site – Appeal C;
D1-D2 dwg.nos.BC/004/R & BC/004/R2 – front and rear elevations with floor and cill height added and rectangular dormer overlay, put in for appellants.

ADDITIONAL PHOTOGRAPHS PUT IN AT THE INQUIRY

1-13 Broadway Court, the appeal sites and adjoining & views of appeal site from rear of South Park Road, put in by the Council;
14 construction vehicle in Broadway Court, put in by appellants;
15-18 flats and roof terraces rear of The Broadway, opposite appeal sites, put in by appellants.

Costs Decision

Inquiry held on 14-15 August 2007 and 23 October 2007

Site visit made on 24 October 2007

by G P Bailey MRICS

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

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date: 18th. December 2007

Costs application in relation to Appeal References: APP/T5720/C/06/2030968; APP/T5720/C/06/2030969; and APP/T5720/C/06/2030971
59, 61 and 63 Broadway Court, Wimbledon, London SW19 1RG

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Sultanglade Ltd and Elan & Sea Ltd for an award of full, or, as the case may be, partial costs against the Merton London Borough Council.
- The inquiry was in connection with three appeals against three enforcement notices each alleging, without planning permission, the erection of a building and use as a dwellinghouse.

Summary of Decision: The application fails and no award of costs is made.

The Submissions for the Appellants

1. Reference is made in particular to paragraphs 24 and 28 of Annex 3 and paragraph 15 of Annex 2 to Circular 8/93.

2. The Council acted unreasonably by not considering the imposition of conditions limiting the use of the building to live/work units. The only reason underpinning the Council's concerns, following the resolution that it was minded to grant planning permission, was the absence of a s.106 agreement. In 2006, the Council ought to have considered its current policies as set out at paragraph 5 of the Council's *"Supplementary Planning Guidance: Live/Work Development"*. The Council has also ignored the fact that the phase 2 development, permitted in 2003, includes such conditions.

3. Mr S Amoako-Adofo, the Council's expert planning witness acknowledged, that such conditions would work appropriately and that such use would be acceptable in the terms of the Council's policies, but was blinded by the requirement for a s.106 agreement. This meant that the enforcement notices required demolition of the building because it was considered by the Council that conditions could not be used.

4. The whole sequence of events concerning the s.106 agreement was about use as live/work units. Had such use been accepted as conditions, then the inquiry would have been unnecessary. Full residential use was debated at the inquiry because it arose during the course of events. Hence an award of full costs is sought.

5. In respect of the four-year immunity provisions of the 1990 Act (as amended), the appellants have always maintained that they were immune from enforcement action. Full information was sent to the Council on 8 July 2007 and receipt was acknowledged. This information was not properly considered by the Council who has no evidence of its own to counter the appellants' evidence and it continues to apply the wrong tests. The Council has misunderstood references to "completion" made by Mr L Trajer for one of the appellants. The Council has misunderstood the evidence of its own building control surveyor, Mr B Kiddell, in respect of the different basis on which a "completion certificate" is issued. An award of partial costs is sought therefore on grounds that after 8 July 2007, the Council failed to reconsider the evidence before it. Enforcement action should have been stopped at that time and has subsequently led to wasted expense.

The Response by the Council

6. The thrust of the appellants' claim in respect of the first limb is inaccurate as it goes against the Council's rule 6 statement and the evidence of Mr Amoako-Adofo as contained in his proof and in examination-in-chief. The Council's complaint is made not only in respect of the use, but also, in the light of policies set out in the unitary development plan, in respect of the visual impact of the development and residential amenities. Such concerns could not be overcome by the imposition of conditions. The claim is made on the basis of a misunderstanding.

7. In respect of the second limb of the claim, there was insufficient evidence submitted by the appellants to justify withdrawal of the enforcement notices. "Substantial completion" would be a matter of fact and degree and requires a holistic approach. An award would only be justified if matters were abundantly clear. That is not the case here.

8. The evidence of the Council's building control surveyor is not indicative or supportive of the appellants' case. It is clears that Mr T Kelly for the appellants attended the site sporadically. The burden falls largely on Mr Trajer for the appellants to discharge the onus on them, assessed on the balance of probability. Only bare assertions have been given, therefore it is reasonable to consider the submitted documents. They were taken into account by the Council in reaching a judgement, but they are insufficient to show the date of substantial completion; the proofs of evidence submitted for the Council indicated that the Council was not satisfied. Any accusation on the part of the appellants that the Council has not considering the evidence available has not been made out. No unreasonable behaviour has arisen on the part of the Council.

Conclusions

9. I have considered this application for costs in the light of Circular 8/93 and all the relevant circumstances. This advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.

10. As a consequence of the consideration of all of the written and sworn oral evidence, I have been able to conclude that the erection of the building, as cited in the allegation in the notice, was lawful by the date of the notice, but that its change of use to that as a dwellinghouse, in the allegation as corrected, would amount to a breach of planning control. Although I have found not all of the Council's objections to that use would be sustained, those that are validly made, in the circumstances of these cases, would be mitigated by the imposition of conditions. Thus, these are not cases where the Council has taken enforcement action solely to remedy the absence of a valid planning permission. That is because cogent planning objections to the scheme exist, affecting public amenity, which could only be overcome by the imposition of conditions on a grant of planning permission. Hence, in this respect, it was expedient to issue the notices.

11. The Council originally sought a s.106 agreement in respect of a scheme for the erection of live/work units. But neither the erection of live/work units, nor the use of the building as live/work units, is part of the allegation in the notices in these cases. Nor for the reasons I have given in the appeals decision notice would it be possible to impose a condition on the grant of planning permission in respect of a scheme for the use as a dwellinghouse limiting the use to that as a live/work unit. No unreasonable behaviour has arisen on the part of the Council in this respect.

12. By s.172(1) of the 1990 Act (as amended) a local, planning authority may issue an enforcement notice where it appears to them that there has been a breach of planning control. That is not a high threshold; the local planning authority must be able to show only that it appeared to them that a breach had occurred and that it was expedient to take action.

13. Ostensibly, the erection of the building, being without planning permission as ascertained from the Council's records, would fulfil those tests. Moreover, the Council had its own evidence from which it could draw conclusions about the use of each of the three units within the building. So, in the terms of the test imposed on the local planning authority by s.172(1), there was evidence of a breach of control on which the Council could justifiably act. Given also, in the light of the Council's policies, the objections to the scheme, it was expedient for the Council to take enforcement action. These are not cases in which the Council has failed to be diligent in investigating whether a breach has occurred leading to appeals against unnecessary or unjustified enforcement notices.

14. Having taken such action, the onus then lies with the recipients of the notices, in respect of the legal grounds of appeal, to demonstrate that the notices should be quashed. Having received the notices of appeals, the appellants' rule 6 statement and, subsequently, the proofs of evidence of Mr Trajer and Mr T Kelly, it would not have been obvious to the Council that either the appeals on ground (b) or those made on ground (d) would succeed.

15. Although I have found in favour of the appellants on part of the appeals made on ground (d), it was not unreasonable of the Council to seek to pursue its statutory right to appear before a person appointed by the Secretary of State at an inquiry so that the appellants' evidence could be tested by cross-

examination. Moreover, certain of the Council's objections on the planning merits of the scheme would only be resolved by the imposition of conditions on the planning permission granted on the deemed application made under s.177(5). These are not cases, therefore, in which examination of the appellants' written submissions to the inquiry, prior to the inquiry, ought to have indicated to the Council that its objections could not be sustained. Although planning permission has been granted for the matters alleged in the notice, that is not to say that the case advanced by the Council was made unreasonably, hence no unreasonable behaviour has arisen.

Conclusion

16. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 8/93, has not been demonstrated and I therefore conclude that an award of costs is not justified.

Formal Decision

17. I refuse the application for an award of costs.

G P Bailey

INSPECTOR