

Committee	PLANNING COMMITTEE (C)	
Report Title	84-86 WICKHAM ROAD SE4 1NF	
Ward	Brockley	
Contributor	Richard Lockett	
Class	PART 1	12 APRIL 2012

REQUEST FOR ENFORCEMENT ACTION

Background Papers

- (1) Case File DE/85/86/TP / EN/08/00079
- (2) Adopted Unitary Development Plan (July 2004)
- (3) PPS 1: Delivering Sustainable Development
- (4) PPG18: Enforcing Planning Control

1.0 Introduction

- 1.1 This report explains the reasons why the council cannot take enforcement action against the alleged breach of Condition (5) of the planning consent - DC/02/51706 granted on 3/12/2002 for *the alteration and conversion of 86 Wickham Road SE4 to provide 4 two bedroom self contained flats, together with the conversion of the attics of 84 & 86 Wickham Road to provide a one bedroom self contained flat.*

2.0 Property/Site Description

- 2.1 The site consists of a pair of 1860 four-storey semi-detached properties situated on the western side of Wickham Road, which is located within the Brockley Conservation Area. The surrounding area is predominantly residential in character.
- 2.2 The building at 86 Wickham Road contains four two bedroom self contained flats as well as a one bedroom self contained flat in the shared roof space of 84 and 86, neither building is listed.
- 2.3 To the rear of the properties is a garden area [which is the subject of this report] and backs on to a pedestrian path connecting Wickham Gardens to Harefield Road.

3.0 Planning History

- 3.1 A planning application - DC/02/51706 was submitted for: *'The alteration and conversion of 86 Wickham Road SE4, to provide 4 two bedroom self contained flats, together with the conversion of the attics at 84 & 86 Wickham Road to provide a one bedroom self contained flat'*. This application was granted consent on 3/12/2002. Condition (5) of this approval states:

The whole of the existing amenity space, as shown on the permitted plans, shall be retained permanently for the benefit of the occupiers of the residential units hereby approved.

- 3.2 A planning application - DC/06/64266 was submitted for: *'The construction of 3 single storey two bedroom mews houses at the rear of 84-86 Wickham Road SE4, together with the provision of 6 bicycle spaces and a bin store'* and refused permission on 25/1/2007 for the following reasons:

- (1) *The loss of these garden areas, with their planting and general greenery, would fail to preserve or enhance the character and appearance of the Conservation Area and would therefore be contrary to Policies URB 16 New Development, Changes of Use and Alterations to Buildings in Conservation Areas and HSG 8 Backland and In-fill Development in the adopted Unitary Development Plan (July 2004) and the Brockley Conservation Area Supplementary Planning Document (Adopted February 2006).*
- (2) *The loss of these garden areas and the habitat that they provide would have a detrimental impact on biodiversity within the local area and would therefore be contrary to Policies HSG 8 Backland and In-fill Development and OS 13 Nature Conservation, in the adopted Unitary Development Plan (July 2004).*
- (3) *The proposed development and the loss of the opportunity for parking/garaging at this site is likely to have a detrimental effect on the appearance of the Conservation Area by giving rise to additional kerbside parking and creating pressure for use of front gardens for parking, contrary to Policy URB 16 New Development, Changes of Use and Alterations to Buildings in Conservation Areas in the adopted Unitary Development Plan (July 2004) and the Brockley Conservation Area Supplementary Planning Document (Adopted February 2006).*

3.3 The owner of the property exercised his right of appeal to the Planning Inspectorate against the council's decision not to grant planning consent however the Inspector agreed with the council's reasons for refusing planning permission and dismissed the appeal.

Enforcement History

3.4 In 2008, the Council received a complaint regarding an alleged breach of Condition (5) of planning consent - DC/02/51706. The complainant stated that an existing fence in the rear garden area had not been removed and as a result the occupiers of the residential units contained within 86 Wickham Road (along with the roof space of 84-86) were unable to use this garden area.

3.5 A site visit established that an existing fence was in situ separating the bottom parcel of land from the main section of the garden. However, the access gate within the fence was not secured and therefore residents were able to access the separated area of garden land should they choose to do so.

3.6 It was established that following completion of the development, leases for each of the individual flats were sold as follows:

- Flat A - sold in February 2006
- Flat B - sold in June 2004
- Flat C and D - sold in May 2006 and Flat E in September 2006.

All five leases were verified by individual solicitors and signed by the purchasers.

3.7 The lease for Flats A and B included the use of outdoor rear garden space. The lease for Flats C, D and E did not include the use of outdoor rear garden space.

- 3.8 The use of the parcel of land to the rear of the garden was excluded from all of the above leases.
- 3.9 The issue surrounding the legality of the leases of the Flat C, D and E in relation to the use of the rear garden area is a civil matter and not one that the planning department can get involved with.
- 3.10 The issue surrounding the alleged breach of a planning condition can be addressed by the planning department. It is the responsibility of the free holder to ensure that all relevant conditions of the approved permission are adhered to.
- 3.11 Following investigation where it was established that despite the fence being in place the area of land in question was accessible, a report was taken to Planning Committee (C) on 9 December 2010 recommending that no further action be taken in respect of the alleged breach of Condition 5. However, the Planning Committee decided to overturn the officers recommendation not to take enforcement action and resolved to authorise the head of legal services to take all necessary legal action to serve a Breach of Condition Notice to secure compliance with Condition (5) of the planning permission issued under reference DC/02/51706.
- 3.12 Although condition 6 was never submitted for approval the committee did agree with the officer and considered it not expedient to take enforcement action against this breach of planning condition as eight years had elapsed since the approved consent and four years since the occupation of the development.
- 3.13 Following the committee resolution on 9 December 2010 Officers held further discussions with the Council's Legal Team regarding the appropriate course of action to be taken. The Council's Legal Team considered that to serve a breach of condition notice without proof that condition 5 had been breached would render the notice ineffective and may result in costs being awarded against the council for unreasonable behaviour [should an application be made]. It was therefore recommended to carry out a further site visit to establish whether there is fact a breach of Condition 5 taking place and if no breach found re-present an amended report to the committee detailing the reasons why a Breach of Condition Notice should not be issued .

4.0 Alleged Breach of Planning Control

- 4.1 Condition 5 of planning consent - DC/02/51706 stated that: *'The whole of the existing amenity space, as shown on the permitted plans, shall be retained permanently for the benefit of the occupiers of the residential units hereby permitted'*.
- 4.2 It is the opinion of some of the residents of 86 Wickham Road that, as there is a fence and gate erected to the rear of the garden, there is a portion of land which is not *'retained permanently for the benefit of the occupiers'*. The residents suggest that the fence and gate preclude them from using this piece of land as amenity space and therefore that condition (5) has been breached.

5.0 Policy Context

Planning Policy Statement 1: Delivering Sustainable Development

- 5.1 Paragraph 18 under the heading of the Protection and Enhancement of the Environment states that 'the condition of our surroundings has a direct impact on the quality of life. Planning should seek to maintain and improve the local environment and help to mitigate the effects of declining environmental quality'

The policy goes further to say that '...decisions should be based on: – up-to-date information on the environmental characteristics of the area; the potential impacts, positive as well as negative, on the environment of development proposals (whether direct, indirect, cumulative, long-term or short-term) and recognition of the limits of the environment to accept further development without irreversible damage.'

- 5.2 PPG 18 Enforcing Planning Control provides guidance to local authorities on the use of enforcement powers.

6.0 Planning Considerations

- 6.1 The main planning considerations in this case is whether it is possible for the Council to serve a Breach of Condition Notice, under Section 187A of the Town and Country Planning Act 1990 (As amended) on all who have a legal interest in the land which is the subject of this report.

7.0 Details

- 7.1 The Council has sought to investigate whether a breach of planning control has actually taken place by virtue of non compliance with Condition 5. As part of the investigation Officers have visited the site (on more than one occasion) to check whether the garden is freely accessible to all occupiers of the property or whether the garden is locked/fenced off and therefore only accessible to those persons with specified access. At the time of the last site visit (16th March 2012) Officers noted that there was a fenced off parcel of land to the rear, however, the access gate adjacent the boundary with 88 was not locked and clearly open. Consequently this area could also be accessed and used by occupiers of all of the flats within this property and therefore no breach is currently taking place.
- 7.2 It is important to note that Officers undertook an un-planned site visit which was not pre-arranged with the landowner and therefore were able to see the indisputable circumstances on site.
- 7.3 The Council has been unable to establish a breach of condition 5 of planning consent - DC/02/51706 at the above address and therefore at this present moment in time it is not appropriate or reasonable to issue a Breach of condition Notice or take further enforcement action.
- 7.4 Whilst a fence is in place, as discussed above this fence does preclude access into the area of land in question. Furthermore, the fence is considered to be development which has existed in excess of four years following the completion of the approved consent and therefore it is considered to be immune from enforcement action.

7.5 The council may only issue a Breach of Condition Notice when a breach of a planning condition has been established and the recipient would have had no right of appeal. The defence against such a notice is limited; namely that the "freeholder" is no longer in control of the land or that the freeholder can show that every effort has been made to comply with the condition. The penalty fine on conviction is a maximum of £2,000.

8.0 Legal Implications

8.1 Government Policy advice to Local Planning Authorities on the use of their enforcement powers is set out in Planning Policy Guidance Note No 18. PPG 18 sets out the issues which local planning authorities should bear in mind when taking enforcement action as follows:-

They have been given primary responsibility for taking whatever enforcement action may be necessary in the public interest.

The Local Government Ombudsman can make a finding of "maladministration" if a Council fails to take enforcement action when it is plainly necessary to do so.

The decisive issue in every case is whether the breach of planning control would unacceptably affect public amenity or the existing use of land or buildings meriting protection in the public interest.

Enforcement action should always be commensurate with the breach of planning control involved.

Where attempts to persuade the site owner or occupier to voluntarily remedy the breach are unsuccessful, negotiation on that issue should not be allowed to hamper the taking of whatever formal enforcement action, which may be required.

9.0 Equal Opportunities and Human Rights Implications

9.1 Implications in relation to the Human Rights Act 1998 (HRA) have been identified in regards to the alleged breach of a condition 5 of planning consent - DC/02/51706. Action will therefore be relevant to the occupiers' Article 8 rights and potentially their Article 1 rights under the first protocol of the HRA, as set out below:

Schedule 1, Part I – The Convention:

Article 8 Right to Respect for Private and Family Life

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Schedule 1, Part II – The First Protocol

Article 1 Protection of Property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

10.0 Conclusion

10.1 The investigating officer has referred the matter to the Planning Committee for a formal decision with a recommendation not to take further action for the following reasons:

- The Council has been unable to establish a breach of condition 5 of planning consent - DC/02/51706 at the above address and therefore at this present moment in time it is unable to issue a Breach of condition Notice or take further enforcement action.
- The fence in question is considered to be development which has existed in excess of four years following the completion of the approved consent and therefore it is considered to be immune from enforcement action

11.0 RECOMMENDATION

Authorise officers to take no further action in respect of the alleged breach of Condition (5) of planning permission - DC/02/51706.