

Re: 8a Hampstead Hill Gardens NW3 2PL

Opinion

1. I am asked to advise SM Planning in respect of proposed development at 8a Hampstead Hill Gardens London NW3 2PL. The proposed development seeks to replace an existing garage in the rear garden with a new building to facilitate living accommodation with roof terrace above and a basement below to incorporate a garage and cinema. This replacement living area will be linked to the existing dwelling by a single storey link.
2. The key issue concerns the meaning and application of policy A5 (basements) of the Camden Local Plan (2017).
3. SM Planning have received pre-application advice in a letter dated 15 October 2021. They do not agree with the approach to policy A5 set out in that letter.
4. The unusual element of the proposal is that the basement is to be built under the proposed living area which replaces the existing garage building rather than under the original townhouse. Policy A5 is not written with such a scenario in mind. The key issue is how it applies in these circumstances.

Legal Approach

5. The determination of a planning application will be made in accordance with the development plan unless material considerations indicate otherwise (s.38(6) of the Planning and Compulsory Purchase Act 2004).
6. The development plan consists of the London Plan (2021), the Camden Local Plan (2017) and the Hampstead Neighbourhood Plan (2018).
7. The Court (ultimately) determines the meaning of planning policies (see Tesco v Dundee CC [2012] 2 P&CR 9 at paras 18-21). The exercise of determining the meaning of the words of a planning policy examines the language used in context and having regard to the purpose of the policy in question.
8. Once the meaning of the words has been established, the application of policy (correctly understood) to the facts of any given case is a matter of planning judgment – see for example

R (Samuel Smith Old Brewery v North Yorkshire CC [2020] 2 P&CR 8 at para 41. The Council exercise their planning judgment in the first instance but there is a right of appeal to a Planning Inspector who would become primary decision maker as to the application of the policy.

Policy A5 of the Camden Local Plan (2017)

9. Policy A5 contains various criteria applicable to basement development.
10. It indicates that basement development will only be permitted where it is demonstrated to the satisfaction of the Council that the proposal would not cause harm to neighbouring properties, the structural, ground or water conditions of the area, the character and amenity of the area, the architectural character of the building and the significance of heritage assets.
11. The policy highlights the need for an impact assessment of the scheme's impact on drainage, flooding, ground water conditions and structural stability in the form of a Basement Impact Assessment and where appropriate a Basement Construction Plan.
12. The policy states that:
"The siting, location and design of basements must have minimal impact on, and be subordinate to the host building and property"
13. There is no definition of what the host building is. The supporting text (at para 6.110) states –
"A basement is a floor of a building which is partly or entirely below ground".
14. In the present proposal, the basement is being provided to the proposed living area (replacing the existing garage building). It is not being provided under the original townhouse.
15. It is relevant to note the approach to gardens recorded in para 6.111 of the supporting text to policy A5. This states: "When this policy refers to gardens and garden space, this includes all outdoor (unbuilt) space on the property, including paved areas, driveways as well as grassed or landscaped areas".
16. It is clear therefore that the existing garage building is not "garden" for the purpose of the policy. It is not "unbuilt". Rather, it is a "building" and the basement at issue is being added to the proposed living area which replaces it.
17. Once these elements of the policy's supporting text are considered, it seems clear to me that the natural answer to the question – what is the host building? - is that the proposed living area

(which replaces the existing garage) is the host building. It is the building where the basement is located. It is not part of the garden for the purpose of the policy.

18. The policy also includes a list of applicable criteria. It states that basement development should:
- f. not comprise more than one storey
 - g. not be built under an existing basement
 - h. not exceed 50% of each garden within the property
 - i. be less than 1.5 times the footprint of the host building in area
 - j. extend into the garden no further than 50% of the depth of the host building measures from the principal rear elevation
 - k. not extend into or underneath the garden further than 50% of the depth of the garden;
 - l. be set back from neighbouring property boundaries where it extends beyond the footprint of the host building; and
 - m. avoid the loss of garden space or trees of townscape merit or amenity value.

The policy wording states that “exceptions to f. to k. above may be made on large comprehensively planned sites” .

The Council’s pre-application advice letter

19. The Council’s pre-application advice letter asserts that the proposed basement would exceed 50% of the rear garden area (criterion h).
20. In so contending, the Council is treating the area of the garage building as part of the rear garden. As above, I consider that this is wrong. It contradicts the meaning of garden set out in paragraph 6.111 of the supporting text to policy A5.
21. The same erroneous approach to “garden” (i.e. treating the garage building as part of the garden) is apparent from the contention in the pre-application letter that there is a breach of criterion k.
22. The Council also assert that the basement would be more than 1.5 times the footprint of the host building in area. This conclusion is based on treating the original townhouse (to which no basement is being added) as the “host building” rather than the building with the proposed living area (which contains the basement) as the host building. As above, I consider that this is the wrong approach. As I have indicated above, the “host building” is not defined but it seems to me that the most relevant building is the building to which the basement is being added (see the meaning of basement in para 6.110). The better view is that the proposed living area (which replaces the garage) is the host building.

23. The letter also asserts that there is a breach of criterion j – but that depends upon taking the rear elevation as being the rear elevation of the dwelling. I do not consider that this criterion can be meaningfully applied where, as here, the basement is being added to a discrete building rather than the original townhouse.
24. The policy indicates (at 6.129) that the Council will control the size of the overall size of basement development “to protect the character and amenity of the area, the quality of gardens and vegetation and to minimise impacts on neighbouring properties”. A relevant consideration in this case is that there is very little reduction in the garden size as the basement is primarily under the footprint of the existing garage building (replaced by the proposed living area). It is not apparent from the Council’s pre-application advice how they have considered this feature of the proposal which is highly relevant to an assessment of the size of the basement given that a purpose of the policy is protecting gardens.

Application of Policy to Criteria

25. Hayhurst & Co Architects have produced a clear analysis (dated 27 October 2021) of how the proposal perform in respect of the criterion if approached from the (correct) standpoint of the host building being the proposed living area (and the garage building not being part of the garden). This shows how the criteria of policy A5 including the size criteria are met.
26. It is fair to note that policy criteria j – “principal rear extension” is not applicable.
27. Hayhurst & Co Architects’ analysis explains how criteria (k) and (l) have been met where possible.

Other Applicable Policy and Guidance

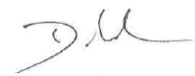
28. I note that chapter 5 of the Hampstead Neighbourhood Plan applies to basements. It explains the geology and topography considerations that apply in Hampstead. It applies to basements is as defined as “the construction or extension of one or more storeys of accommodation below the prevailing ground level of a site or property”. Its policies require Basement Impact Assessments and contains provision where appropriate for Basement Construction Plans. The contents of the Neighbourhood Plan do not bear on the issues discussed above.
29. The Council have made supplementary planning guidance in respect of Basements (dated January 2021) (CPG). I have considered this guidance but it does not bear directly on the key

issues of approach discussed above. The Council have referred to paragraph 2.5 of the CPG which indicates that the size base criteria in policy A5 need to be considered together. But that does not assist with the prior issue discussed above as to how those criteria apply where the basement at issues is part of the proposed living area replacing the existing garage building rather than the original townhouse. As explained above, I consider that the Council's analysis is wrong in respect of what it treats as the garden and what it regards as the host building.

30. I have considered the contents of paras 108-115 of the Camden Local Plan Inspector's report dated 10 May 2017 but nothing in that report sheds light on the issues of approach that I have discussed above.

Conclusions on Approach to Policy A5

31. As explained above, I consider that the better approach is to apply the size criteria to the proposed living area (which includes the basement) rather than to the original townhouse (which does not include a basement).
32. It is wrong to treat the garage building as part of the garden for the purpose of applying the size criteria. This contradicts the clear guidance in para 6.111 of the supporting text to policy A5.



Daniel Kolinsky QC

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