

Appeal Decision

Site visit made on 14 December 2016

by John Whalley

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

Decision date: 22 December 2016

Appeal A: ref: APP/X5990/C/16/3150495 254 Edgware Road, London W2 1DS

- The appeal was made by Violet Holdings Ltd under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the City of Westminster Council.
- The notice was issued on 29 April 2016.
- The breach of planning control alleged in the notice was: Without the requisite planning permission, and within the last 4 years the erection of a roof extension at sixth floor level with a terrace at roof level enclosed by a glazed panel and metal rail balustrade (shown outlined by red lines on Photographs A-I attached to the notice).
- The requirements of the notice are to:
 - a) Remove the sixth floor extension at No. 254 Edgware Road (shown outlined by red lines on photographs A-I); and
 - b) Return the roof of the property to its previous condition to match in facsimile the design, materials, profiling and fenestration of the tiled roof with small front and rear facing dormer windows as shown outlined by blue lines on photographs J-M; and
 - c) Remove all materials from the land associated with the unauthorised development and its removal in accordance with steps a) – b) above.
- The period for compliance with the requirements is 12 months.
- The appeal was made on grounds (a), (f) and (g).

Summary of Decision: The enforcement notice is upheld. Planning permission is not granted on the application deemed to have been made

Appeal B: ref: APP/X5990/C/16/3150497 254 Edgware Road, London W2 1DS

- The appeal was made by Violet Holdings Ltd under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the City of Westminster Council.
- The notice was issued on 29 April 2016.
- The breach of planning control alleged in the notice was: Without the requisite planning permission, and within the last 4 years the installation of mechanical plant and associated wiring, pipework and fixings at sixth floor level (shown outlined by yellow lines on Photograph N attached to the notice).
- The requirements of the notice are to:

- a) Remove from the property the mechanical plant and any associated wiring, pipework and fixings installed at sixth floor level (shown outlined by yellow lines on Photograph N); and
 - b) Remove all materials from the land associated with the unauthorised development and its removal in accordance with step a) above.
- The period for compliance with the requirements is 6 months.
 - The appeal was made on grounds (a), (f) and (g). The fee payable for the application for planning permission deemed to have been made was not paid. The appeal on ground (a) therefore falls away.

Summary of Decision: The enforcement notice is varied and upheld

Appeal property

1. The appeal property, 254 Edgware Road, London, is the penultimate building at the north-western end of the terrace that runs on the north-eastern side of Edgware Road between Old Marylebone Road to the south and Chapel Street to the north. No. 254 and the other brick built buildings in the terrace are mostly 5 storey or so, several of which, including No. 254, have distinctive Dutch or Flemish style gables with high pointed pediments that may incorporate a window facing onto Edgware Road. The gable to the double fronted No. 254 is taller than the adjoining No. 246. It incorporates fourth and fifth floor windows. The original roofs in this part of the terrace have steep pitched roofs with a near uniform ridge running parallel to the road. There is an unusually tall and lengthy chimney stack above the party wall on each side of No. 254. Nos. 254 and 246 have been joined internally to form a hotel. The gables have been painted light grey. No. 254, whilst being a distinctive and characterful building of some architectural merit, is not listed. It is not within a conservation area.
2. Appeal A concerns the hotel manager's flat that has been built onto the roof of No. 254. The new flat has effectively added an extra residential floor to the building. Appeal B deals with the air-conditioning units that have been fitted to the roof of the building.

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3. The appeal on ground (a) asks that planning permission be granted to retain the 6th floor flat, the roof terrace and balustrading. The decision turns on the effect of the development on the appearance of No. 254 and the immediate surrounding area.

Planning policy

4. The Council said that the appeal development was contrary to policy 7 as set out in the NPPF and the Planning Practice Guidance. It was also contrary to the Development Plan policies contained in London Plan Policies 7.1, 7.4 and 7.6 and also contrary to Westminster City Council's - Strategic Plan Policy S28, and saved Unitary Development Plan Policies DES1, DES5 and DES6.
5. Policy DES6 in particular deals with roof level alterations. It says that development at roof level should not adversely affect the architectural character of the host building. It should not affect a complete roof composition or mansard arrangement and should not harm the local skyline. It should not result in an intrusion on views and or result in the loss of historic roof forms.

Considerations

6. In dealing with the merits of the ground (a) appeal in respect of the 6th floor flat and the associated terrace and balustrading, the planning appeal decision of 17 September 2015, (our ref: APP/X5990/W/15/3049390), is of considerable relevance. I am not bound by that decision, particularly as the Appellants have suggested alterations to the 6th floor flat structure. But it should be borne in mind that a rerun of an unaltered recently failed case is unlikely to produce a different result.
7. In the September 2015 appeal decision, deliberating upon the application to retain the manager's flat, the Inspector dealt with 2 main issues. The first was a consideration of the effect of the rooftop flat on the character and appearance of the host building. There she found against the Appellants, deciding:
 1. that the positive contribution made by the distinctive chimney block to the south-eastern side of No. 254 to the design of the building was greatly diminished by the side wall of the appeal flat;
 2. that the replacement of the roof's 2 small dormers by 4 larger dormers broke up the roof slope excessively, detracting and diminishing the pre-eminence of the important gable feature;
 3. the solid mass of the appeal roof extension did not reflect or respect the nearby roofscape. It was an incongruous feature that disrupted the surrounding roofscape features and profile, to the detriment of the area's character and appearance.
8. The Inspector concluded that the roof extension and associated works seriously and unacceptably harmed the host building's distinctive character and appearance, and the character and appearance of the surrounding area, contrary to development plan policy. The roof extension did not amount to good design.
9. The second main issue considered by the previous Inspector was the likely effect of the sixth floor flat on living conditions, particularly possible privacy loss, on those living in neighbouring properties. She concluded that, apart from the possible application of a planning condition requiring the removal or re-siting of the roof terrace balustrade, there would be no material harm caused to the living conditions of neighbouring occupiers through loss of privacy. The decision also concluded that the air conditioning units would not cause any undue noise problems for those living in the nearby Hyde Park Mansions.
10. There is a duty on the decision maker in dealing with significant objections to the granting of planning permission on an application, as an alternative to outright refusal, to consider granting permission subject to conditions. The conditions could include requiring specific approval for aspects of the development, such as the materials to be used. Reasons have to be given for applying planning conditions. Planning Practice Guidance to the National Planning Policy Framework, Use of Planning Conditions at para. 001 says: "*When used properly, conditions can enhance the quality of development and enable development proposals to proceed where it would otherwise have been necessary to refuse planning permission, by mitigating the adverse effects of the development.*".
11. It is reasonable to assume that the application of such conditions was considered by the Inspector in the September 2015 decision, (s.70(1)(a) of the Act). In para. 14 of her decision the Inspector said: "*I have borne in mind also the scope to impose conditions requiring removal and re-siting of the roof*

terrace balustrade, and the re-siting of the air conditioning units to a less conspicuous position, but doing so would not address the harm caused by the roof extension to create a new flat.” Nowhere in her decision did she conclude that the use of different cladding materials or a reduction in the size of the flat could overcome the fundamental objections to the retention of the appeal flat

12. I agree on the main points considered by the Inspector in the previous decision, especially in relation to policy DES6 dealing with roof level alterations. That policy seeks to ensure that development at roof level does not adversely affect the architectural character of the host building. Nor should it harm the local skyline or result in the loss of a historic roof form. Two matters of objection could be altered without undue difficulty. The 4 windows in the steep roof slope facing Edgware Road that are readily seen from Praed Street near to its north-eastern end could be removed or reduced in size; the metal and glass balustrading that is particularly visible from close to the entrance to Edgware Road Underground Station at the junction of Chapel Street and Cabbell Street could be removed. Elimination or modification of those 2 unacceptable features would go some way to overcoming the harm caused to the appearance of the building at No. 254. That would, however, leave the 6th floor flat itself, the presence of which was a matter of most concern to the previous Inspector. The Appellants suggested that a reduction in the size of the flat might be acceptable. I cannot come to a useful view on that because the suggestion was vague and non-specific. It is not for me in the context of this appeal to attempt a redesign of the appeal structure. That would have to be a matter to be considered in association with the local planning authority if it was thought necessary or acceptable.
13. In addition to the 3049390 appeal decision of 17 September 2015 considered above, an unsuccessful appeal decision, ref: APP/X5990/W/16/3148110, was issued on 14 December 2016. That was concerned with a retrospective planning application to retain extensions to the rear of Nos. 254 and 246. It was suggested in that decision that there was a dispute between the main parties as to whether any of the previous planning permissions had been lawfully implemented. The apparent fragmentary method of dealing with earlier planning applications and the deemed application before me, especially where there may be overlapping parts of the Nos. 254 and 246 redevelopments, made it difficult for the parties to come to a considered comprehensive view. I have not found, in this instance, sufficiently compelling arguments in support of the Appellants' case to come to a different conclusion to the Inspector in the 2015 appeal decision.
14. The appeal on ground (a) fails. Planning permission is not granted on the application deemed to have been made to retain the manager's flat on the sixth floor of the property at No. 254 Edgware Road, London.

The appeal on ground (f)

15. An appeal on ground (f) says that the requirements of the enforcement notice are too onerous and that something less would be appropriate.
16. The Appellants suggested an additional alternative to the requirement to demolish the managers flat. They said the flat could be reduced in size such that it would not be readily visible from the street. In the absence of a detailed scheme, it is impossible consider its merits or to draw up an alternative requirement. To attempt to do so would introduce uncertainty. That would fail to comply with the requirement in s.173(3) of the Act to specify the steps,

(Payne v NAW and Caerphilly CBC (QBD 5/1/06 Wyn Williams J, also Kaur v SSE [1989] EGCS 142 – notice a nullity as it did not then specify with sufficient particularity what was required of the appellant).

17. As I indicated above, if there is any scope to making acceptable changes to the manager's flat, it would be a matter for the Appellants to discuss and possibly resolve with the Council.
18. Section 173(4) of the Act says an enforcement notice should set out the steps required to be taken, or the activities which must cease, to achieve, wholly or partly, the purposes of either:
 - (a) remedying the breach of planning control. That is, making any development comply with the terms of any planning permission, discontinuing the use of any land, or restoring the land to its condition before the breach took place; or,
 - (b) remedying any injury to amenity caused by the breach.
19. The enforcement notice seeks the removal of the 6th floor extension and the restoration of the roof of the building to its previous condition. That comes under (b) purposes above. The requirement of the notice addresses the objections to retaining the appeal development. In the absence of acceptable or precise alternatives, the notice's requirements are not excessive. The appeal on ground (f) fails.

The appeal on ground (g)

20. The Appellants said the 12 months period did not allow enough time for compliance, given the need for scaffolding, for ensuring the safety of any hotel guests and for arranging necessary works to take place. A period of 18 months was requested.
21. The Council remained of the opinion that the 12 months compliance period was sufficient. They referred to the power available to them under s.173A(1)(b) to extend any period for compliance without prejudicing the right to take further action. They said such provisions would be considered where the owner made genuine efforts to achieve compliance.
22. I consider that a compliance period of 18 months would be unusual and, in this case, excessive. Indeed, the period of 12 months is almost tantamount to the grant of a temporary planning permission. It may be that the matters the subject of this enforcement notice and other outstanding concerns regarding the redevelopment of Nos. 254 and 246 could be resolved within 12 months. But if progress is unavoidable delayed, the Council's offer to bear the s.173A powers in mind should mean that precipitate action would be unlikely. The appeal on ground (g) fails.

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23. Planning permission 03/03316/FULL was granted on 11 December 2003 for: Rear extension from first to fifth floors to create 11 additional hotel bedrooms, new rooftop plant enclosure and use of basement bar (A3) as part of the hotel. The Appellants said that a condition was attached to the 2003 planning permission requiring details to be submitted for the screening of any rooftop plant and machinery, ducting and apparatus. The condition indicated an expectation by the Council as part of the original approved scheme for some high-level extraction and ventilation equipment to be installed on the rooftop of the property.

24. The Appellants said the requirement to remove the apparatus that had been installed was therefore excessive. A reasonable lesser step would be to require details of screening to be provided to the Council for approval. Alternatively, a requirement to install smaller or different types of apparatus, but still adequate to serve the hotel/café uses below, could be acceptable.
25. There was no ground (c) appeal in respect of the installation of the air conditioning units, that for example, they might have been installed in compliance with the terms of the 2003 planning permission. The suggestion that the equipment might be screened or replaced by smaller units goes to matters of planning merits, rather than to what may be reasonably required to remedy the breach of planning control.
26. In the absence of a ground (a) appeal, general planning considerations, policy or amenity arguments cannot be introduced under ground (f), (*Wyatt Bros (Oxford) Ltd v SSETR and Oxfordshire CC CA [2002] JPL 753*). Therefore I cannot consider the question of whether screening or replacement of the air conditioning equipment by smaller units could make the development acceptable. If an appellant does not pursue an appeal under ground (a), he or she cannot introduce planning or amenity considerations under ground (f). The power to vary a notice in s.176(1)(b) needs to be read in such a way as not to afford a remedy that is obtainable by pursuing an appeal under ground (a).
27. In the present circumstances, the requirement to remove the air conditioning mechanical plant and its associated wiring, pipework and fixings installed at 6th floor level at No. 254 is apt and proportionate. The appeal on ground (f) fails.

The appeal on ground (g)

28. The Appellants said that the timescale for compliance with Notice B should be the same as that for Notice A. I agree, on the basis that more time should be given to allow the Appellants the opportunity to discuss with the Council possible alternative rooftop developments at No. 254. I increase the period for compliance to 12 months. To that extent, the appeal on ground (g) succeeds.

FORMAL DECISIONS

Appeal A - ref: APP/X5990/C/16/3150495

29. The enforcement notice is upheld. Planning permission is not granted on the application deemed to have been made to retain the roof extension at sixth floor level and the terrace at roof level enclosed by a glazed panel and metal rail balustrade on the property at No. 254 Edgware Road, London W2 1DS.

Appeal B - ref: APP/X5990/C/16/3150497

30. The enforcement notice is varied by the deletion of the words "SIX MONTHS" in the last line of para. 5 on page 2 of the notice and the substitution therefor of the words: "12 months". Subject to that variation, the enforcement notice is upheld.

John Whalley

INSPECTOR