

Appeal Decision

Site visit made on 23 February 2017

by George Mapson DipTP DipLD MRTPI

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

Decision date: 27 March 2017

Appeal Ref: APP/K5600/C/16/3152579

South Kensington Club, 38-42 Harrington Road, London, SW7 3ND

- 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 Mainstream Estate Limited against an enforcement notice issued by the Council of The Royal Borough of Kensington & Chelsea.
 - The Council's reference is E/16/00080.
 - The notice was issued on 5 May 2016.
 - The breach of planning control as alleged in the notice is: *"Without planning permission, alterations at first floor level at the front of the building facing Harrington Road comprising the erection of unauthorised steel scaffolding tubes to the existing ornamental stone balustrade to create a means of enclosure for the flat roof area."*
 - The requirements of the notice are: *"1. Remove the unauthorised steel scaffolding tubes from the front of the building as shown in photo 1 [; and] 2. Restore the front elevation to its former condition."*
 - The period for compliance with the requirements is one month.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Background

The appeal site and surroundings

2. Nos. 38-42 Harrington Road is a building that was originally a church and hall and now comprises a basement, a ground floor and four upper floors. It lies within the designated Queen's Gate Conservation Area but is not statutorily listed.
3. In 1983 planning permission was granted to use the basement, ground and 1st floors of the hall as a school of dance and ancillary offices. In 2012 permission was granted for the use of those floors and the 2nd floor as a health club. This use extends to No. 17 Queensbury Mews and No. 44 Harrington Road and operates as the South Kensington Club (a private members' club).
4. The appeal building is constructed mainly from brickwork but on the south elevation, facing Harrington Road, there is a ground floor projection with a rendered finish painted white. The flat roof of this projection is bordered on three sides by an ornamental balustrade and is now covered by timber decking.

The appeal development

5. The appeal development is a structure formed from scaffolding poles, spray-painted a copper colour, around which cord has been wrapped to create a decorative effect. The structure augments the balustrade, in the sense that it provides an added barrier around the perimeter of the decking, enabling this area to be used as a 'roof terrace' for sitting out and dining.

The appeal on ground (c)

6. An appeal on ground (c) is that there has not been a breach of planning control. Common ground (c) arguments are either that no 'development' has taken place; or that planning permission has already been granted; or that the matters alleged in the notice are 'permitted development'.
7. The appellant's case is that the works that have been carried out do not constitute 'development' as defined by section 55 of the 1990 Act.

Reasons and conclusions of the appeal on ground (c)

8. Section 55(1) of the 1990 Act defines two limbs of development. The first is operational development, which means the carrying out of building, engineering, mining or other operations in, on, over or under land. The second is making a material change of use. The first limb comprises activities which result in some physical alteration to the land which has some degree of permanence. The second limb comprises activities which are carried out in, alongside or on the land, but do not interfere with the actual physical characteristics of it.
9. Section 336 interprets the meaning of a 'building' and section 55(1A), inserted by the Planning and Compensation Act 1991, defines 'building operations'. These include demolition, rebuilding, structural alterations or additions, and other operations normally carried on by a person in business as a builder.
10. Court judgments in the cases of *Skerritts of Nottingham Limited*¹, *Barvis Ltd*², *Cardiff Rating Authority*³, and others, have identified three primary factors as being decisive in establishing whether a structure should be regarded as a building, or building operation, for the purposes of the Act. These are firstly, size (considerations may include whether the structure is of a size that required construction on site); secondly, permanence (rather than being transient or mobile); and thirdly, some degree of physical attachment (rather than being simply deposited on the land). No one factor is decisive.
11. Dealing first with size, although the appellant regards the structure as small, I found it to be substantial. It required assembly on site and is long enough to enclose three sides of the decked area; a space that accommodates three tables with chairs. It is high enough to provide a sturdy barrier for users of the decked area and be visible above the ornamental balustrade from public vantage points along Harrington Road.
12. Turning next to permanence, the appellant contends that the entire structure could be removed by one man in half a day. However, there is no evidence to show that it has been moved since it was constructed on the site or that there has been any intention to move it. It will remain in place as long as the company sees a benefit in offering its client's the opportunity to eat and drink outdoors and enjoy the view over Harrington Road. It is clearly intended to be permanent.

¹ *Skerritts of Nottingham Limited v Secretary of State for the Environment, Transport and the Regions* and LB Harrow, No QBCOF 1999/0690/C.

² *Barvis Ltd v Secretary of State for the Environment and another* [1971] PCR 710

³ *Cardiff Rating Authority v Guest Keen Baldwin Iron and Steel Company Limited* [1949]

13. In coming to this view I am mindful of the judgment in *Skerritts of Nottingham* - a case that involved a marquee that remained in place in the grounds of a hotel for an eight month period each year. The Court held that whilst it could be dismantled and moved elsewhere at any time, the fact that it remained in the same position for eight months amounted to it being a permanent rather than transient structure.
14. Turning finally to the matter of physical attachment, the appeal structure might not be physically attached to the building, in the sense of the components being drilled into the fabric of the building, but neither does it simply rest upon or against the surfaces of the building. It is tightly clamped into place around parts of the ornamental balustrade and draws part of its strength from being anchored to the building in that way. It is of such weight and size that it could not be easily moved from its present position. In my view, it has resulted in a physical change of some permanency to the building.
15. Having regard to all the circumstances, and as a matter of fact and degree, I conclude that the structure falls within the definition of a building operation requiring planning permission. Accordingly the appeal on ground (c) fails.

The appeal on ground (a)

16. An appeal on ground (a) is that planning permission should be granted for the matters alleged in the notice.

Main issues

17. The main issue is the effect of the development on the host building, the streetscene of Harrington Road and the character and appearance of the Queen's Gate Conservation Area.

Planning policy

18. There is a statutory duty⁴ to pay special attention to the desirability of preserving or enhancing the character or appearance of a conservation area and I must consider the effect of the unauthorised development from that perspective.
19. Furthermore, the National Planning Policy Framework [NPPF] defines a conservation area as a 'heritage asset', and seeks to ensure that heritage assets are conserved in a manner appropriate to their significance⁵. It is therefore necessary to assess the significance of the conservation area in those terms, and come to a view on whether the development would cause 'substantial' or 'less than substantial' harm.
20. The development plan policies cited as relevant to the appeal are CL1, CL2, CL3, CL6 and CL11 of the Consolidated Local Plan (2015) [CLP]. These policies appear in chapter 34 'Renewing the Legacy – conservation, quality and design'. They set the standards of design quality that are expected in new development. In conservation areas, the expectation is that new development, including alterations to buildings, will respect their historic context in terms of design, siting, materials, scale, form and quality of detail.

Reasons and conclusions on the appeal on ground (a) and the deemed planning application

21. CLP chapter 34 explains that heritage assets are irreplaceable and any harm requires clear and convincing justification. The Queen's Gate Conservation Area has

⁴ This requirement is set down in section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and is always a material consideration when dealing with appeals in conservation areas.

⁵ The NPPF makes it clear that decision-makers should identify and assess the significance of any heritage asset and the impact of a proposal on the significance of the asset. When considering the impact of a development on significance, great weight should be given to the asset's conservation; the more important the asset, the greater the weight will be. In *Barnwell Manor Wind Energy Ltd v East Northants DC & Others* [2014] EWCA Civ 137 it was held that harm caused to a listed building or its setting should carry considerable importance and weight. This approach applies also to conservation areas.

- considerable significance as a heritage asset and this is an important factor in my consideration of the appeal development.
22. The CLP explains that the historic environment is central to the character of the Royal Borough. The exceptional quality of the built environment underpins the reputation of the borough and its character and appearance are highly valued, locally, nationally and internationally.
23. Past approaches, where no worsening was good enough, are no longer acceptable. The prevailing philosophy is now to drive up the quality of design to improve the borough's built environment. The plan requires that a sensitive approach be taken to the design of modifications to existing buildings. This should be to a high standard, with very high quality expected within conservation areas.
24. I saw that Harrington Road contains some of the large-scale principle terraces, rich in detail, from which the conservation area derives much of its character. Some of the buildings in the conservation area have a ground floor projection or portico that protrudes towards the street. These distinctive architectural features are of great importance visually because they frame the most significant part of the ground floor of the building, its front door. Ideally they should be left unaltered and uncluttered so as not to detract from the formality of the entrance to the building.
25. The appeal building is a particularly conspicuous and imposing element in the street scene of Harrington Road. This is partly because its predominantly redbrick façade and compact scale contrasts with the yellow London stock brickwork of the taller buildings that flank it. It is also partly because the proportions and detailing of its rendered ground floor projection, with its ornate balustrade, sets it apart from neighbouring buildings. This part of the building draws the eye of passers-by and exposes unsympathetic alterations to public scrutiny.
26. The symmetrical arrangement of the windows and individual decorative details give the façade of this building an ordered and refined character and appearance. With such a clearly defined unity of design, even small changes or additions to the building can be disruptive. Different parts of a building can have varying degrees of sensitivity to changes and with increased height comes greater sensitivity.
27. The cord-covered steel scaffolding poles are a harmful and incongruous addition to the front of the building at 1st floor level. Having regard to the requirements of CLP policies CL1, CL2, CL3, CL6 and CL11, it cannot be said that the development is of the very highest quality or that it improves the quality and character of the building and the area. It is not attractive or 'pleasing in its composition, materials and craftsmanship'. It is not locally distinctive and does not respond well to its context. For these reasons it conflicts with the objectives of those development plan policies.
28. I recognise that the use of this flat roof offers benefits to the club and its members as a sitting out and dining area. In the interests of public safety, both for users of the roof terrace and the passing public below, it can be used in this way only if a secure barrier of some type is installed to augment the existing ornate balustrade.
29. I note that the Council has advised the appellant informally that the option of glazed panels would not be regarded as an acceptable alternative, because they would be alien in the street scene. The Council has told the appellant that it is unable to offer a sensible alternative means of enclosing the area that would be acceptable aesthetically and also comply with building regulations. Whether or not alternative measures could be devised and agreed lies outside my remit in determining this appeal.
30. The harm caused by the appeal development might seem insignificant from the appellant's perspective. However, CLP paragraph 34.3.44 explains that although small alterations and additions may have a negligible impact, if unsympathetically designed and sited, they may individually harm the appearance of a building or its setting. It is

the individual and cumulative effect of these small-scale alterations and additions which can negatively impact on the borough's overall high quality townscape.

31. In terms of the test set by the NPPF, the appeal development could be said to have 'less than substantial harm', rather than 'substantial' harm, on the Queen's Gate Conservation Area. However, it neither preserves nor enhances the character or appearance of the conservation area and has a conspicuous adverse effect on the host building and the streetscene of Harrington Road. No conditions would satisfactorily address the harm caused. For these reasons, the appeal on ground (a) fails.

The appeal on ground (g)

32. An appeal on ground (g) is that the time given to comply with the notice is too short.
33. The appellant's case is that the requirement to remove the 'barrier' within one month would adversely affect the ability of the club to carry on its business. The roof terrace is a draw for club members who book tables there. In order to maintain the level of service offered to members, the club would have to provide alternative arrangements within the building. It is argued that this would take longer than one month to organise, but no alternative period is suggested.

Reasons and conclusions of the appeal on ground (c)

34. I recognise that some members of the club enjoy having use of the roof terrace and would wish to book tables there for meals. However, that benefit to the club and its members that does not outweigh the harm caused by the breach of planning control that has occurred. The Council is right to seek to remedy that breach, and to rectify that harm, without undue delay.
35. The appellant has stated, as part of the submissions made in support of the ground (c) appeal, that the removal of the entire structure could be carried out by one man in half a day (see paragraph 12 above). That being the case, a compliance period of one month is a reasonable one in which to carry out those works. Accordingly, the appeal on ground (g) fails.

Conclusions

36. I have taken account of my observations at the site and surrounding area. For the reasons given I conclude that the appeal should be dismissed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

George Mapson

INSPECTOR