
Appeal Decision

Site visit made on 15 June 2017

by Susan Wraith Dip URP MRTPI

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

Decision date: 18 July 2017

Appeal ref: APP/E5330/X/16/3161452

Flat D, 9 Bennett Park, Blackheath, London SE3 9RA

- The appeal is made under s195 of the Town and Country Planning Act 1990 [hereafter "the Act"] as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development [hereafter "LDC"].
 - The appeal is made by Mr Timothy Boler against the decision of the Council of the Royal Borough of Greenwich.
 - The application no: 16/2791/CP dated 26 August 2016 was refused by notice dated 20 October 2016.
 - The application was made under s192(1)(b) of the Act.
 - The development for which an LDC is sought is: Installation of replacement "like-for-like" timber box sash windows.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed works comprising the installation of replacement "like-for-like" timber box sash windows which is considered to be lawful.

Preliminary matters

2. The replacement windows are described as "like-for-like". However, they are clearly not exact replicas as the existing windows are single glazed whereas the proposal is for double glazed windows. I understand that in describing them as "like-for-like" the appellant means that in terms of what can be seen from the exterior of the building the new windows will appear, essentially, the same as those that they replace. I shall deal with the appeal accordingly.
3. The relevant date for the purposes of this determination of lawfulness is the date of the LDC application i.e. 26 August 2016. The matter to be decided upon is whether the works proposed, if instigated or begun at that date, would have been lawful. For ease of reading, however, I shall write in the present tense.
4. In an LDC appeal the burden of proof to demonstrate lawfulness is upon the appellant. The planning merits of the matter applied for do not fall to be considered. The decision will be based strictly on the evidential facts and on relevant planning law and judicial authority.

Main issue

5. The main issue in this appeal is whether the Council's decision to refuse the LDC was well founded.
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Reasons

6. It is common ground between the parties that, being a flat, the appeal property does not enjoy permitted development rights. In fact this was the reason for the Council's refusal of the LDC application.
7. The need to consider permitted development, however, does not arise if the proposed works do not amount to development in the first place. This is the essence of the appellant's case which is argued on the basis that no material change will take place to the external appearance of the building.
8. The meaning of development is set out in s55 of the Act. As well as stating what *does* constitute development, the provision also lists other operations and uses which (for the purposes of the Act) are not to be taken to involve development. In particular, s55(2)(a) states that the carrying out for the maintenance, improvement or other alteration of a building of works which do not materially affect the external appearance of the building shall not be taken to involve development.
9. The works to replace the windows are works for the "maintenance, improvement or other alteration" of the building, probably falling within all three. These works are an "alteration" in that single glazing is replaced by double glazing and an "improvement" insofar as they provide for greater thermal efficiency and sound insulation. In respect of "maintenance" the works bring the windows into a good state of repair. The decisive issue, therefore, under s55(2)(a) is whether the works "materially affect the external appearance of the building".
10. There is no statutory definition of "materially affect". When giving the term its normal and everyday meaning a material effect would be one which is of significance. The term does not mean that there should be no change at all.
11. Case law¹ has held that, in considering such matters, there is a judgement to be made which will involve considerations of the degree of visibility by an observer outside the building; the nature of the building; the nature of the alterations/works; and the change to the external appearance of the building as a whole rather than a part taken in isolation. I shall consider each of these factors in turn.

Visibility

12. The two windows to the front elevation are clearly seen from the public realm when gazing up towards them; and from the facing properties to the opposite side of the road.
13. There are a further two windows to the rear elevation which, at the time of my site visit, were heavily screened by trees and foliage. At other times of the year, when the trees are not in full leaf, the windows would only be glimpsed at a distance from neighbouring gardens and from the properties beyond the railway line, the main views of these windows being from within the property garden itself.
14. The other window is to the side elevation facing the gap between the appeal property and number 7. The views of this window are limited given the close proximity of the neighbouring property.

¹ *Burroughs Day v Bristol CC* [1996] 1 PLR 78; 1 EGLR 167

15. Thus it is the front facing windows that are most critical, in terms of their visibility, to the determination of whether there would be a material effect.

Nature of the building

16. The appeal property is a one bedroom self-contained flat situated on the 2nd floor of a Victorian semi-detached villa. The street is predominantly residential in character comprised of mainly three and four storey townhouses. The property is situated within the Blackheath Park Conservation Area.
17. The building within which the flat is located contributes positively to the character and appearance of the conservation area and itself (whilst not a listed building) is of some historic merit. It's traditional timber sliding sash windows add to its value as a heritage asset. Sliding sash windows are one of the defining characteristic of the conservation area.
18. With an historic building such as this in a conservation area even small and/or subtle changes to the external appearance could be of significance. That could still be so, even if there is limited visibility of the part(s) of the building concerned.

Nature of the alterations/works

19. The works involve the replacement of all of the main windows (5 no.) to the second floor accommodation (flat D) at number 9.
20. The replacement windows have been carefully designed with diligence to follow as closely as possible the design and proportions of the existing windows. For example they are to have matching, vertical, sliding sash openings constructed in timber, painted white. The applied glazing bar dimensions are to be identical. The sash horns and window hardware will match as closely as possible those of the existing windows.
21. The change to double glazing means that the new windows cannot be the same as the existing windows in every constructional detail. For example, the box frame is a little deeper (in plan form), as is each sash. This would be identifiable when examining the windows at close quarters from inside the flat. However, in views externally this change would be hardly, if at all, detectable.
22. The more critical changes are those affecting the external face of the windows (i.e. their elevations). However, even in this respect, the changes are millimetric. The meeting rails would be a little deeper as would the top and side rails. The depth of the bottom rail and glazing bars would be the same. The box frame would sit into the brickwork opening as before.
23. For their most part the replacement windows would match the existing windows. I shall continue to consider their differences in respect of the building as a whole.

Change to the external appearance of the building as a whole

24. When taking into account the history of the property, I consider the "building as a whole" to be the semi-detached property (number 9) or, the pair of semi-detached properties (numbers 9 and 11) rather than just the flat itself.²

² In the interpretation given at s336 of the Act the term "building" includes (amongst other things) any part of a building.

25. The windows within the building have uniformity in respect of their traditional timber sliding sash design and symmetry across the pair of semi-detached villas. The front rounded bays of the villas at ground and first floor level are a particularly strong feature with the subject windows, which sit above, being subordinate.
26. The meeting rails of the new windows will still be of slender appearance, albeit a little deeper, when compared to the existing windows. When taking into account the distances and angles of views this change will be barely discernible and of insignificance.
27. Similarly, the slightly sturdier side and top rails will be hardly detectable in views from ground level and across the street. Neither will these small changes distort the glazing proportions of the windows to any significant or detectable extent, or result in any appearance of discord which detracts from the uniformity and symmetry of the building with its dominant front bays.
28. In all significant respects the windows will match the existing windows. They will not have any material effect upon the external appearance of number 19 or the pair of semi-detached villas as a matter of fact and degree. I come to that view having taken into account that even small changes and/or those which have limited visibility could still be material on a historic building in a conservation area in other circumstances.
29. Even if it is just the flat that is considered as "the whole building" the changes to its external appearance would still, to my mind, be small and insignificant in that context.

Other matter

30. In the case of the side window, a further change is from clear to obscure glazing. However, given the limited visibility of the window with the only views being at very acute and steeply sloping angles, such a change would be barely seen. This further change does not alter my overall conclusion.

Conclusion

31. I find that the works do not materially affect the external appearance of the building as a matter of fact and degree. Thus, the works do not constitute development requiring planning permission. For all the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant an LDC for the installation of replacement "like-for-like" timber box sash windows was not well founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me under s195(2) of the Act.

Susan Wraith

INSPECTOR

Lawful Development Certificate

APPEAL REFERENCE APP/E5330/X/16/3161452
TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by section 10 of the Planning and Compensation Act 1991)

THE TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT
PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 26 August 2016 the operations described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended) [hereafter "the Act"] for the following reason:

The proposed replacement windows would have been works for the maintenance, improvement or other alteration of a building which would not have materially affected its external appearance. Thus the operations would not have amounted to development within its meaning as set out in s55 of the Act.

Susan Wraith

INSPECTOR

Date: 18 July 2017

First Schedule

Installation of replacement "like-for-like" timber box sash windows.

Second Schedule

Flat D, 9 Bennett Park, Blackheath, London SE3 9RA

IMPORTANT NOTES – SEE OVER

CERTIFICATE OF LAWFULNESS FOR PLANNING PURPOSES

NOTES

1. This certificate is issued solely for the purpose of section 192 of the Town and Country Planning Act 1990 (as amended).
 2. It certifies that the operations described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful on the certified date and, thus, would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.
 3. This certificate applies only to the extent of the operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any operations which are materially different from those described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.
 4. The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.
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Plan

This is the plan referred to in the Lawful Development Certificate dated: 18 July 2017

by Susan Wraith Dip URP MRTPI

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Scale: Not to scale

