
Appeal Decision

Site visit made on 29 June 2017

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 24 July 2017

Appeal Ref: APP/A5840/C/17/3166490

97 Talfourd Road, London, SE15 5NN

- 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 Mr Egon Cossou against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The enforcement notice was issued on 7 December 2016.
 - The breach of planning control as alleged in the notice is: On 6 October 2011, planning permission (LPA reference 11/AP/0424) was granted on appeal (Appeal reference: APP/A5840/A/11/2157976) for the extension to an existing single family dwelling house comprising second and third floor extension; extension at rear ground floor level; alterations to front and rear facade including bay window to front subject to conditions. A non material amendment to the planning permission was issued by the Council on 7 November 2014 (LPA reference 14/AP/2576). Conditions 2), 3) and 4) of the planning permission state that:
 - 2) The development hereby permitted shall be carried out in accordance with the following approved plans: Location Plan 01 Rev A, 13 Rev A, 14 Rev B, 15 Rev B, 16, 17, 18B, 19 Rev B, 20 Rev A and 21 Rev B.
 - 3) The facing materials used in the carrying out of this permission (with the exception of fenestration) shall match the original facing materials of the building at No 99 Talfourd Road, including matching in type, colour dimensions, and in the case of brickwork, bond and coursing and pointing.
 - 4) The materials used in the finish of the fenestration shall not be otherwise than as described and specified in the application and on the drawings hereby approved unless the prior written consent of the Local Planning Authority has been obtained for any proposed change or variation.It appears to the Council that these conditions have not been complied with because the materials used in carrying out the development do not match the original facing materials of the building at Number 99 Talfourd Road. In addition, the building has not been constructed in accordance with the approved drawings of the planning permission as amended.
 - The requirements of the notice are:
 - 5.1 Remove the existing UPVC windows and install timber sash windows as indicated on drawing 201 submitted as part of non-material amendment application (reference 14/AP/2576) and such amendments to the drawing as subsequently agreed with the Council on 30 October 2014;
 - 5.2 Remove the existing roof tiles and install tiles that match 99 Talfourd Road, London SE15 5NN and as specified on drawing number 18B (Proposed Front Elevation) of planning permission reference 11/AP/0424 (granted on appeal- reference: APP/A5840/A/11/2157976);
 - 5.3 Remove the existing white UPVC soffit to the front elevation and install soffit which matches 99 Talfourd Road, London SE15 5NN;
 - 5.4 Install a pitched roof and gutter above the bay window to match the profile of 99 Talfourd Road London SE15 5NN as specified on drawing number 18B (Proposed Front Elevation) of planning permission reference 11/AP/0424 (granted on appeal-
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- reference: APP/A5840/A/11/2157976);
- 5.5 Paint the rear façade of the building to match the existing ground floor rear paint work; and
- 5.6 Remove from the Land any material and debris arising from compliance with the requirements of 5.1 to 5.5 above.
- The period for compliance with the requirements is 6 months after this Notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Summary of Decision

1. The appeal is dismissed and the enforcement notice is upheld with corrections.

Procedural matter

2. The planning merits of the development are not relevant to an appeal on grounds (c) or (f). At the site visit I acceded to the appellant's request to view other properties in the street (apart from No 99 which I also viewed and which is directly relevant to the alleged breach of planning control). For the avoidance of doubt I have not found the other properties relevant to my decision which relates only to the grounds on which the appeal is proceeding.

The planning permission and the effect of the non-material amendment

3. The relevant planning history of 97 Talfourd Road is set out in the banner heading above. The planning permission the subject of the notice (the Permission) was granted on appeal in 2012. It permitted a scheme to add extra storeys to No 97 and to alter the front and rear elevations. The scheme was subject to a non-material amendment approved by the Council by a decision notice issued in 2014. The 2014 decision approved, so far as is relevant "alterations to the appearance of the front and rear façade". The decision only relates to the non-material changes sought and described in the notice. It is not a reissue of the original planning permission, which still stands. The two documents should be read together.¹
4. The breach of planning control as alleged consists of breaches of Conditions 2, 3 and 4 of the Permission in that materials used in carrying out the development do not match the original facing materials of 99 Talfourd Road; and that the building is not built in accordance with approved Drawings 18B and 201. Drawing 18B forms part of the Permission and shows the proposed front elevation. Drawing 201 shows the non-material changes approved in 2014 for both the front and rear elevations.
5. Drawing 201 is different from 18B in a number of obvious respects, such as changes in the positioning and proportions of the fenestration which have now been carried out. However it does not supersede Drawing 18B. Firstly, it is not stipulated anywhere that it has that effect and secondly it shows in detail that is lacking on Drawing 201, the front elevation with specific descriptions of how the proposed roof, timber sash windows, bay window, front door and

¹ See Planning Practice Guidance: Paragraph 011 Reference ID: 17a-011-20140306.

brickwork are to be carried out. Drawing 20A which forms part of the Permission shows a similar level of detail to the rear elevation.

6. Thirdly, the application form for the non-material amendment sought to make "changes to elevation designs" the purpose being to "account for inaccurate levels on original design and improve internal layout". Although it indicated an intention to substitute amended plans, the box in which to list the old plans was marked "N/A". The terms of the application indicate that there was no intended complete substitution of any one plan for another.
7. The Council in its correspondence with the appellant considered that conditions cannot be imposed on applications for non-material alterations but this is incorrect. Section 96A(3) of the 1990 Act states that the power to make non-material changes to a planning permission includes power "(a) to impose new conditions; (b) to remove or alter existing conditions."
8. One obvious use of such a power would be to amend the list of plans in Condition 2 in accordance with which the development is required to proceed. The decision notice did not do that. It contained a standard form of wording to the effect that it must be read with the original planning permission and is subject to the conditions imposed in that permission "unless those conditions and notes are expressly altered or superseded by this decision notice". There were no express changes made to the conditions. Nor is there any basis for reading Condition 2 to include non-material changes illustrated in Drawing 201.
9. Thus, whilst the developer may proceed in accordance with the non-material changes, he would not be required to do so. But if he fails to adopt a specification contained in Drawing 201 he must still comply with the relevant approved drawings that are linked by the various conditions to the Permission.

Requirements of the notice

10. Requirements 5.1 and 5.5 respond to alleged failures to comply with Drawing 201 which I deal with further below. However as there is no enforceable requirement to comply with that drawing alone, such a failure would not itself be a breach of condition.
11. The Council does not seek to enforce compliance with the original details of the rear elevation shown in Drawing 20A, which Condition 2 of the Permission requires to be carried out. However the appellant is aware that to accord with the Permission as amended, the rear elevation must either be completed in accordance with Drawing 20A or Drawing 201. In reality he is being given the less onerous option of painting over the brickwork which is alleged not to conform to the Permission. It would therefore get the notice in order and not cause injustice to either party, to amend requirement 5.5 of the notice to require compliance with Drawing 20A, whilst preserving the alternative of completing the paintwork in accordance with the non-material amendment.
12. Similarly, as regards the front elevation, the development must comply with drawing 18B or drawing 201. Requirement 5.1 is vague as to which elevation is referred to. Since the Council clarified in its statement that it does not require replacement of the rear UPVC windows and since drawing 201 refers to both front and rear elevations, requirement 5.1 should preserve the alternative option favourable to the appellant but excluding a requirement to replace the rear windows.

13. Accordingly I will make the necessary amendments using the power of correction of the notice pursuant to s176(1)(a) of the 1990 Act.

The appeal on ground (c)

14. In an appeal on this ground the appellant has to demonstrate on the balance of probability that the matters alleged in the notice to have occurred do not constitute a breach of planning control.
15. As to the specific matters which are the focus of the Council's attention as appearing to be a breach of control I will assess each in turn. Drawing 201 is relevant in that it provides alternative minor changes which if properly completed alongside requirements pursuant to Conditions 2,3 and 4, would avoid there being a breach of planning control. In considering the Permission as amended, appropriate account should be taken of the applications for the Permission and the non-material amendment.

UPVC windows to front elevation

16. Drawing 18B refers to "proportions of proposed timber sash windows to match adjoining windows at 99 Talfourd Road". The application form that led to the Permission proposed materials for the windows as "timber sash". The form also referred to the design and access statement that stated the windows would consist of more traditional style timber framed sashes rather than matching the casement window frames at No 99.² I saw however that all the windows on the front and rear elevations were UPVC casement windows.
17. There is no annotated description pertaining to the windows on Drawing 201 but there are arrows indicating, by architectural drawing convention, vertical sliding sashes. No materials are specified. If materials were to be part of the proposed changes, this would have been apparent on the later drawing which it is not. I am therefore satisfied that the original specification for the use of timber remains part of the Permission as amended and is subject to the requirements of Conditions 2 and 4. No consent of the Council under Condition 4 was obtained to a change to the finish of the fenestration.
18. The materials and sliding sash design were clearly not non-material matters. The Council had explained to the appellant that without an undertaking that all windows will be "timber sash windows as per approved drawing" the alterations will not be non-material. Furthermore the 2014 decision notice specifically refers to a later e-mail dated 30 October 2014 in which the appellant confirmed that "the proposal will have timber sash windows". Drawing 201 shows some windows as sash hung only in relation to a single frame but each window opening is shown as either double hung or single hung.
19. The appellant has therefore breached Conditions 2 and 4 of the Permission by failing to install timber framed, sash hung windows as shown in Drawing 18B, and has also failed to install timber windows in accordance with Drawing 18B that are sash hung as detailed on Drawing 201. Failing to comply with any condition subject to which planning permission has been granted, constitutes a breach of planning control by virtue of s171A(1)(b) of the 1990 Act.

² Design and Access statement, paragraph 5.1, date stamped 11 Feb 2011.

The requirement for matching tiles

20. The relevant part of Condition 3 requires that the facing materials shall match the original facing materials of the building at No 99, including matching in type, colour and dimensions.
21. The appellant claims that the roof tiles are the same style and dimensions as those at No 99, the only difference being that his are new and not weathered. I agree that the overall appearance of the tiles is a relevant factor in relation to the criteria used in Condition 3, including their ageing and weathering qualities in the context of a particular area.
22. I viewed the roofs of Nos 97 and 99 from a slightly elevated position on the opposite side of the road. The tiles have a distinctive reddish hue in contrast to the grey/black shade of the tiles at No 99. The aerial photograph supplied is indistinct and in my view not a reliable indicator of colour. The other photographs supplied are clearer although photographs can often be deceptive as to true colours. From all that I have seen I am not convinced the tiles are made with the same or a similar pigment or colour.
23. The Council accepts there will be weathering and this may be so, although it is known that some tiles are designed to keep their colour. It is not explained to what specification the tiles on the roof of No 97 have been manufactured.
24. Taking all these factors into account, even if a more benevolent interpretation were given to the word "colour", i.e. the appearance of the roof due simply to the way in which it reflects light, I am not persuaded that there is, or will be as a result of weathering, a reasonable match "in colour" between the two roofs. I conclude that the roof tiles are in breach of Condition 3 of the Permission.

Soffit and bay window at front elevation

25. It is clear from my inspection of the front elevation that the introduction of a prominent white UPVC soffit does not match the roof at No 99 and the bay window lacks a pitched roof and gutter. The development as built fails to comply with the approved Drawing 18B which specifies "*roof to match profile and materials of adjoining roof at 99 Talfourd Rd*" and "*profile and materials of proposed bay window extension to match those on 99 Talfourd Rd*".
26. The appellant states he has been informed by his contractor that it would be physically impossible for the pitch of the bay roof to match that of No 99 but I can see no basis at all for such an assertion.
27. The soffit and bay window elements of the development I therefore find to be in breach of Condition 2, which requires the development to be carried out in accordance with approved plan 18B, Proposed Front Elevation.

Paintwork to the rear facade

28. Drawing 09A shows the pre-existing rear elevation annotated "painted brick façade". Whereas Drawing 20A specifies "*bricks to match adjoining facade at 99 Talfourd Rd*", the later approved Drawing 201 specifies "brickwork matching existing" for the rear elevation. As seen on site however, the paint has been irregularly applied and extends only about half way up the elevation.
29. As this part of the non-material amendment has not been carried out, there remains a breach of Condition 2 that requires compliance with Drawing 20A,

because, as I saw, the brick work at the rear elevation does not match that at No 99.³

Other matter

30. The appellant submits that the alleged breaches of planning control are authorised by the Town and Country Planning (General Permitted Development) (England) Order 2015 (the Order). However such permitted development rights would become relevant to an operation that has received specific planning permission only when that operation has been completed in accordance with the permission. That is not the case here. Article 3(5) of the Order states that permitted development rights shall not apply if in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful.

Conclusion on ground (c)

31. On examination of the Permission, non-material amendment and associated plans and documents, I find on the balance of probability that the notice correctly alleges a breach of planning control including, by reason of the materials used in carrying out the development, a failure to match the original facing materials of No 99, contrary to Conditions 2, 3 and 4 and approved drawings 18B and 20A. The development as built is therefore in breach of planning control and the appeal on ground (c) fails.

Ground (f)

32. The issue on ground (f) is whether the steps required by the notice to be taken, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
33. The notice as corrected seeks to remedy various aspects of the breach of planning control. Having regard to the purposes of issuing the notice set out in s173(4)(a) and (b) of the 1990 Act that should inform the requirements of the notice, I find that its purpose is to remedy the injury to amenity rather than seek a complete remedy to the breach of planning control.
34. Therefore the sole question is whether there are alternative lesser steps than stated in the notice that have been put forward or are obvious, such that if taken, they would remedy the injury to amenity. As there is no ground (a) appeal and no deemed planning application, an appeal under ground (f) cannot seek to put in place an alternative form of development where its planning merits would need to be scrutinised under ground (a).
35. The appellant states that the Council delayed enforcement action until well after the UPVC windows were installed but the Council says that they acted on receipt of complaints. The delay, if any, does not provide a good reason to treat any of the steps required to be taken as excessive. To paint and retain the soffit and tiles and retain UPVC windows at the front elevation would involve a planning merits judgement which is beyond the scope of a ground (f) appeal. I note moreover that the Inspector who granted the Permission in the

³ Distinctive features of No 99's rear elevation are the use of London stock brick and brick arches above the several windows. The arches are shown as proposed in Drawing 20A but as I saw when I visited, the rear elevation, which is constructed with uniformly manufactured bricks, lacks them entirely.

previous appeal decision, dealt fully with the merits or otherwise of the UPVC windows.

36. The required steps in the notice as corrected do no more than identify what is required in order to achieve a proper and lawful remedy to the injury to amenity caused by the breach of control. Consequently the appeal on this ground must fail.

Conclusion

37. For the reasons given above I conclude that the appeal does not succeed. I shall uphold the enforcement notice as corrected.

Formal decision

38. It is directed that the notice be corrected as follows:

- Delete Requirement 5.1 and replace with "5.1 Remove the existing UPVC windows from the front elevation and replace them with timber sash windows as indicated **EITHER** on drawing 18B (Proposed Front Elevation) of planning permission reference 11/AP/0424 (granted on appeal- reference: APP/A5840/A/11/2157976) **OR** on drawing 201 submitted as part of non-material amendment application (reference 14/AP/2576) and such amendments to the drawing as subsequently agreed with the Council on 30 October 2014;"
- Delete Requirement 5.5 and replace with "5.5 Make the brickwork of the rear façade of the building comply with drawing number 20A (Proposed Rear Elevation) of planning permission reference 11/AP/0424 (granted on appeal- reference: APP/A5840/A/11/2157976) **OR** Paint the rear façade of the building to match the existing ground floor rear paint work; and"

39. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld.

Grahame Kean

INSPECTOR