
Appeal Decisions

Site visit made on 3 July 2017

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

Decision date: 24 August 2017

Appeal A Ref: APP/X5990/C/16/3164401

Appeal B Ref: APP/X5990/C/16/3164402

Ground Floor and Lower Ground Floor Flat, 79 Hamilton Terrace, London NW8 9QX

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Khuram Yousaf and Mrs Ayah Elmaazi against an enforcement notice issued by the Council of the London Borough of Westminster.
 - The notice (EN1) was issued on 27 October 2016.
 - The breach of planning control as alleged in the notice is without planning permission and within the last four years:
 - 1) The removal of white painted, timber framed tripartite doors with timber framed casement windows above and the installation of replacement timber framed French doors at lower ground floor level beneath the balcony on the rear elevation of the building, as shown in yellow in the attached Photograph A;
 - 2) The removal of white painted, timber framed top-hung tripartite casement windows and London stock brickwork and the installation of replacement timber-framed French doors at upper and lower ground floor levels in the window bay on the rear elevation of the building, as shown in red in the attached Photograph A; and
 - 3) The removal of white painted, timber framed top-hung casement windows and London stock brick and installation of replacement timber framed windows at upper and lower ground floor levels in the window bay on the rear elevation of the building as shown edged blue in the attached Photograph A.
 - The requirements of the notice are:
 - a) Remove the timber-framed French doors in the window bay at the rear of the Property at upper and lower ground floor levels, as shown edged in red in Photograph A; and
 - b) Return these parts of the Property to its previous condition as shown in Plan A, by reinstating white painted, timber framed tripartite timber framed top-hung casement windows, the detailed design, location and size of which shall match the pre-existing windows and infill the areas immediately below the windows with London stock brick, the coursing and finish to match that of the existing surrounding brickwork; and
 - c) Remove the timber-framed windows in the window bay at the rear of the Property at upper ground and lower ground floor levels as shown edged in blue in Photograph A; and
 - d) Return these parts of the Property to its previous condition as shown in Plan A, by reinstating white painted, timber framed top-hung casement windows, the detailed design, location and size of which shall match the pre-existing windows and infill the areas immediately below the windows with London stock brickwork, the coursing and finish to match of the existing surrounding brickwork; and
 - e) Remove the timber-framed French doors at lower ground level at the rear of the Property beneath the balcony as shown edged in yellow in Photograph A; and
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- f) Return this part of the Property to its former condition as shown in Plan A, by installing white painted, timber framed tripartite doors with timber framed casement windows above, the detailed design, location and size of which shall match the pre-existing doors and casement windows.
- The period for compliance with the requirements is: 6 months after this Notice takes effect.
- Appeal A is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended. Appeal B is proceeding on the grounds set out in section 174(2)(c) and (f) of the 1990 Act. Since the prescribed fees have not been paid within the specified period for Appeal B, 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 in relation to that appeal have lapsed.

Summary of Decisions: The appeals are dismissed and the enforcement notice upheld with corrections.

Appeal C Ref: APP/X5990/C/16/3164911

Appeal D Ref: APP/X5990/C/16/3164912

Ground Floor and Lower Ground Floor Flat, 79 Hamilton Terrace, London NW8 9QX

- The appeals are made under section 174 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeals are made by Mr Khuram Yousaf and Mrs Ayah Elmaazi against an enforcement notice issued by the Council of the London Borough of Westminster.
- The notice (EN2) was issued on 3 November 2016.
- The breach of planning control as alleged in the notice is: without the requisite planning permission, and within the last four years, the installation of a wooden staircase at the rear of the property leading from the upper-ground floor level balcony to the rear garden at lower-ground floor level, as shown in the attached Photograph A.
- The requirements of the notice are:
Remove the wooden staircase at the rear of the property leading from the upper ground floor level balcony to the lower ground floor level, as shown in the attached Photograph A; and return the property to its former condition by installing a timber balustrade to enclose the balcony, which must match in design and finish the appearance of the balustrade shown in the attached Photograph B.
- The period for compliance with the requirements is: six months after this Notice takes effect.
- Appeal C is proceeding on the grounds set out in section 174(2)(a) and (f) of the Town and Country Planning Act 1990 as amended. Appeal D is proceeding on the ground set out in section 174(2)(f) of the 1990 Act. Since the prescribed fees have not been paid within the specified period for Appeal D, 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 in relation to that appeal have lapsed.

Summary of Decisions: The appeals succeed in part and the enforcement notice is upheld as varied in the terms set out below in the Formal Decisions.

Application for Costs

1. An application for an award of costs was made by the Council against Mr Khuram Yousaf and Ms Ayah Elmaazi. This application is the subject of a separate Decision.

Matters relating to notice EN1 dated 27 October 2016

2. The appellants claim that the French door below the balcony replaced a door of similar appearance and not as alleged in point 1) of the description of the breach of planning control. There is no appeal on ground (b) to the effect that

the matters stated in the notice have not occurred. However the appellant raises the matter in relation to the appeals on ground (f), dealt with below.

3. Minor spelling and grammatical corrections to the wording of the notice issued on 27 October 2016 are necessary in the interests of clarity, which I shall make under powers in s176(1)(a) of the Act, no injustice being caused to the parties.

Appeals A and B on ground (c) in relation to notice EN1

4. In an appeal on ground (c) the appellants must show on the balance of probability that the development as alleged to have been constructed did not constitute a breach of planning control.
5. The appellant who is professionally represented, considers that the works do not materially change the appearance of the property and therefore planning permission is not required as no development, as defined by s55 of the 1990 Act, has taken place. It is argued that the principles established in *Burroughs Day v Bristol City Council* [1996] 1 PLR 78 are relevant.
6. *Burroughs Day* establishes that for alterations to the exterior of a building to fall within the definition of development, the test is whether they materially affect the external appearance, taking account of any change to the external appearance of the building as a whole rather than a part taken in isolation, the degree of visibility by an observer outside the building; the nature of the building; and the nature of the alterations.
7. It is incorrect that, as claimed by the appellant, the building must be viewed from "publicly accessible vantage points". The court held that "all roof alterations which can be seen from any vantage point on the ground or in or on any neighbouring building or buildings would be capable of affecting the 'external appearance' of the building in question" (my emphasis). Nor is it correct that as claimed, a material effect on external appearance must be evidenced by a "substantial or significant physical change". On the contrary, the court said that it was not assisted by the substitution of "materially" with possible synonyms such as "substantial"¹.
8. There are several vantage points within the rear garden of the appeal site and in nearby properties, as evidenced from the submitted photographs, from which the windows and French doors, the subject of the notice, appear as main features of the rear elevation of No 79. I disagree that the appeal site is "barely visible" in the photographs. A few views may be obscured by vegetation in some months but overall the alterations are sufficiently visible in my judgement to be capable of materially affecting the external appearance of the elevation. The absence of comments from neighbours is not itself evidence of immateriality, although in any event the Council did receive a complaint about the unauthorised alterations
9. The former openings included tripartite doors with timber framed casement windows, now replaced with the French doors. The pre-existing tripartite style windows had traditional transoms and cambered arches, now replaced, and the loss of traditional detailing in the openings is marked. The full length frames and glazing of the new openings have different proportions compared to the rest of the rear façade of No 79 and indeed to those of No 77. Although not listed, No 79 is a period building of some architectural and historic merit in a

¹ [1996] 1 PLR 78 at 88

conservation area. In my judgement the changes to the rear elevation have materially affected the external appearance of the building as a whole in accordance with the criteria set out in *Burroughs Day*. From what I have seen and read, if the pair of semi-detached properties were to be considered together as one building, the full length frames and glazing of the new openings would in my opinion still constitute a material change in its external appearance.

10. Consequently, development has occurred under s55(2)(a) of the Act. By s57 planning permission is required for the carrying out of development on any land. The development is not permitted by any general development order or express planning permission. Therefore the matters stated in the notice constitute a breach of planning control and the appeal on ground (c) must fail.

Appeals A and C on ground (a) and the deemed planning applications

Main issue and matters common to both enforcement notices

11. The main issue in both notices is the effect of the development on the character and appearance of the area including the St John's Wood Conservation Area (CA).
12. When considering the grant of planning permission in a conservation area I have a duty to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. The CA Audit is a material consideration of significant weight but such documents do not necessarily describe in exhaustive terms the full extent of the significance of the designated heritage asset with which they are concerned.
13. No 79 and surrounding properties form an attractive residential area where there is a variety of designs and building types, including open villas and more contained flats in historic mansion-style blocks of high architectural quality.
14. The focus of the Audit is on the frontages, rather than rear elevations of properties. However the architectural integrity of a building may also derive from an appraisal of its rear elevation. The Audit advises that windows and door openings are crucial in establishing the character of a building's elevation² and I see no reason why this advice may not also apply to rear elevations. I note in this connection the previous appeal decision concerning alterations to a property nearby. It was a different scheme to the present appeal, but I agree with the view expressed that rear elevation alterations evident from the rears of nearby buildings may encompass "the character of an area as it is experienced and appreciated by others".³
15. There is considerable variety in the design and form of ground floor additions at Nos 73, 75 and 77. However I disagree that the balcony and glazed extension to No 77 which projects beyond the appeal site, defines the character of this part of the rear of the mansion block. In my view the original doors and windows of the rear elevation of the appeal building and surrounding properties, including their detailing and materials make a significant contribution to the historic and architectural character of this part of the CA.

² Paragraph 4.60

³ 16 Hall Road, APP/X5990/D/15/3023024

16. Paragraph 132 of the National Planning Policy Framework advises that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The appellant states rightly that No 79 is unlisted but omits to state that it is an unlisted Building of Merit in the CA Audit which under the National Planning Policy Framework (Framework) is a heritage asset in its own right. Paragraph 135 states that a balanced judgement is required as to the scale of any harm or loss resulting from the development and the significance of the heritage asset.

Appeal A and notice EN1- Installation of windows and French doors

17. Planning permission was granted on 29 January 2013, Ref 12/11230/FULL for alterations to the rear elevation of No 79. The appellant states that the works the subject of the notice were carried out between August 2013 and June 2014. The description of the approved development and the approved plans included no reference to the windows and doors in the rear elevation being altered.
18. Although the notice relates to just two storeys within a five-storey semi-detached building designed to be used as residential flats, the openings form integral features of the rear elevation and the windows affected are within a prominent and attractive bay projection crowned with an iron balustrade. Windows within the surrounding properties are varied but contain traditional detailing such as grille pattern transoms and tripartite designs whose attractiveness makes no less a contribution to the CA because they are commonly found. The loss of the tripartite doors and windows with transom elements above is unfortunate as they are characteristic of the age of the property and contributed positively to the finer detailing of the original layout.
19. The replacement windows and French doors have significantly larger elements of glazing whose proportions are in my opinion unsympathetic to the elevation, whilst the heavy modern frames appear incongruous against the elevation of No 79 and indeed of Nos 77 and 79 taken together. The fenestration has an unacceptably adverse visual impact on the appearance of the building and the surrounding rear elevations.
20. I accept that there are instances elsewhere along the terrace where the bays have been altered, in particular at No 77 where one side has been subsumed within an extension and windows replaced with patio doors onto an extended terrace. In my view neither this nor the other examples justify the alterations to the bay that are the subject of these appeals. In any event it is understood that the permissions relating to Nos 73, 75 and 77 involved the replacement of historic extensions. The replacement doors for Flat 3 at No 79 are smaller in size than those installed at the appeal site and although some traditional detailing has been lost I agree with the Council that the windows on the appeal site are of a greater scale and bulk and have a more obtrusive effect on views of the rear elevation.
21. Although I have taken account of development at these and other properties pointed out by the appellant, the circumstances are different, as detailed in the Council's statement and in any event the focus of attention in my view should rather be on the loss of architectural integrity caused by the unauthorised alterations to the rear elevation of No 79. The references to case law about

consistency in decision making, whilst noted, do not assist my consideration of the appeals.

22. The CA audit advises that the detail of doors and windows should match existing originals including in terms of glazing patterns. The materials and detailing of the replacement doors and windows do not resemble the original and undermine the architectural qualities of No 79 and the character of this part of the CA. Despite the other changes to the fenestration at No 79, the works to No 77, and variety of extension types that exist in the terrace, the loss of the original detailing of the doors and windows as specified in the notice has caused substantial harm to the inherent character of the appeal property as an unlisted building of merit. This has undermined the character and appearance of the CA.
23. The harm caused is considered to be less than substantial to this designated heritage asset, but is still serious and contrary to the expectations of paragraph 132 of the Framework. It is also exacerbated by the harm to the character and appearance of the building itself, as a non-designated heritage asset. There are no public benefits to the development that would significantly and demonstrably override the harm caused.
24. I conclude that the installation of the windows and doors as alleged in the notice fails to comply with Policies S25 and S28 of Westminster's City Plan: *Strategic Policies 2013 (SP)* which seek to conserve heritage assets, including conservation areas, and ensure that historic buildings are upgraded sensitively with respect for local distinctiveness. There would also be conflict with the London Plan: Spatial Development Strategy for London (consolidated with alterations since 2011, published March 2015), in particular Policy 7.4 which seeks high quality design in development that is sympathetic to the character of its surroundings, and Policy 7.8 which seeks conservation of the significance of heritage assets through the sympathetic scale, materials and architectural detail of development.
25. The development also conflicts with the City of Westminster Unitary Development Plan 2007 (UDP), Policies DES1 and DES5 in that the doors and windows are visually insubordinate to and out of scale with the rest of the building and fail to reflect the period, style and detail that are present therein. The loss of the pre-existing fenestration fails to preserve or enhance the character or appearance of the CA, contrary to the CA Audit and UDP Policy DES9(C) in that the modern design of the openings has failed to reinstate its traditional features and is inappropriately located within this unlisted building of architectural and historic merit.
26. Each of these development plan policies accords with the aims in Section 7 of the Framework to achieve high quality design in all development.

Appeal C and notice EN2 - Installation of staircase

27. Turning to the staircase the approved design is a simpler structure than as built and would not unduly disrupt the appearance of the rear elevation. However in situ it has a dog-leg form with a raised landing on stilts, rendering it an overly prominent structure that obscures and detracts from the appearance of, the rear elevation. The use of timber rather than the wrought iron has failed to match the materials and finer detail of the railings at No 77 as well as the crown railings above the bay projections. This represents a lost opportunity to

better reveal the architectural significance of the buildings and indeed has caused significant harm to its character and appearance. The installation of the staircase as a result has an adverse impact on the architectural qualities of the rear elevation and fails to preserve the character and appearance of the CA.

28. Although timber was used for the existing balustrade it had only become lawful through the passage of time. I have considered the use of timber on other neighbouring properties but the approved use of wrought iron is in my view more in keeping with the original features of the elevation such as the railings above the bays on both Nos 77 and 79. The approved design maintains connectivity between the internal and external living spaces. The other planning applications referred to are not in my opinion sufficiently similar to the timber staircase as found in situ as to afford a meaningful comparison.
29. I conclude that the design and materials used in the construction of the unauthorised staircase are a harmful influence on the local character and the architectural quality of the host building and of the area and as a result fail to preserve or enhance the character or appearance of the CA. Great weight should be given to the conservation of the designated heritage asset, the CA. Although the harm is less than substantial under the Framework, there is no clear and convincing justification for it, as is required under Paragraph 132.
30. I therefore find that the harm is contrary to the aims of UDP Policies DES1, DES5, DES9, SP Policy S25 and London Plan Policies 7.4 and 7.8 as described. It is also contrary to UDP Policy DES6 in that the erection of the staircase has unacceptably adversely affected the architectural character of the host building.

Conclusions on ground (a)

31. For the reasons given above in relation to Appeal A and Appeal C and taking into account all other matters raised the appeals on ground (a) fail and planning permission on the deemed applications is refused.

Appeals A, B, C and D on ground (f) in relation to both notices

Matters common to both enforcement notices

32. In appealing on ground (f), it has to be demonstrated that the steps required by the enforcement notice to be taken exceed what is necessary to remedy the breach of planning control or as the case may be to remedy any injury to amenity, and that lesser steps would fulfil that purpose. Taking each enforcement notice individually, each notice makes quite clear that its purpose is to remedy the breach of planning control that has occurred.
33. The appellant refers to the case of *Tapecrow Ltd v First Secretary of State [2006] EWCA Civ 1744* which noted that the enforcement procedure is intended to be remedial rather than punitive. I am therefore requested to explore powers available to me to decide whether there is any solution, short of a complete remedy of the breaches, which are acceptable in planning terms.
34. However no detailed descriptions, plans or drawings have been provided for consideration in relation to either notice. Whilst the judgment encourages a flexible approach in the context of ground (f) where there is a deemed planning application, it was also noted in that case that "given the limitations of the written representations procedure, an appellant would be well advised to put

forward any possible fall-back position as part of his substantive case. It is not the duty of the inspector to make his case for him" (Paragraph 46).

Appeals A and B and notice EN1- Installation of windows and French doors

35. As to the requirement in notice EN1, to replace the lower ground French doors below the balcony with white timber framed tripartite doors with casement windows above, it is suggested that the Council has relied on a drawing that does not show the elevation prior to the alleged works being undertaken. However no supporting evidence is provided in this regard. The works the subject of the notice were carried out as from August 2013. The planning permission, granted on 29 January 2013 contained approved plans showing the existing and proposed window below the balcony. These plans correspond to the allegation in that they show tripartite doors with transom windows above.
36. I have seen various photographs of the elevation of No 79, but it has not been demonstrated that there was any other lawfully installed door in this position. Advice was sought by the appellant in July 2014 in relation to the alterations to the rear elevation and the Council's officer explicitly raised concerns over the loss of traditional detailing, such as the window transoms.
37. Having considered the appellant's case and seen the site, I am satisfied that there is no other obvious alternative to the requirements set out in the notice, which would overcome the planning difficulties at less cost and disruption. I therefore consider the requirements are not excessive and the appeals on ground (f) in relation to notice ENS1 therefore fail.

Appeals C and D and notice EN2 - Installation of staircase

38. Whilst a staircase was approved under planning permission Ref 12/11230/FUL, that was subject to an undischarged condition requiring the submission and approval of further details. Having regard to *Kaur v SSE and Greenwich London Borough Council [1990] JPL 814*, it would not be appropriate for me to vary the notice EN2 to require the replacement of the staircase in accordance with that planning permission as it would introduce an unacceptable degree of uncertainty as to its ultimate appearance.
39. Enforcement notice EN2 requires the property to be returned to its former condition by installing a timber balustrade to enclose the balcony to match that which previously existed. In the appellants' view a more appropriate solution would be to retain the existing balustrade and extend it across the balcony. The Council finds the difference negligible as between the balustrade in situ and its pre-existing condition. It would not object to a variation of the notice to require retention of the existing balustrade and its extension to enclose the balcony. It would therefore be excessive to match the pre-existing balustrade and as no injustice to the parties would result I will vary the notice accordingly using the power in s176(b) of the 1990 Act. The appeals on ground (f) in relation to notice ENS2 succeed to this extent.

Overall Conclusions

40. For the reasons given above I conclude that Appeals A and B should not succeed. I shall uphold the enforcement notice EN1 with corrections and refuse to grant planning permission on the deemed application.

41. For the reasons given above I conclude that the requirement to match the balustrade with its pre-existing condition is excessive and I am varying the enforcement notice EN2 accordingly prior to upholding it. The appeals under ground (f) in Appeals C and D succeed to that extent. I shall uphold the enforcement notice EN2 with a variation and refuse to grant planning permission on the deemed application.

Formal Decisions

Appeals A and B Refs: APP/X5990/C/16/3164401 and 3164402

42. It is directed that the requirements of the enforcement notice EN1 be corrected as follows:
- In a) and e), delete "timer" and replace with "timber"
 - In b) and d), delete "its" and replace with "their"
 - In d), after "finish to match" delete "of"
43. Subject to these corrections the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeals C and D Refs: APP/X5990/C/16/3164911 and 3164912

44. The appeals are allowed on ground (f) and it is directed that the requirements of the enforcement notice EN2 be varied as follows:
- Delete all wording after "Photograph A;" and replace with "and extend the existing balcony balustrade to enclose the balcony as in the position shown in Photograph B, to match in design and finish the appearance of the existing balustrade as shown in Photograph A"
45. Subject to this variation the enforcement notice EN2 is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Grahame Kean

INSPECTOR