



Appeal Decisions

Site visits on 8 May and 3 July 2018

by Stephen Brown MA(Cantab) DipArch RIBA

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

Decision date: 18 December 2018

Appeal A: ref. APP/U5360/C/17/3180828

145-147 Upper Clapton Road, London E5 9DB

- 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 by Rabbi Moshe Meisels against an enforcement notice issued by the Council of the London Borough of Hackney.
 - The enforcement notice, ref. 2015/0417/ENF, was issued on 14 June 2017.
 - The breach of planning control as alleged in the notice is:
'Without the benefit of planning permission the erection of a wraparound extension to the property on the front and side and rear elevations, comprising; a four-storey rear extension fronting onto Filey Avenue; the excavation of a basement; and, a two storey front and side extension ("the Development")'.
 - The requirements of the notice are to:
 1. Remove the four storey rear extension fronting onto Filey Avenue.
 2. Remove the two storey front and side extension.
 3. Back-fill the excavated basement areas at the site and return land levels within the front, rear and side garden areas of the property to their levels immediately before the unauthorised development commenced
 4. Remove all materials, debris, waste and equipment resulting from compliance with the other steps above from the property and its premises.
 - The period for compliance with the requirements is 6 months.
 - The appeal 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. 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 do not fall to be considered.
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Appeal B: ref. APP/U5360/C/17/3180836

145-147 Upper Clapton Road, London E5 9DB

- 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 by Mr David Meisels (Radvan Estates Ltd) against an enforcement notice issued by the Council of the London Borough of Hackney.
- The enforcement notice, ref. 2015/0417/ENF, was issued on 14 June 2017.
- The breach of planning control as alleged in the notice is:
'Without the benefit of planning permission the erection of a wraparound extension to the property on the front and side and rear elevations, comprising; a four storey rear extension fronting onto Filey Avenue; the excavation of a basement; and, a two storey front and side extension ("the Development")'.

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 - The period for compliance with the requirements is 6 months.
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Decisions

Appeals A and B: refs. APP/U5360/C/17/3180828 & APP/U5360/C/17/3180836

1. Both appeals are dismissed.

Preliminary matters

2. I first visited the appeal site on 8 May 2018, but found the plans submitted did not match the as-built situation, mainly with respect to the layout of the 4-storey rear extension. At my request, as-built plans were duly provided, and a further site visit arranged for 3 July 2018. I have taken the as-built plans into account in determining the appeal.
3. It also became apparent that there was doubt concerning payment of the statutory fee for the ground (a) appeal and the deemed planning application. On enquiry, the Council had no record of the fee(s) having been paid, and also confirmed that they chased up the fee payment with the agent but received no response.
4. The appellant provided a photocopy of a cheque stub and covering letter indicating that the correct sum may have been paid in respect of Appeal A on 28 July 2017. However, on further enquiry, and having been given several weeks' notice he did not provide any of the further documentary evidence requested – such as a receipt from the Council. In the event, he was informed on 20 November 2018 that the ground (a) appeal and deemed planning application had lapsed. As a consequence I will not be considering the planning merits of the scheme.

Background matters

5. The appeal site lies at the northern corner of Upper Clapton Road and Filey Road. The original buildings that have been extended are at the end of a terrace of two-storey houses, probably built in the early 20th century.
6. In February 2006 planning permission was granted for the construction of a four-storey rear extension (including a part single-storey extension to the rear of no 147 Upper Clapton Road), to provide 4 self-contained flats (2 no. two-

bedroom and 2 no. four-bedroom); and a three-storey extension plus a roof level side/rear extension to the main building, to provide an enlarged synagogue and ancillary offices together with alterations to the elevations¹.

7. This permission was subject to a number of planning conditions. Notably Conditions 2 and 4, which the Council say are 'pre-commencement' conditions: Condition 2

'Full details, with samples, of the materials to be used on the external surfaces of the buildings, including glazing, shall be submitted to and approved by the Local Planning Authority in writing before any work on the site is commenced. The development shall not be carried out otherwise than in accordance with the details thus approved'.

The reason given for imposing the condition was:

'To ensure that the external appearance of the building is satisfactory and does not detract from the character and visual amenity of the area'.

Condition 4

'Full particulars and details of provisions for soundproofing between the synagogue and surrounding occupiers shall be submitted to and approved by the Local Planning Authority, in writing, before the commencement of works on site, and subsequently installed in the building in a satisfactory manner, before the development is first occupied/use commenced'.

The reason given for imposing the condition was:

'In order to minimise the transmission of noise and vibration between and within units in the interests of providing satisfactory accommodation'.

8. Prior to development there was a single storey extension at the back of no. 145 Upper Clapton Road. This has been demolished, as proposed in the approved scheme. The proposal was then to build a mainly four-storey extension at the rear, set back from the Filey Road frontage, and with a garden in that set-back. The lower ground floor of the extension would have been approximately half a storey below the general ground level, and the top storey would have been within a Mansard roof set behind a parapet. Within this extension a total of four flats were proposed – 4-bedroom flats on each of the lower-ground and ground floors, a 2-bedroom flat on the first floor, and a 2-bedroom flat on the second floor. Each flat would have generously sized living and kitchen/dining rooms, as well as service rooms. Those on the first and second floor are shown with balconies onto Filey Road.
9. The front and side of the original building would have been extensively altered and extended, and the existing full basement extended beneath the extensions. This part of the building would principally have contained the synagogue with associated office and service rooms on the ground floor, reading rooms and offices on the second and attic floors, and a reading room in the basement. Building works on this section are still very much in progress. The side extension and alterations to the front of the building are mostly complete, but there has been little work on internal alterations to form the large spaces of the synagogue and reading rooms. The external envelope of this part of the building so far constructed appears to be reasonably in line with the approved scheme.
10. As built, the envelope of the part 2-storey and part 4-storey back extension is also very much as the proposed scheme, and it can be seen from the level of

¹ Decision notice ref. 2005/2226, dated 24 February 2006.

the lower ground floor windows in relation to the ground level, and the level of the Mansard in relation to the side extension, that it has been built with the lower ground floor at much the same level as proposed.

11. On the lower ground floor of the rear extension is a single large space – labelled on the as-built drawings as 'storage' - and a small area with 2 WC compartments and washing facilities. On the ground floor are two self-contained flats. On the northern side is a 1-bedroom flat, and on the southern, Filey Road side a 2-bedroom flat. On the first floor there are again two self-contained flats – a 2-bedroom flat on the Filey Road side, with a balcony, and a 1-bedroom flat at the back. On the second floor is a single 3-bedroom flat, also with a balcony on the Filey road side. As a result, the total accommodation in the rear extension is storage on the lower ground floor, with five flats on the floors above.
12. As to fenestration of the rear extension, on the Filey Road side the size and positions of windows are very much as shown on the approved drawings. Similarly, those to the rear - facing towards the gardens and yards of Upper Clapton Road houses to the north – appear much as proposed, but they are clear glazed rather than obscure glazed as shown on approved drawings, and required by condition. Similarly, on the flank elevation, the arrangement is much as originally proposed.
13. The area outside the rear extension and fronting onto Filey Avenue, is indicated as 'garden' on the approved drawings, but is now largely occupied by a concrete stair and a ramp.
14. I noticed a few slight differences, in that the double French doors proposed for the lower ground floor flat have become a single door, and a bathroom window in the flank elevation on the second floor has become a slightly larger bedroom window. Furthermore, the windows indicated on the approved scheme appeared to be sash windows, whereas those installed are a mixture of top hung vents over fixed lights, and side hung casements, all in uPVC.

Appeals A and B on ground (c)

15. This ground is that there has not been a breach of planning control. The appellant claims the development under construction conforms to the approved plans, and was commenced within the 3 year statutory period.
16. As the Council say, it is a requirement of Conditions 2 and 4 that they should be discharged before work commenced on site. Both conditions are expressed in terms that prohibit any development before they are discharged. It appears to me that Condition 2 – which clearly fundamentally controls the final appearance of the building and its relationship to its surroundings - should be considered as going to the heart of the planning permission. It is arguable that adequate soundproofing of the building could be achieved at later stages of the construction process, and that Condition 4 does not necessarily go to the heart of the permission. However, that does not in any way lessen the importance of Condition 2.
17. Condition 2 expressly prohibited the start of development before the approval of external constructional materials. On the principle set out in the case of

*Hart Aggregates*² the development carried out was not an implementation of the approved scheme.

18. A letter from London Building Control Ltd (LBC Ltd) – an approved inspection organisation - dated 2 May 2012, states that an initial notice for Building Regulations purposes was issued on 30 January 2009. It goes on to cancel that initial notice on the basis that the works had not commenced on expiration of the 3 year period after the notice date.
19. A recent e-mail dated 19 March 2018 from the Inspector who carried out the first inspection, but no longer works for LBC Ltd, says he recalls carrying out that inspection on 19 February 2009, and was happy that the works had commenced. He denies authorship of the May 2012 letter, but acknowledges that any cancellation would have been under the jurisdiction of the directors of LBC Ltd. However, the letter does not purport to have been written by the inspector who claims to have made the February 2009 inspection. The cancellation was made by the approved firm, no contemporaneous documentary evidence is submitted of site inspections, or the works then observed. In the absence of such evidence I can give little weight to the view that the cancellation letter was not valid. I am not persuaded, on the balance of probabilities, that the works were started on or before 24 February 2009. Be that as it may, the building embarked on was so significantly different from that approved, that it must be regarded as implementation of a quite different scheme for which planning permission had not been granted.
20. While the internal layout of a scheme may not be subject to planning control in some circumstances, in this case the number of flats as built, is greater than as proposed in the 2006 planning permission, and the future intentions for the lower ground floor are by no means apparent. This is significantly different from the approved scheme in planning terms, and I consider as a matter of fact and degree the scheme in the process of construction does not accord with the approved scheme.
21. Overall, I consider that the planning permission has lapsed, on account of non-compliance with a condition precedent, not being in accordance with the approved drawings, and development not starting within the 3-year statutory period following the permission. On the balance of probabilities a breach of planning control has occurred, and the appeals on ground (c) must therefore fail.

The appeal on ground (f)

22. This ground is that the requirements of the enforcement notice are excessive and that lesser steps would overcome the Council's objections. The appellant submits that in the event there has been a deviation from the approved scheme, amendments to the built form would clearly remedy the breach.
23. Given that the overall form of the building constructed so far is very similar to that of the approved scheme, I concur with the appellant's view that the extension could possibly be adapted in terms of internal layout, and the external arrangements. However, this would probably be a substantially different scheme as compared with what has already been built, and compared with the originally approved scheme. The differences in layout are significant,

² R (oao Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin).

and I am not at all confident that the originally approved scheme could still be implemented. Furthermore, the appellant has not put forward any obvious alternative, and it is not for me to attempt to prescribe one. In my view the proper way forward would be for the appellant to submit a planning application for a new scheme, which could be subject to a full consultation.

24. I consider no sufficiently defined lesser steps have been put forward that would overcome the Council's objections. The appeal on ground (f) therefore fails.

Other matters

25. No appeal has been made on ground (g), and the stated compliance period will stand. However, under s.173A(1)(b) of the Act it is open for the Council to relax a requirement of the notice, and in particular they may extend the compliance period. Provided that the appellant acts in good faith, and in good time, seeks to discuss matters with the Council at an early stage, and makes any necessary planning application, I see no good reason why an extension should not be granted if appropriate.

Conclusions

26. For the reasons given above, and having regard to all other matters raised, I consider that the appeals should not succeed.

Stephen Brown

INSPECTOR