
Appeal Decision

Site visit made on 24 October 2019

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

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

Decision date: 29 November 2019

Appeal Ref: APP/J4423/C/18/3216477

Land at 38 – 40 Wostenholm Road, Sheffield S7 1LJ

- 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 Grant Kangley of High Bank Quarry Estates against an enforcement notice issued by Sheffield City Council.
 - The notice was issued on 11 October 2018.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised installation in the building on the Land of:
 - i. windows with UPVC frames in the ground floor bays in both the south western elevation facing Priory Place and the south eastern elevation facing Wostenholm Road as shown marked 'A', 'B', 'C' and 'D' on the attached photographs contained within Appendices One, Two and Three;
 - ii. windows with UPVC frames in the ground floor and first floor window openings in the south western facing elevation facing Priory Place as shown marked 'E', 'F' and 'G' on the attached photograph contained within Appendix Two;
 - iii. windows with UPVC frames in all ground and first floor window openings in the south western facing elevation facing Wostenholm Road as shown marked 'H', 'I', 'J', 'K', 'L', 'M', 'N' and 'O' on the attached photographs contained in Appendices One and Three.
 - The requirements of the notice are:
 - i. Remove the following unauthorised windows (as shown outlined in red in the photographs included within the appendices attached to this notice) from the building on the Land:
 - windows with UPVC frames in the ground floor bays in the south eastern facing elevation facing Wostenholm Road as shown marked 'A', 'C' and 'D' on the attached photographs contained within Appendices One and Three;
 - windows with UPVC frames in the ground floor bay in the south western facing elevation facing Priory Place as shown marked 'B' on the attached photograph contained within Appendix Two;
 - windows with UPVC frames in all the ground floor and first floor window openings in the south western facing elevation facing Priory Place as shown marked 'E', 'F' and 'G' on the attached photograph contained within Appendix Two;
 - windows with UPVC frames in all the ground floor and first floor window openings in the south western facing elevation facing Wostenholm Road as shown marked 'H', 'I', 'J' and 'K' on the attached photograph contained within Appendix One; and
 - windows with UPVC frames in all the ground floor and first floor window openings in the south western facing elevation facing Wostenholm Road including the window openings in the link extension elevations as shown marked 'L', 'M', 'N' and 'O' on the attached photograph at Appendices One and Three.
 - ii. Make good any damage caused to the Land by the carrying out of step (i).
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- The period for compliance with the requirements is 24 months from the date this notice takes effect.
- The appeal is proceeding on the grounds as set out in section 174(2)(c), (d) and (f) of the 1990 Act.

Summary of Decision: The appeal is allowed, and the enforcement notice is quashed.

Preliminary matter

1. I have not canvassed the parties on the judgment in *Muir* (paragraphs 11 and 16 below), handed down since the appeal statements were exchanged since, although it is generally relevant to the issues in the appeal, my approach to the question of what constitutes "the building" for the purposes of s55(2)(a)(ii) of the 1990 Act does not require the application of any new principle to be found in *Muir* but rather an assessment, as I have made, on the facts of the case.

Background

2. The appeal property, currently used as an hotel, is a large two-storey brick-built, partially rendered building with a slate roof to the west of Wostenholm Road and at the junction with Priory Place, in the Nether Edge Conservation Area. It has ground floor canted bay windows and stone or reconstituted stone quoins contrasting with the brickwork but is otherwise fairly unremarkable. It is set back considerably from the main road with a large parking area in front.
3. The windows the subject of the enforcement notice have not been the subject of any planning application although various permissions for alterations to the property were granted prior to the installation of the windows. Further and for the avoidance of doubt, planning permission Ref 15/01060/FUL granted on 12 November 2015 was for various extensions and other works to Nos 38-40, but the windows in question were not part of the application for that permission.

The appeal on ground (c)

4. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control. The onus of proof in a ground (c) appeal is on the appellant and the test of the evidence is on the balance of probability. The planning merits of the development are not relevant to consideration of an appeal on this ground.
5. Planning permission is required for "development", defined by s55(1) of the 1990 Act as including "the carrying out of building, engineering, mining or other operations in, on, over or under land". By s171A(1) carrying out development without the required planning permission constitutes a breach of planning control.
6. The main issue in this ground of appeal is whether the replacement of the windows constitutes "development" within the meaning of the 1990 Act.
7. Certain operations or activities are not to be taken as development for the purposes of the 1990 Act, as set out in s55(2). These include:

"(a) the carrying out for the maintenance, improvement or other alteration of any building of works which...(ii) do not materially affect the external appearance of the building."

8. The Council's only response on this ground is that "*there are no permitted development rights for alterations of this kind to this property*" and that "*the replacement windows materially change the character of the area.*"
9. The Council in my view inadequately addresses the question of whether the replacement windows amount to development for the purposes of s55 of the 1990 Act. To pray in aid a material change in the character of "the area" is irrelevant to the question that arises under s55(2)(a)(ii) whose wording implies that in analysing the position, a decision maker should not have regard to the impact on the external appearance of anything other than the building.
10. Further, the question of what is the "building" has not been commented upon. The statutory definition in s336 of a building includes "part of a building". There seems no good reason for not applying that definition for the purposes of determining whether building works materially affect the external appearance of a building so as to amount to "development" within the meaning of s55(2).
11. Generally then, there is a number of possible approaches to what constitutes "the building" in any given case. These might range from considering, for example, a single terraced house in a terrace where, as the court put it in *London Borough of Haringey v Secretary of State for Housing Communities and Local Government*, *Paul Muir* [2019] EWHC 3000 (Admin):

"*in common parlance each house in a terrace would be considered a building*".
12. Secondly, one might consider whether the circumstances were indeed such as to justify an argument that two or more properties were "the building", for example a pair of semi-detached houses exhibiting a high degree of symmetry or complementarity in their design and appearance.
13. Then there is the question how small or discrete a "part of a building" it is permissible to consider, and whether the material change in its external appearance is to be assessed without reference to, say a larger and more discrete part of the building, or indeed the building as a whole.
14. Indeed as one focusses on a smaller and ever more discrete "part of a building" it might be appreciated (through a process of *reductio ad absurdum*) that its external appearance would inevitably be materially affected by comparison only to what was there before, or what was there in a tightly circumscribed area.
15. It may be that such considerations lay behind part of the rationale in *Burroughs Day v Bristol City Council* [1996] 1 P.L.R. 78 (QBD) in holding that the change in external appearance also had to be judged in relation to the building as a whole, not by reference to a part of the building taken in isolation.
16. However Leiven J in *Muir*, as well as confirming that for the purposes of s55(2), the term "building" could include part of the building, also said this:

"*Given the statutory definition in s.336 [building includes part of a building] it is open to the decision maker to take into account the impact on that part alone, and to the degree the Judge in Burroughs Day was suggesting that as a matter of law (rather on the facts of the case) that was not material, in my view he was wrong.*" (My emphasis)

17. That said, it remains permissible of course to look at the bigger picture, that is the effect that a relatively small change may have on the whole, or a larger part of the building. As might be said, "context is all".
18. Works took place some years ago to integrate the two properties now known as Nos 38-40 Wolstenholm Road. The front elevations appear as one building despite the linked addition, and the previous works to integrate the properties went further than the façade. In any event I consider from their appearance within the single plot, that Nos 38-40 constitutes the "building" that is relevant for me to consider as the backdrop against which to evaluate whether the replacement windows have materially affected its external appearance.
19. Several points are made in the appeal statement under this ground of appeal about the planning merits of the windows installed. I am unable to take these into account as I have explained, however the appellant asserts the new windows not to be materially different from other uPVC windows that they replaced.
20. For example, in his statement the appellant refers to *"the quality black woodgrain sash style PVCu windows"* as a huge improvement on the *"20+ year old white upvc windows that were fitted in the property previously"*. He also states *"I was told I could replace the windows like for like and we had PVCu before"* and *"The windows photographed (SEE ATTACHED) replaced in September 2014 previous uPVC windows (see evidence) that have the same design and construction (if not improved)"*.
21. The statement also asserts the following:
"the current owner replaced like for like. The construction of the windows, being modern, using beading and being opening not sash windows, is a replacement of what was already in situ. And even whilst They utilise glazing beads rather than putty as a method of fixing the glazing in place but can you even notice this from the street?"
22. Additional points made are that the windows are set well back from the road and the elevated position of the building means that that the opening of the windows is never going to affect anyone. In addition, it is said, *"if the windows [have been] replaced with old fashioned joints and beading this is not visible by neighbours or from the road."*
23. The Council makes no attempt to argue that the replacement windows have materially affected the building's appearance by reference to what windows were there previously. They do not dispute that the previous windows were white uPVC windows in all the openings (save for "G" which I deal with below). The fact that they are in a conservation area is not relevant. From the photographs submitted, Nos 38-40 had what I consider to be old and rather unattractive white uPVC windows in the openings on the front and side elevations of the building, before the black uPVC windows were fitted.
24. A material effect on appearance, like beauty, can be in the eye of the beholder but the factors held to be relevant to assess have a degree of objectivity nonetheless. Whether an alteration is material depends in part on the degree of visibility by an observer outside the building and is also likely to depend on the nature of the building and the nature of the alteration or improvement.

25. Additional glazing bars in the replacement windows are noticeable but the non-traditional uVC windows are of similar materials and proportions to the original windows. That they may lack the character and detailing of timber sliding sash windows considered acceptable in a conservation area is not relevant. Their construction, mitred joints, meeting rails, glazing beads and so forth may differ in detail from their predecessors but the differences are not significant.
26. Strikingly, the Council in criticising the use of uPVC and its effects, states: "*this results in the loss of the three dimensional quality of a traditional sliding sash window due to the crude flattened appearance of the replacements.*" Yet there is no loss of traditional sliding sash windows. The installations may represent a lost opportunity but there is no actual loss through the alterations made. The appellant is not to be penalised for failing to take advantage of such an opportunity where he has merely replaced old uPVC windows with new ones.
27. I also saw from the images supplied that several opening lights appeared top hinged in common with the replacements. The black colour of the windows I do not regard as materially affecting the appearance of the building given the generally less reflective quality that I saw they possessed, compared to the white windows they replaced.¹ A low reflectance value in a colour would not imply it is recessive but still, the colour change in situ is not dramatic in effect.
28. With regard to the window marked "G" in the photograph attached to the notice, a relatively small porch of poorer environmental quality on the side elevation was replaced with a smaller opening in which was then installed a white uPVC window. The side elevation, as is the case with the front elevations, is set back from the boundary and partially obscured by a low boundary wall. Judged against the exterior of the building as a whole, this particular alteration does not in my view materially affect its external appearance, nor for that matter the side elevation alone.
29. Furthermore, although the Council takes no point on it, as it appears from the photograph it is unlikely that the volume of the porch exceeded the threshold that would make it necessary to obtain planning permission for its demolition.

Other matter: the Article 4 direction

30. The Council states the property is covered by an "Article 4 Direction" that removes permitted development rights for replacement of windows at the front of the property, but I have not been given evidence that such is the case. I have examined carefully the Article 4 Direction submitted which came into force, according to its face, on 10 December 2011. With regard to a large area of land within the Council's area, understood to include the appeal site, it purports to remove permitted development rights in Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the "GPDO") insofar as they would have permitted a change of use from a dwellinghouse within Class C3 to a house in multiple occupation (HMO) under Class C4. These are classes of development set out in the Town and Country Planning (Use Classes) Order 1987 (as amended) (the "UCO").
31. The schedule to the Article 4 Direction appears to contain an error in that it cites "Class 1" rather than "Class L", because it is this latter class of development specified in the GPDO in Part 3 of Schedule 2, that corresponds to

¹ I note in passing that it is white uPVC windows whose shiny and highly reflective surface is often criticised.

the change of use between dwellinghouses and HMOs. More importantly however, for present purposes, the prohibition in the Direction on that change of use taking place without permission being expressly applied for, does not relate to operational development that may or may not have taken place in the form of replacement of windows, including whether or not such windows are in a conservation area.

32. It is possible that the wrong direction may have been supplied in the appeal and the Council intended to refer to another Article 4 Direction that I have not seen. Be that as it may, I have found that no development is involved in the alterations or improvements that are the subject of the enforcement notice. Therefore the question of permitted development rights does not arise.

Conclusion on ground (c)

33. I conclude on this ground on the balance of probability, from what I have seen and read, that the replacement of the windows in question constitutes the carrying out of an improvement or alteration of the building which has not materially affected its external appearance such that it should be regarded as development for the purposes of the 1990 Act. Accordingly the works do not require planning permission and as a result the matters alleged in the notice do not constitute a breach of planning control. The appeal on ground (c) therefore succeeds.

Overall conclusion

34. For the reasons given above I conclude that the appeal should succeed on ground (c). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under the various grounds set out in section 174(2) to the 1990 Act as amended does not need to be considered.

Formal Decision

35. The appeal is allowed and the enforcement notice is quashed.

Grahame Kean

INSPECTOR