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## Appeal Decision

Site visit made on 3 December 2019

by **Anthony J Wharton BArch RIBA RIASI**

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

Decision date: 20 December 2019

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**Appeal Ref: APP/X1735/F/19/3222642**

**The Railway Cottage, 59 Langstone Road, Havant PO9 1RB**

- The appeal is made under section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Ms T White against a listed building enforcement notice (LBEN) issued by Havant Borough Council.
- The enforcement notice was issued on 4 January 2019.
- The contravention of listed building control alleged in the notice is the *demolition of a dwellinghouse on the land*.
- The requirements of the notice are to rebuild 59 Langstone Road to match, in facsimile, the building as it stood immediately prior to its demolition and in conformity with the photographs attached and to the measurements shown therein.
- The period for compliance with the requirements is 18 months.
- The appeal is made on grounds (a), (b), (h) and (i) as set out in section 39(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended (PLBCAA).

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### Decision

1. The appeal is allowed and the listed building enforcement notice is quashed.

### Matters of clarification

2. This appeal only relates to No 59 Langstone Road. Initially the LPA issued 2 planning enforcement notices (PENs) and 2 listed building enforcement notices (LBENs) relating to the pair of cottages at Nos 59 and 61 which are listed buildings in Grade II. Only the LBEN relating to No 59 was appealed and the other LBEN and 2 PENs have now come into effect with a compliance period ending in July 2020. There is no appeal on ground (e) and, therefore, listed building consent (LBC) for what is alleged in the notice (demolition of No 59) cannot be considered.

3. With regard to the ground (b) appeal, this is made on the basis that *'that the matters alleged to constitute a contravention of section 9(1) or (2) have not occurred'*. However, from the submissions made on behalf of the appellant, I consider that there are ground (c) arguments, on the basis that a contravention of the PLBCAA has not occurred. I have, therefore, dealt with the appeal on the combined grounds (b): that what is alleged has not occurred and (c); that, if it has occurred there has been no contravention of the PLBCAA. In dealing with the appeal in this way, I am satisfied that no injustice will be caused since the LPA is fully aware of the appellant's case and has been able to respond accordingly.

## **Background information and relevant policy**

### *Background information*

4. The pair of 18<sup>th</sup> Century cottages were listed in Grade II on 15 November 1974 and the list description is as follows:

*'Pair of houses. Late C18. Weather-boarded walls, and tiled roof. Symmetrical front (west) of 2 storeys, and attic, 2 window, 1/2-hipped roof, 2 hips above the rear extension Casements. Side entrances, within a small porch on the south side.'*

5. The appeal site is located on the east side of Langstone Road, on the road frontage and within the Langstone Conservation Area (LCA) and the Chichester Harbour Area of Outstanding Natural Beauty (CHAONB). The overall site is quite large and there is an existing vehicular access and car parking area to the south of the site. The 'Havant Footpath', a former railway line, passes the site and leads off, in a north-easterly direction, towards Havant. The dwellings along Langstone Avenue, which is set back from and parallel to the main road (A3023), are located immediately to the north.

6. Towards the end of 2018 two fires occurred at the cottages. The second fire caused severe damage to both properties. It is reported that, at that time, the cottages were both vacant and had been subjected to break-ins and acts of vandalism. It has since been established that both fires were started deliberately by persons unknown. The appellant had purchased the properties in June 2018 and, prior to the vandalism and fire damage, the LPA had liaised with the appellant with a view to carrying out works for their preservation and continued use as dwellings.

7. Following these negotiations applications for '*replacement of the external timber cladding, new windows and for conversion into a single dwelling*' were submitted. However, these applications were not validated due to the fact that the fires had occurred. Further attempts to liaise with the appellant are stated, by the LPA, to have '*failed to move matters forward*' with regard to the re-building of the cottages. Eventually, therefore, the Council considered it expedient to issue the notices.

8. Following the issuing of the notices, it is stated that the LPA worked closely with the appellant's agent and this resulted in applications for planning permission (PP) and listed building consent (LBC) being made. These applications (APP/19/00834 and APP/19/00837) for a '*Replacement Cottage, Privy style storage building, installation of gates in front wall and repointing of front wall*' were granted PP and LBC in November 2019. The proposals were remitted for '*Committee Consideration*', at the discretion of the *Director of Regeneration and Place*, due to the level of public interest.

9. In the Council's Report, which recommended a granting of PP and LBC, the planning history of the site is set out at section 2. As well as the above applications for PP and LBC and reference to the enforcement action the subject of this appeal, the report also refers to applications for the felling of some trees on the site within the LCA. These comprised several Hornbeam a Sycamore; a Common Hawthorn and 2 Ash.

### *Policies referred to by the Council*

10. These are policies within both the Havant Borough Local Plan (Core Strategy) (HBLP) and the Havant Borough Local Plan (Allocations) July 2014 (HBLPA). In the HBLP the following policies are listed: CS11 (Protecting and Enhancing the Special Environment and Heritage of Havant Borough); CS12 (CHAONB); CS16 (High Quality Design); DM13 (Car and Cycle Parking on Residential Development); DM8 (Conservation, Protection and Enhancement of Existing Natural Features) and DM9 (Development in the Coastal Zone).

11. In the HBLPA the listed policies are: DM17 (Contaminated Land); DM20 (Historic Assets); AL1 (Presumption in Favour of Sustainable Development); DM24 (Recreational Disturbance to Special Protected Areas (SPAs) from Residential Development) and AL2 (Urban Area Boundaries and Undeveloped Gaps between Settlements).

12. However, in relation to the grounds pleaded in this appeal the policies are not directly relevant, since the merits of the case are not being considered. However, clearly these policies were relevant to the Council's consideration of the approved applications for PP and LBC, as were policies within the National Planning Policy Framework (NPPF).

13. In their report relating to the above applications the Council referred to the Statutory and Non Statutory Consultations; to the Chichester Harbour Conservancy and the AONB; to Conservation Officer comments; to the site and description of works; to legislation and policy background and to the assessment of significance of the heritage asset (the cottages). The report also covered the question of contamination following the fire damage and to other consultees including Hampshire County Council and Historic England South East. The latter made no specific comments and the County Archaeologist raised no issues. There were four responses from other persons.

14. In conclusion the report had recommended approval and consent. It was considered that the proposal would result in a replacement dwelling on the site in lieu of the two cottages and that this would be an appropriate response to the current condition of the listed buildings. The proposal was also considered to have a positive effect on the character and appearance of the LCA; that it would not harm the AONB and would not harm residential amenity.

*Whether or not enforcement action should have been taken*

15. Reference is made, on behalf of the appellant, to paragraph 58 of the NPPF and in particular that LPAs should act proportionately in responding to suspected breaches of planning control. It is contended that the LPA failed to exercise their discretionary powers and have instead acted inappropriately through the service of the enforcement notices. It is stated that no wilful unauthorised works to the building, by the appellant, have occurred. It is contended that the issues regarding fire damage were best addressed through the planning application process and not through enforcement.

16. The LPA's actions are deemed to have been '*heavy-handed*' and to have failed to consider the actual events concerning what has actually happened. It is considered that this has been to the detriment of the appellant and has resulted in an implied knowledge and intention behind the alleged actions. It is stated that this implied intent has had ramifications in planning legal terms, as well as implying wider criminal activity, despite no further action being taken or any further investigation by the police. It is contended, therefore that there was no justification for the service of the PENs and LBENs and in any case the matters have now been dealt with through the approvals.

17. In response the Council refers to the statutory duties set out in the PLBCAA, as well as to various paragraphs within the NPPF relating to the conservation and enhancement of the historic environment (184, 190, 191 and 193). It also refers to case law whereby the courts have found that a decision maker must attach considerable or special weight to the desirability of preserving the settings of listed buildings. Whilst it is accepted that the statutory duty and the policies within the NPPF refer in essence to '*proposals*', it is contended that these are still '*pertaining to the appeal and the loss of this historic asset*'.

18. Having considered the above points and all of the other submissions, it is evident that that there is no case to argue that the fires and subsequent damage to the 2

cottages, were caused through any premeditated or planned actions on the part of the appellant. It has been recorded that the fires were started following vandalism to the property by persons unknown. However, there can be no dispute that the fire damage occurred during the ownership of the appellant, who is legally responsible for complying with the PLBCAA in relation to any 'works' to the listed building.

19. I accept that a LPA has the discretion as to whether or not take LBEN action. In this case, following what they considered to be inadequate initial actions on the part of the appellant, the LPA concluded that, having had regard to the effect of the fire damage on the character of the listed buildings, it was expedient to issue the notices.

20. Notwithstanding my conclusions below, I consider that it was for the Council's judgement as to whether or not it was expedient to issue the 4 notices. It clearly did so to ensure that the special architectural and historic interest of the cottages could be somehow preserved, despite the serious fire damage. It is clear now that the appellant wishes to rebuild the cottages, albeit as one dwelling. The LPA considers that if the approvals are not implemented, the enforcement procedures are the only remaining route open to ensure that the harm caused to the buildings could be reversed. I have noted the parties' stances on this point. However, the LBEN was issued by the LPA; it has been appealed and I am empowered to deal only with the grounds pleaded and the implied ground (c) arguments. I now turn to these grounds of appeal.

### **The appeal on ground (a)**

21. An appeal on this ground effectively constitutes an application to the Secretary of State (SoS) to remove the building(s) from the statutory list by virtue of the power set out in section 41(6)(c) of the PLBCAA. The Act indicates that the time at which this question falls to be considered must be the time before the allegations set out in the LBEN were carried out, rather than the date of issue of the LBEN. This is because otherwise the enforcement procedure would be totally ineffective where the works (or fire damage in this case) had destroyed the special interest of the building.

22. On behalf of the appellant it is argued that, although built around 1790, the original cottages were of low quality construction and that they are not of great importance in terms of their architectural design, decoration or craftsmanship. It is also stressed that there were little original features left before the fires and even less left, following the fires. It is argued, therefore that the cottages are of low architectural importance. With regard to their listing in 1974, it is indicated that this only occurred due to the historic links with the former 'Billy Line' railway and the fact that the houses were used by the Station Master.

23. Other than the above, it is indicated that there are no other historic links to any notable historic figure; that the houses did not contain any significant architectural detail and that, prior to the fires, they were in a run-down state with boarded-up windows and derelict internal ground and first floors. Since the fires it is further argued that the lack of quality and historic significance in the materials and architecture of the buildings has become more apparent. Finally it is argued that the removal of the listed status would not prevent the LPA from achieving a proper replacement building. This can be seen from the appellant's actions and liaison with Conservation Officers in gaining PP and LBC for the replacement building.

24. Having seen the buildings in their current state, the only elements clearly recognisable are the chimney stacks and the basic outline shape of the cottages. Having seen the historic and latest photographic evidence of the cottages prior to the fire, I acknowledge that their construction was basic. However, that does not mean that they were not of architectural and historic interest. When they were listed, in

1974, it is clear that the weather-boarded walls, the tiled roof, the casement windows and even the extensions were considered worthy of being listed in Grade II.

25. Buildings are listed in Grade II because they are of special interest relating to the time they were built, because of their materials and because of their social and historic significance. The criteria for listing indicate that to be of architectural interest a building must be of importance in its architectural design, decoration or craftsmanship. Whilst accepting that the cottages did not possess any notable features of architectural decoration, I consider that the simple design, the basic materials and the timber craftsmanship of the day rendered them worthy to be listed for their architectural and historic interest. In this respect they had a quality of interest in the external fabric to justify statutory protection.

26. Irrespective of whether or not the buildings had been allowed to deteriorate, I consider that they would have been clearly recognisable from the list description. The cottages also had an historic link to the old railway line and had been used by railway staff. The listing criteria indicate that to be of special historic interest, a building must illustrate, amongst other things, important aspects of the nation's social economic and cultural history. It is my view that due to the historic links to the area and the history of usage, particularly relating to the historical associations with the railway era, the cottages were and still are (despite the damage) of special historic interest.

27. This architectural and historic interest was evident before the fire damage occurred. On the basis of the PLBCAA requirement that a building must be assessed prior to any works being carried out (or in this case fire damage occurring), I do not consider that the cottages can justifiably be removed from the statutory list. The courts have held that a building cannot be taken outside of the protection of listed building control simply because it was demolished, dismantled or destroyed. I conclude, therefore, that the appeal on ground (a) must, therefore, fail.

### **The appeal on grounds (b) and (c)**

28. It is argued that to state that the building(s) have been demolished is factually incorrect and that '*demolition*' as defined in the Oxford English Dictionary' (OED) means '*the act of pulling or knocking down a building*'. It is stressed that the buildings were damaged as a result of arson and that the LPAs decision to use the enforcement process was inappropriate. I have dealt above with that point.

29. The first question is whether or not the matters alleged to constitute a contravention of section 9(1) or (2), have occurred as a matter of fact. Clearly the listed cottages have been affected by the two fires. I noted the fire damage during my site visit and No 59, as a former dwellinghouse has been destroyed. The definition of '*demolish*' in the Concise OED is to '*Pull or throw down (building), destroy*' (my underlining).

30. Clearly No 59 was not '*demolished*' in the normal understanding of the word. But it was '*destroyed*' to all intents and purposes by the fire damage. I consider, therefore, that the use of the word '*demolition*' in the allegation set out in the LBEN was an appropriate word to use. I now turn to the question of whether or not the destruction of No 59 constituted a contravention of the PLBCAA. The Council clearly contends that this is the case, as demonstrated by the issuing of the notices and the details of their case.

31. On behalf of the appellant it is argued that '*the destruction of the property by fire is not development*' and that the policy and legislative background set out by the Council should not apply. This clearly implies that the destruction by fire does not constitute a contravention of sections 7 and 8 the PLBCAA. Section 7 states that

*'Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special or architectural or historic interest unless the works are authorised'* (my underlining). Section 8 sets out when works to a listed building are authorised.

32. It is argued that the appellant in this case has not carried out any 'works' for the demolition of the cottages. It has been concluded that the damage, destruction or 'demolition' was caused by persons unknown. It has not been shown that it was caused by any action on the part of the appellant and, therefore, the appellant has not been in contravention of the PLBCAA.

33. For a contravention to have taken place there must have been some 'works' for the demolition, destruction or alteration of the listed building. In this case, although not recognised as normal 'works', it is the destruction by fire which has affected the character of the cottages as buildings of special architectural and historic interest. Normally when 'works' have been executed for demolition (or destruction) of a listed building, there would be some premeditated intent or plan of action on the part of those carrying out the 'works'. The use of the word 'works' in section 7 of the PLBCAA has been found to indicate that they are to be premeditated. However, this was not the case in relation to the damage caused to the cottages.

34. The evidence clearly indicates that the fire damage was caused by arson and by person(s) unknown. The changes (or 'works') which have affected the character of the listed buildings had, therefore, been out of the control of the appellant. This is not disputed by the LPA or the Police, following their investigations. Thus the appellant cannot be said to have premeditatively planned or willingly carried out the damaging 'works'.

35. In similar situations to this, the Secretary of State has found (JPL [1981] 443 and JPL [1990] 444) that where a listed building has been damaged by something totally outside of the owner's control, there cannot generally have been a contravention of listed building control. One of the above cases (Ref APP/5373/F/33, August 1980) relates to damage caused to a building where it was hit by a motor vehicle. This is not exactly the same but is a situation whereby the vandalism and subsequent fire damage cannot be said to have been within the appellant's control.

36. The fire damage was not caused by any premeditated or planned action on the part of the appellant. In the above cases the SoS concluded that there had been no contravention of control and that it was beyond the powers of enforcement procedures to require the reinstatement of property damaged or destroyed, by accident or by any action that did not involve a premeditation of the works by the building owner. Although the fire damage was clearly not an accident, it was an occurrence which was not instigated by the appellant.

37. Taking into account the above cases and the particular circumstances relating to the fire damage of No 59, it is my judgement that a contravention of listed building control has not, therefore, occurred. The appeal succeeds and the LBEN will be quashed. Where an appeal is successful on legal grounds, grounds such as (h) and (i) do not, therefore, fall to be considered.

### **Other Matters**

38. The other two PENs and the LBEN, which have come into force, remain in place, irrespective of my conclusion in this appeal. These were not appealed; are not before me and should now be on the Council's Enforcement Register. However, the courts have held that in such circumstances, a notice ceases to have effect only to the

extent that the requirements are inconsistent with the PP. Thus, even if premeditated 'works' had been carried out by the appellant, the requirements of the extant notices contradict or, are inconsistent, with the PP and LBC granted.

39. Section 173A of the Act affords LPAs discretionary powers (subject to challenge on usual judicial review principles) to withdraw enforcement notices and to waive requirements. These powers can be exercised whether or not a notice has taken effect and section 173(4) expressly provides that the 'withdrawal' of a notice does not affect the power of a LPA to issue a further enforcement notice. In this case any subsequent matters relating to the extant notices, or withdrawal, are for the parties to consider. I am not empowered to deal with such matters.

40. I have noted the considerable support for the Council's actions from the local community and the many interested persons and have taken all of their submissions into account in reaching my decision. However, none of these alters my view that in relation to the notice before me, the evidence indicates that a breach of listed building control has not technically occurred. I acknowledge that there was significant support for rebuilding like-for-like and this may well have been preferable to some to the now approved scheme for PP and LBC. However, the Council has granted PP and LBC and, in the overall context of this appeal this is now a major material consideration in this appeal for reasons set out above.

41. Even if my conclusion on the ground b/c arguments had been different and this fourth LBEN had been upheld, it would make no difference to the overall situation regarding compliance with the requirements of the LBEN. As indicated above, although the other notices remain in place, the requirements are inconsistent with the approval and consent. In such circumstances if implemented in accordance with the approved scheme, the PP and LBC details override the requirements to re-build like-for-like as set out in the notices.

42. In reaching my conclusions I have taken into account all of the other matters raised by the Council; by and on behalf of the appellant and by the interested parties and persons. These include the full planning history of the site; its context and history; the initial submissions; the detailed statements; the Design, Access and Heritage Statement and Report; the individual letters in support of the Council; the rebuttal statement on behalf of the appellant; all final comments and all of the drawn and photographic evidence submitted.

43. However, none of these carries sufficient weight to change alter my conclusions on the grounds of appeal and nor is any other factor of such significance to change my decision that the appeal should allowed and the notice quashed.

#### **Formal Decision**

44. For the above reasons the appeal is allowed and the Listed Building Enforcement Notice is quashed.

*Anthony J Wharton*

Inspector