



Appeal Decision

Site visit made on 4 November 2019

by Thomas Shields MA DipURP MRTPI

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

Decision date: 31 December 2019

Appeal Ref: APP/G2625/C/18/3218100

13 Magdalen Street, Norwich, NR3 1LE

- 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 Act").
- The appeal is made by Mr Timothy Harber (Earsham Properties Ltd) against an enforcement notice issued by the Norwich City Council.
- The enforcement notice was issued on 19 November 2018.
- The breach of planning control as alleged in the notice is without planning permission, carrying out the following operations:

- i) The removal of six number single glazed, vertical sliding sash windows of white painted timber construction (probably original to property); and
- ii) The installation of PVC-u double glazed casement windows - (top hung outward opening), with trickle vents

The replacement of the windows constitutes development and no permitted development rights would apply in this case (The property is three storey, this relates to the flat in multiple occupation on first and second floors above a commercial ground floor premises). No planning consent has been granted for the works, the breach of planning control has occurred within the last four years and is not therefore immune from enforcement action.

- The requirements of the notice are:
 - a. Remove the unauthorised PVC-u windows from the Land. Photographs of the unauthorised windows have been included in ANNEX B for clarification.
 - b. Install traditional painted timber framed, single glazed, sliding sash windows to match the design of those removed, including two over two pane design, genuine structural timber glazing bars separating the glazed panes and moulded timber horn details to the top sash. The new windows should match those shown in photographs and details in Annexes C and D and component dimensions shown in Annexe C (Detail 3)
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the ground set out in section 174(2)(a), (c), (d), (f) and (g) of the Act.
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Formal Decision

1. The appeal succeeds in part on ground (g) only. As such it is directed that the notice be varied in Section 6.a and 6.b by deleting "six months" and substituting instead "nine months".
2. Subject to the variation the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

Appeal site and background

3. 13 Magdalen Street is a three storey 19th century terraced building of traditional form and construction with later alterations, including to the shopfront at ground floor. As one of a pair with No. 15 it is locally listed and is a non-designated heritage asset, and sits within the Colegate character area of the Norwich City Centre Conservation Area. Timber windows at first and second floor (4 to the front elevation, and 2 to the rear) have been removed and replaced with PVC-u windows.
4. The burden of proof in legal grounds of appeal, including grounds (c) and (d) falls to the appellant and the test of the evidence is on the balance of probability.

The appeal on ground (c)

5. An appeal on ground (c) is a claim that the matters alleged to have occurred at Section 3 of the Notice do not constitute a breach of planning control.
6. A breach of planning control comprises the carrying out of development without the requisite planning permission, and the meaning of “development” is set out in section 55(1) of the Act. It includes the carrying out of building, engineering, mining or other operations in, on, over or under land¹.
7. The installation of the PVC-u windows is a building operation within the meaning of section 55(1) of the Act. I disagree with the appellant that there is little visual difference between the old and new windows. The PVC-u windows are markedly different in design, form and appearance from the original ones which were of painted timber, slimmer profile, and single glazed sliding sash construction. Given the significant change in appearance together with their front and rear visibility, they materially affect the external appearance of the parts of the building in which they sit, and of the building as a whole. As such, they do not fall to be considered as an exemption from being development under Section 55(2) of the Act. Therefore, they are development as defined by the Act for which planning permission is required.
8. The appellant argues that the upper floors of the building are not flats but rather comprise a house in multiple occupation (HIMO) and, as such, the windows benefit from the planning permission (“permitted development”) for “dwellinghouses” granted by Article 3 and Class A of the Town and Country Planning (General Permitted Development) Order 2015 (GPDO). The 2015 GPDO replaced its former 1995 version but the provisions relevant to the appellant’s case are unchanged.
9. For the purposes of assessing permitted development Article 2 of the GPDO states:-

“dwellinghouse”, except in Part 3 of Schedule 2 to this Order (changes of use), does not include a building containing one or more flats, or a flat contained within such a building; and

“flat” except in the expression “flat roof”, means a separate and self-contained set of premises constructed or adapted for use for the purpose of

¹ Section 336 of the Act defines “land” as including a building.

a dwelling and forming part of a building from some other part of which it is divided horizontally.

10. Having regard to the forgoing it is pertinent to note that the upper floors of the building are separated from the ground floor which is in commercial use. Consequently, the upper floors said to be in shared use as a HIMO comprise “a separate and self-contained set of premises adapted for use for the purpose of a dwelling and forming part of a building from some other part of which it is divided horizontally”. Thus, the upper floors (if not individual flats) nonetheless comprise a “flat” for the purposes of the GPDO.
11. Since “dwellinghouse” as defined by the GPDO does not include “flats”, the replacement windows cannot be permitted development under Class A.
12. I therefore conclude that the PVC-u windows are development which has been carried out without planning permission and hence constitutes a breach of planning control.
13. The appeal on ground (c) fails.

The appeal on ground (d)

14. An appeal on ground (d) is a claim that at the date the Notice was issued the development had become immune from enforcement action due to the passage of time, in this case a period of 4 years.
15. The Notice under appeal is the third one that has been issued in respect of the same matter. Earlier Notices (later withdrawn) were issued in September 2018 and on 22 August 2018. Notwithstanding withdrawal of those notices, in such circumstances section 171B(4)(b) of the Act provides for the taking of “further” enforcement action in respect of any breach of planning control if, during the 4 years ending with that action being taken, the Council have previously taken, or have purported to have taken, enforcement action in respect of that breach. That is the case here, and so the provisions of section 171B(4)(b) apply. Consequently, although the Council have argued that for immunity purposes the appellant must demonstrate the new windows were installed before 19 November 2014, it is a matter of law that the relevant date is 22 August 2014.
16. The appellant’s evidence is based on the later date of 19 November 2014. Even on this basis his evidence provides no clarity as to when the works actually took place. The appeal form states that it was at the end of 2014, and that his accounts show a deposit being paid on 31 July 2014 to cover the cost of scaffolding, together with an invoice dated 15th January 2015. However, copies of the invoice and account records have not been provided, and in any event this evidence would not establish that works “at the end of 2014” took place on or before 19 November 2014.
17. His evidence is also disputed by the Council who have supplied a copy of email correspondence between officers dated 27 February 2015. In the email one officer explains to the other that he inspected the property that same day and spoke to the contractor who was at that time installing the last PVC-u window.
18. On the balance of probability, I find overall that the appellant has failed to demonstrate that the windows were installed before 22 August 2014 (or even before 19 November 2014). The appeal on ground (d) therefore fails.

The appeal on ground (a)/deemed planning application

Main Issue

19. The main issue is whether the development preserves or enhances the character or appearance of the Norwich City Centre Conservation Area.

Reasons

20. The appeal building is a three storey terraced building constructed in brick with tiled roof. Like others in the terrace and the wider area the ground floor is in commercial use while upper floors are in residential use.
21. Much of the architectural and historic interest of No. 13 derives from its relatively unaltered traditional design and detailing, together with its coherence with others in the terrace and elsewhere in Magdalen Street and beyond. Part of that traditional detailing and coherence with others is the original form and design of its timber windows. All of the properties in the terrace, including the appeal property, lie within and contribute to the significance of the Conservation Area, a designated heritage asset.
22. The appellant argues he replaced the timber sash windows because they were in poor condition. However, there is no submitted photographic evidence before me which demonstrates that they were beyond reasonable repair and refurbishment. Moreover, even if that were the case, it would not justify their replacement with windows of an unsuitable design and materials that would inappropriately harm the architectural and historic character and appearance of the building and the Conservation Area. In this regard the PVC-u windows now in place are visible from Magdalen street and Thoroughfare Yard. They have wider profile frames with an obviously modern reflective shiny appearance. They also incorporate projecting trickle vents and white vertical PVC-u strips as faux glazing bars that are not integral to the frame structure. The frame of the lower panes overlaps the upper and opens outwards away from the vertical plane, making their incongruity with the original sash windows all the more obvious.
23. Overall, I consider that the PVC-u windows lack the more elegant and crafted traditional form of the former timber windows which were intrinsic features to the traditional architectural form and character of the host building. They are poor representations of the originals they replaced. While I acknowledge the appellant's argument that some properties in the area have undergone unsympathetic modern alterations, including the installation of PVC-u windows, that provides no justification for allowing further erosion of the character and appearance of the Conservation Area through further poor quality development.
24. For these reasons I find that the PVC-u windows results in harm to the character and appearance of the host building, and thereby fail to preserve or enhance the character or appearance of the Norwich City Centre Conservation Area. As such, the development conflicts with the aims and objectives of Policies DM3 and DM9 of the Norwich Local Plan (2014).
25. The harm I have identified is *less than substantial* in terms of paragraph 196 of the National Planning Policy Framework (2018). Accordingly, the harm should be weighed against any public benefits. In this regard, environmental sustainability is not only concerned with greater energy efficiency, it also

relates to protecting the historic environment for future generations. I see no reason why the argued security, noise insulation and energy efficiency benefits could not be realised from traditional timber windows with internal insulation. I also acknowledge that that the appellant would be put to further expense in dismissing the appeal. However, these considerations do not outweigh the harm that would result if the PVC-u windows were allowed to remain.

Conclusion

26. The appeal on ground (a) therefore fails.

The appeal on ground (f)

27. Section 173(3) of the Act requires an enforcement notice to specify the steps which the authority require to be taken for the purposes of remedying the breach of planning control under s.173(4)(a), or, as the case may be, to remedy any harm to amenity resulting from the breach; (s.173(4)(b)).
28. The Notice requires the removal of the PVC-u windows and the restoration of the building to its condition prior to the breach taking place by the installation of timber windows to the original design. It is clear therefore that the purpose of the Notice is to remedy the breach of planning control within s.173(4)(a). Hence, this appeal on ground (f) is a claim that the Notice requirements exceed what is necessary to remedy the breach of planning control.
29. The relevant merit considerations in respect of the appearance and effect of the new windows, and whether they should be allowed to remain, even on a temporary basis, has been considered in the ground (a) appeal which fails for the reasons set out. This ground (f) appeal is concerned solely with whether the Notice requirements exceed what is necessary to remedy the breach.
30. Leaving any of the existing windows in situ would not fully remedy the breach, and the appellant does not suggest what alternative or lesser requirements would so fully remedy the breach.
31. I consider that anything less than the removal of the PVC-u windows, and restoration with like-for-like replacements of the originals, would fail to fully remedy the breach. As such, I conclude that the Notice requirements are not excessive in order to remedy the breach.
32. The appeal on ground (f) therefore fails.

The appeal on ground (g)

33. The ground of appeal is that the period of time for compliance with the enforcement notice requirements falls short of what should reasonably be allowed. The notice requires compliance within 6 months.
34. I am mindful that harm resulting from a breach of planning control should be remedied as soon as possible. However, I acknowledge that procuring new timber windows and carrying out the necessary finishing and painting works might take longer than 6 months, given that all of that would be dependent on the availability and scheduling of suitable contractors. Against that, a significantly longer period would be excessive and more akin to the grant of a temporary planning permission.

35. Having regard to all the circumstances I consider on balance that 9 months would be more reasonable.

36. The appeal on ground (g) therefore succeeds to this extent and I have varied the notice accordingly.

Thomas Shields

INSPECTOR