



Appeal Decision

Site visit made on 6 January 2020

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 06 February 2020

Appeal Ref: APP/D1590/C/18/3218190

4 Marine Avenue, Westcliff on Sea, Essex SS0 7PS

- 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 Mr Andrew Savva against an enforcement notice issued by Southend-on-Sea Borough Council.
 - The enforcement notice was issued on 22 November 2018.
 - The breach of planning control as alleged in the notice is without planning permission, the replacement of the existing Upvc framed windows at ground and wooden framed windows at first floor level in the front elevation with Upvc windows.
 - The requirements of the notice are:-
 - (a) Remove the unauthorised windows to the front elevation.
 - (b) Remove from the site all rubble, materials and equipment associated with complying with the notice.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a),(d)&(f) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
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Decision

1. It is directed that the enforcement notice be corrected by the substitution of the plan annexed to this decision for the plan attached to the enforcement notice.
2. Subject to that correction, the appeal is dismissed, 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.

Application for Costs

3. An application for costs was made by Mr Andrew Savva against the Council. This application is the subject of a separate decision.

Procedural Matters

4. There is an error on the enforcement notice plan. The area outlined has been marked in the wrong place. Instead of identifying the boundaries of No 4 Marine Avenue, a line is drawn around part of the plot and included the land behind it. As the address is given, the correct site is identifiable. It is also evident from the nature of the submissions that the appellant knew precisely what land was subject of the notice. This is reinforced by the fact that the appellant applied retrospectively for planning permission for the replacement

front windows and the notice follows the refusal of that application¹. I am satisfied that the appellant has not been misled and I can correct the notice by substituting the plan with one showing the correct boundaries without causing injustice to either party.

5. The appellant argues that the enforcement notice is a nullity/invalid because it requires removal of the windows attacked by the notice without prescribing what is to be installed in substitution. It is a well-established and well-known principle of the *Miller-Mead*² judgment that a notice must tell a recipient of it fairly what he has done wrong and what he must do to remedy it. In this case, the nature of the breach is identified and the notice states clearly what remedial action is required. A notice cannot be regarded as null or invalid where it requires removal of unauthorised works without specifying their replacement. The notice under-enforces by merely requiring removal of the offending development. Should the appeal fail, it will be for the appellant to seek planning permission for the further works required.
6. Arguments are raised under ground (d) to the effect that the ground floor windows enforced against are a continuation of an existing breach of planning control which is already immune from enforcement action. It is argued that the windows replicate those replaced. In effect, the argument is that no development has taken place. This raises issues more pertinent to ground (c) which is where the matters alleged in the notice do not constitute a breach of planning control. Ground (d) only applies where there has been a breach of planning control. The Council has responded to explain why it considers development has taken place. I shall therefore deal with those arguments as through raised under ground (c). Grounds (c) and (d) are known as legal grounds of appeal where the burden of proving relevant facts is on the appellant, and the relevant test of the evidence is the balance of probabilities.
7. Since the enforcement notice was issued, Government policy contained within the National Planning Policy Framework ('the Framework') has been revised. The ground (a) appeal and deemed planning application arising thereunder fall to be considered against the latest version of that document.

Reasons

The appeal on ground (c)

8. The point in issue is whether the replacement of the ground floor windows amounted to 'development'. Section 55(2)(a) excludes from the definition of 'development' works for the maintenance, improvement, or other alteration of any building which do not materially affect the external appearance of the building. In this case, the building is No 4.
9. A Direction³ is in place made under Article 4 of the Town and Country Planning (General Permitted Development) Order 1995 to remove permitted development rights for development consisting of the alteration of any windows of a dwellinghouse which front a highway used by vehicular traffic. The Direction can have no effect if the replacement windows do not amount to development in the first place.

¹ Council ref: 17/00789/FULH refused on 10 August 2017

² *Miller-Mead v Minister of Housing and Local Government* [1963] 1 All ER 4592

³ Approved by the Secretary of State on 30 October 1989

10. It is not contested that the first floor uPVC windows which replaced timber framed windows would have required express planning permission as development to which the Article 4 Direction applied.
11. When the new ground floor windows were installed, they replaced existing uPVC windows which had become immune from planning control through the passage of time. There is no dispute on that point. It is also plain that the replacement ground and first floor windows were not installed as a single operation. The appellant states that the replacement ground floor windows were installed first in 2015 and the first-floor windows were replaced the following year. For development to have taken place at ground floor level, the new windows would need to materially affect the external appearance of No 4 from the lawful position that existed before.
12. It is not a question of whether the windows are identical to those replaced. The previous windows were fixed uPVC with a central glazing bar and the replacements are uPVC sash windows. Thus, the windows are of a different type and this is very noticeable in the photographs supplied. They do not replicate what went before as suggested. The differences in appearance would be particularly apparent when the new windows are open. The windows are a prominent and key feature of the front elevation given the large scale of the bay comparative to the house and the number of windows involved. In context, the new ground floor windows do materially affect the external appearance of the building.
13. Consequently, when the replacement ground floor windows were installed, it amounted to 'development' for the purposes of section 55(1) of the 1990 Act. Express planning permission was required, but not obtained constituting a breach of planning control as provided by section 171A of the Act.
14. The ground (c) appeal fails

The appeal on ground (d)

15. The ground of appeal is that at the time the notice was issued it was too late to take enforcement action. The case is argued with respect to the ground floor windows only.
16. Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed (section 171B(1) of the 1990 Act)
17. Therefore, to succeed on ground (d) the appellant must demonstrate that the replacement windows were installed before 22 November 2014.
18. The appellant relies upon the concession of the Council that there were existing uPVC windows at ground floor level before they were replaced. A letter is produced from the Council dated 18 December 1996 accepting that "*the UPVC windows in the ground floor of this property were installed in June 1992 and are therefore immune to enforcement action.*" However, it does not matter how long ago the previous ground floor uPVC windows were in place because they are no longer there. The notice is directed at their replacements.

19. Photographs taken by Council officers show scaffolding at the property indicating the upper storey windows were in the process of being installed in July 2016. In a statutory declaration, the appellant swears that the installation of the ground floor windows took place in a single day in January 2015. Therefore, they had not been installed for a period of 4 years by the time of issue of the enforcement notice.
20. The ground (d) appeal fails.

The appeal on ground (a) and the deemed planning application

Main Issue

21. The main issue is the effect of the replacement windows on the character and appearance of the host dwelling and the surrounding area including the Shorefields Conservation Area.

Reasons

22. The appeal property is a two-storey end of terrace dwelling located on the corner of Marine Avenue with Tower Court Mews. It is located within the Shorefields Conservation Area, being a designated heritage asset.
23. Pursuant to Section 72(1) of The Planning (Listed Buildings and Conservation Areas) Act 1990 special attention must be paid to the desirability of preserving or enhancing the character or appearance of that area.
24. The Conservation Area includes Marine Avenue and neighbouring streets to the west. The Council's Conservation Leaflet forming its Conservation Guide explains that Shorefields contains a variety of late Victorian architecture and materials associated with Southend's rapid growth as a seaside resort.
25. Marine Avenue predominantly comprises two storey residential properties in rows of terraces with small enclosed frontages. One notable difference is a grand and imposing multi-storeyed period property in use as a hotel which occupies a corner position at the end of the street with its main façade facing the sea. The overall impression is of an attractive street made up of traditional properties mostly in long terraces bearing a strong similarity in appearance.
26. The terrace of which the appeal site forms part is a period property fronting the highway in Marine Avenue and described by the Council as late Victorian/Edwardian. The terrace is characterised by the repetition of large upper and lower bay windows which bring uniformity in appearance. There are four windows in each bay and a single window above the door. The deemed planning application is for the nine replacement uPVC front windows.
27. The wider Conservation Area is similarly characterised by traditional period properties displaying uniformity in their architectural details. In this instance the original period features and details which are evident in the terrace and the neighbouring streets contribute towards the significance of the Conservation Area.
28. Street view images produced by the Council which are said to date from 2014 show timber sliding sash first floor windows at the appeal property. Even though the ground floor windows were uPVC before being replaced, their replacements amounted to development. The Article 4 Direction requires planning permission to be obtained for any replacement window which fronts a

highway in the Conservation Area. In consequence, the windows fall to be assessed against current planning policies.

29. These include Policy DM1 of the Council's Development Management Document, 2015, ('LP') which requires development to reinforce local distinctiveness. In order to achieve this, development should add to the overall quality of the area and respect the character of the site, its local context and surroundings in terms of matters such as materials. The policy also expects reference to be taken from the design principles set out in its Design and Townscape Guide 2009 ('SPD') which has been adopted as a Supplementary Planning Document.
30. The SPD provides that development within Conservation Areas will normally require existing features of the area and of its buildings which contribute to its character and appearance to be retained. It further advocates opportunities to be taken to enhance the area by reinstating original designs, materials and features which have previously been altered unsympathetically. As a basic principle the SPD advises that when considering alterations or repairs to the property original materials and designs should be respected.
31. LP Policy DM3 expects alterations to a building to make a positive contribution to the character of the original building and the surrounding area. It also aims, where appropriate, to enhance the original building and ensure successful integration with it.
32. I note that the Council has granted planning permission to replace timber framed windows with wood effect uPVC windows at a flat in another area. As each case must be considered on its individual merits, it has no real bearing on my decision.
33. The appellant argues that as the replacement first-floor windows cannot be seen close-up, it is not possible to tell they are not timber. However, the outer frames are thicker than the more delicate profile of a typical timber sash window. If nothing else, this factor alone is enough to reveal the nature of the materials which are inconsistent with the historic character of the property. It is further submitted that the ground floor windows are similar in style to those replaced, but there are notable differences particularly the opening mechanism. The disparity with the former timber framed first floor windows is marked.
34. The uPVC windows now installed at both levels appear as a modern and discordant feature which detracts from the building and terrace as a whole.
35. Although there are several other examples of uPVC windows in the terrace and neighbouring streets, they are not the norm. Where they are installed, the uPVC windows are at odds with the traditional and historic façade of the buildings appearing as unsympathetic alterations which are significantly harmful to the area. The presence of other uPVC windows in the vicinity is not a reason to allow the harm to be exacerbated. In any event the Council could not have controlled those earlier installations where they pre-dated the Article 4 Direction.
36. The appellant has produced two Appeal Decisions from 2013 and 2014 where replacement uPVC windows were allowed on appeal in conservation areas and the enforcement notices quashed. Neither case was in this area and each was

decided on the particular facts. In the Sheffield case⁴ the Inspector noted that the replacement windows were not significantly different in design and proportions from the previous timber framed windows which had been rotting and not all matched. In those circumstances the replacement windows preserved the character of the conservation area. The Inspector made the specific point that this did not serve as a precedent for the replacement of traditional sliding sash windows in the conservation area with uncharacteristic uPVC windows. In the Stoke-on-Trent case⁵ the uPVC windows had replaced non-original timber windows which the Inspector considered to be of poor construction and design. This was also in circumstances where there was a lack of uniformity in windows in the street scene.

37. In this instance, the upper and lower storey windows did not match before they were replaced. The ground floor windows were already uPVC and the upper windows were timber framed albeit the frames appeared to be in poor condition. The notice requires only the removal of the unauthorised windows. I daresay the Council has no wish for the same mis-match of window type to be restored. The previous position is of relevance in considering the effect upon the Conservation Area. However, the replacement windows have a heavy and cumbersome appearance impacting negatively not only on the house itself, but also the terrace and street scene with corresponding harm to the Conservation Area. The front windows may now all match and be in good condition, but it is not an improvement when they cause harm in other ways. Similarities with the adjoining property do not lessen the harmful effect or provide justification for unsatisfactory development which fails to preserve or enhance the Conservation Area.
38. Therefore, I find that the replacement windows have a significant adverse effect on the character and appearance of the host dwelling and the surrounding area including the Conservation Area. As such, they are contrary to Policy KP2 of the Southend-on-Sea Core Strategy ('CS') which amongst other things seeks development that respects the character of the existing neighbourhood. It also fails to enhance and complement the dwelling, terrace and area as contemplated by CS Policy CP4 and does not accord with the principles of LP Policies DM1 and DM3 as aforesaid.
39. In addition, they neither preserve nor enhance the setting of the Conservation Area as required by LP Policy DM5. Paragraph 193 of the Framework states that great weight should be given to the conservation of designated heritage assets. Although there is less than substantial harm to the significance of the Conservation Area as referred to in Paragraph 196 of the Framework and LP Policy DM5, there is no public benefit before me that would outweigh that harm. As such, the development does not accord with the development plan or the Framework.

Conclusion on ground (a) and the deemed planning application

40. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal on ground (a) and the application for deemed planning permission should fail.

⁴ Appeal Ref: APP/J4423/C/13/2190525 dated 19 August 2013

⁵ Appeal Ref: APP/M3455/C/13/2211243 dated 26 August 2014

The appeal on ground (f)

41. The ground of appeal is that the steps required by the notice to be taken are excessive.
42. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These are either to remedy the breach of planning control which has occurred (section 173(4)(a)), or to remedy any injury to amenity that has been caused by the breach (section 173(4)(b)).
43. In requiring removal of the windows, it is evident that the Council seeks to address the breach of planning control.
44. The thrust of the appellant's argument is that it would be excessive to require removal of the first-floor windows if the ground floors window can remain on the basis that they are indistinguishable from the windows that existed before. This pre-supposes partial success on the other grounds considered above. The former ground floor uPVC windows had become immune from enforcement action, but that does not render it excessive to require removal of uPVC replacements installed in breach of planning control where conflict with the development plan and harm to the Conservation Area has been identified.
45. The appellant's arguments have not succeeded regarding either the upper or lower windows and so there is no question of disparity between the windows occurring in consequence of the enforcement notice. All that it requires is removal of the offending development without specifying their replacement.
46. Given that the notice does no more than seek to achieve the purpose of section 173(4)(a), it is not excessive.
47. I consider that the requirements of the notice in this case do not exceed what is necessary to remedy the breach.
48. The appeal on ground (f) fails.

KR Seward

INSPECTOR



Plan

This is the plan referred to in my decision dated: 06 February 2020

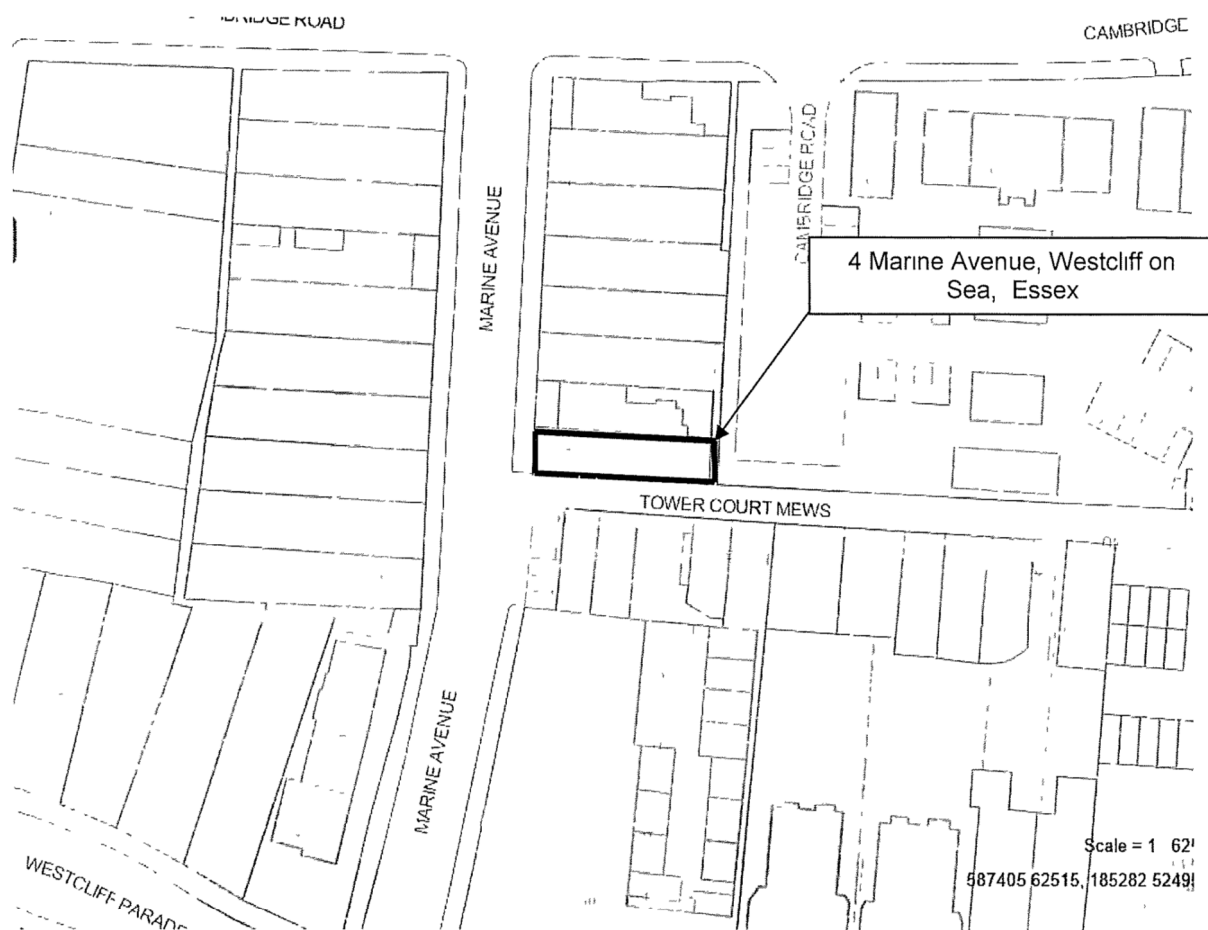
by **K R Seward Solicitor**

Land at: 4 Marine Avenue, Westcliff on Sea, Essex SS0 7PS

Reference: APP/D1590/C/18/3218190

Scale: NOT TO SCALE

ANNEX B



Sec 172 T&CPA 1990

4 Marine Avenue, Westcliff on Sea, Essex SS0 7PS