
Appeal Decision

Site visit made on 26 May 2020

by K R Seward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 29 May 2020

Appeal Ref: APP/Z2260/C/19/3225511
25 Gordon Road, Cliftonville, Margate

- 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 David Krimgoltz (Action Property Limited) against an enforcement notice issued by Thanet District Council.
 - The enforcement notice was issued on 14 February 2019.
 - The breach of planning control as alleged in the notice is without planning permission, the removal of timber windows and the installation of upvc windows.
 - The requirements of the notice are to remove the unauthorised upvc windows and reinstate timber windows of the same design and materials as those removed.
 - The period for compliance with the requirements is 9 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a),(d),(f)&(g) 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:-
 - (i) deleting the words "the removal of timber windows and" and inserting the words "in replacement of timber windows" after "upvc windows" in paragraph 3.;And varied by:-
 - (ii) inserting "(which does not include those in the single-storey rear extension)" after the words "Remove the unauthorised windows" in paragraph 5; and
 - (iii) deleting 9 months and substituting 12 months as the period for compliance.
2. Subject to that correction and those variations, 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.

Preliminary Matters

3. I undertook an unaccompanied site visit viewing the front and rear of the appeal property from the public domain. Not all rear windows were visible, but the appellant provided additional photographs. On my site visit I was able to see the wider area. From my own observations and all the material provided, I am satisfied that there is sufficient information for me to arrive at a decision.
4. The "removal of timber windows" would not constitute an act of development

and so, the allegation cannot be correct as drafted. It is evident from the reasons for issuing the notice that the Council is concerned with the installation of upvc windows in replacement of timber windows. For precision, the allegation should be amended accordingly. When I raised this with the parties the appellant objected to a correction saying that it would impact on the grounds/submissions and could result in injustice. The appellant did not explain how injustice might arise when I invited clarification.

5. If reference to timber windows is deleted entirely from the allegation then I can see how injustice might arise because the case under ground (d) is made on the basis that some timber windows were replaced with upvc windows prior to those now installed. By correction of the allegation to refer to the installation of upvc windows in replacement of timber windows, it would not affect the arguments pleaded. Given the nature of the submissions made, the appellant clearly understood that the Council was concerned with upvc windows replacing timber windows. I am satisfied the substance of the allegation would not be altered by this minor correction which can be made without injustice to either party.
6. In response to the appeal on ground (f) the Council says there is a drafting error in the reasons for issuing the notice. It describes harm arising from the double glazed upvc windows to the front elevation only whereas upvc windows have also been installed at the rear of the property. I note that the Council intended to refer to all the windows and not just those in the front elevation. It is unnecessary for me correct the notice because neither the allegation nor the requirements are confined to the installation of upvc windows to the front elevation. This was understood by the appellant as a case was made out on ground (d) to retain the rear windows and for the approval of all windows under ground (a). The omission does not affect the validity of the notice.

Ground (d) & hidden ground (c)

7. Ground (d) applies where there has been a breach of planning control and it is argued that at the time the notice was issued it was too late to take enforcement action. For operations amounting to a breach of planning control a 4 year time period applies (section 171B(1) of the 1990 Act). Thus, to succeed on ground (d) the appellant must demonstrate that upvc windows were installed in replacement of timber windows before 14 February 2015.
8. The argument advanced under ground (d) is that some of the previous rear windows were of upvc construction and the new windows are a like-for-like replacement. This raises issues pertinent to ground (c) which is where the matters alleged in the notice do not constitute a breach of planning control. The Council responded to explain why it considers development has taken place. I shall deal with those arguments as through raised under ground (c).
9. The facts are relevant to both grounds (c) and (d). In each case, the appellant has the burden of proof and the test of the evidence is the balance of probabilities.

The evidence

10. It is argued that a number of the original timber windows at the rear of the property had already been replaced with upvc frames, but it is not clearly specified which ones.

11. The Council accepts that one second floor window in the side of the rear projection appears to be upvc from photographs taken at the time of its investigation in November 2018 which it says did not appear very worn. The side rear windows at first floor level appear from the photographs to be sliding timber sash. For the other rear windows, the Council relies upon Google Earth images which it acknowledges are "not of a good enough quality to be certain that these are timber". Nevertheless, it suggests "the thin profiles of the frames and the inclusion of glazing bars and the appearance of the opening indicates the likelihood that they were formally timber".
12. A witness statement has been produced from Marc Krimgoltz who purchased the property some time in 2015 before transferring it to the appellant company in September 2016. He does not explicitly state when the rear timber windows were replaced but mentions that the house, which is converted into flats, was licensed from October 2015. He describes the previous windows as "rotting and weathered". This could be an apt description for timber framed windows, but it seems far less likely that upvc windows would rot.
13. In a letter to the Council's Planning Enforcement Officer in November 2018 Mr Krimgoltz said that "This house was already fitted with some UPVC windows prior to our purchase" without identifying how many and which ones. In his witness statement Mr Krimgoltz repeats that from his own knowledge "there were a number of upvc windows in the rear elevation which, from their condition and appearance had evidently been in place some considerable time prior to my purchase of the Property in 2015". Later in the same statement he refers to the works to install the new windows and states: "They removed the rear windows first, a mixture of rotting sash and old aluminium windows". Thus, there is inconsistency in the witness statement over whether the windows removed were aluminium rather than upvc. There is also a lack of detail over how many and which windows the witness refers.
14. In support, reference is made to the Energy Performance Certificates ('EPC') for two of the flats. The window type in the top floor flat are identified in the EPC as 'single glazed'. For the ground floor flat the EPC specifies that (on 25 January 2018) the windows had 'some double glazing'. It is no more specific than that. The recommendation was to 'replace single glazed windows'. At the rear of the property is a small single storey extension with a window in the side and rear. The different colour brickwork clearly indicates it is a more modern addition. It seems most likely that it is these windows to which the EPC refers. The appellant presumes the extension was built with upvc windows but does not say when.
15. The company which installed the new windows confirms in a statement that the windows removed were "rotted in places and badly exposed to draft and noise pollution". The statement does not say that any of the windows were upvc.
16. A tenant who has lived in one of the flats for over 5 years describes the poor condition of the sash windows and expresses concern at the prospect of timber windows being put back in. Nothing is said about when the timber windows were removed.

Ground (d) summary

17. In summary, the appellant's evidence is vague and contradictory on whether upvc windows existed previously in the rear elevation of the main building. The exception is the rear second storey side window which appears to have been

upvc. Even then it is unclear if that one window was installed prior to February 2015 to have existed for more than 4 years.

Whether there has been a breach of planning control – ground (c)

18. Whilst not explicitly pleaded by the appellant, section 55(2)(a)(ii) 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. Opportunity was given to both parties to make submissions on the application of section 55(2)(a) given that it is fundamental to the question of whether the notice has properly identified a breach of control.
19. In this case, the building is No 25 which is a terraced property that has been converted into four flats. Since a 'dwellinghouse' does not include a building containing one or more flats for the purposes of Schedule 2, Part 1 of the Town and Country Planning (General Permitted Development)(England) Order 2015, there are no permitted development rights under that Part if the replacement windows amount to 'development'.
20. For development to have taken place, the new windows would need to materially affect the external appearance of the building from the lawful position that existed before.
21. The potential ground (c) argument applies to the rear replacement windows only. Nevertheless, the windows to the front and rear were installed as a single building operation and so considerations are not confined to the rear elevation when assessing the effect on external appearance. Indeed, section 55(2)(a)(ii) is concerned with the effect on 'the building'.
22. It is undisputed that the front elevation windows were timber framed. I have established on the evidence before me that there was only one side facing second floor window which differs visibly in type and opening from the others shown in that elevation and seems to have been upvc.
23. The Council cites the judgment in *Burroughs Day v Bristol City Council*¹ where the meaning of section 55(2)(a)(ii) was considered. This makes clear that for the "external appearance" to be affected the alteration must be one which affects the way in which the exterior of the building is or can be seen by an observer outside the building. The degree to which the alterations can be seen can be relevant. Whether the external appearance is "materially" affected will depend in part on the degree of visibility. Materiality must in every case take into account the nature of the particular building and be judged in relation to the building as a whole, and not by reference to a part of the building taken in isolation. Evidence of facts will almost always be relevant.
24. There is an appreciable difference in appearance between upvc and timber windows. Not only are the upvc frames thicker than the more delicate and detailed profile of a timber frame but the finish is flat rather than the textured grain of wood. The opening mechanism also differs which will be most evident when the windows are open. The new windows are top hung casements which open outwards from the lower part of the frame instead of a traditional sliding form. The effect on each elevation will have changed significantly.
25. There is a public footpath running behind the rear gardens of the terrace from

¹ [1996] 1 PLR 78

which some of the upper windows are visible. More windows are likely to be seen in private views from neighbouring properties. The windows are a large and notable part of the building. When looking at the building as a whole, the appearance will have been altered materially by the introduction of modern materials in this period property of a different type and opening.

Conclusions on grounds (d) and hidden (c)

26. The appellant has not discharged the burden of proof to demonstrate that there have, on the balance of probabilities, been upvc windows at the property for a period in excess of 4 years so as to be immune from enforcement action. The appeal on ground (d) fails.
27. In my judgement, and as a matter of fact and degree, the replacement windows do materially affect the external appearance of the building so as to amount to development within the meaning of section 55(2)(a)(ii) to require express planning permission which has not been obtained. An appeal on ground (c) would fail.

Ground (a) and the deemed planning application

Main Issue

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

Reasons

29. The appeal property is a three-storey mid-terrace dwelling located along Gordon Road the whole of which lies within the Edgar Road and Sweyn Road Conservation Area ('the CA'). The deemed planning application relates to the double glazed upvc windows installed at the front and rear of the property.
30. Even if the appellant was unaware of the need to obtain planning permission, the fact remains that the CA was designated in October 2016 and thereby became a designated heritage asset. As such, it enjoys statutory protection under section 72(1) of The Planning (Listed Buildings and Conservation Areas) Act 1990 which requires special attention to be paid to the desirability of preserving or enhancing the character or appearance of that area. That duty is not diminished in any way by reason of the designation being fairly recent.
31. Photographs from the Council's site visit in November 2018 show the removed timber windows with horn details to the corners. The upvc windows now installed are casement windows with a horizontal bar.
32. The Council's Character Appraisal and Management Plan for the CA of October 2016 provides a detailed analysis of the special interest of the CA and records those features which made it worthy of designation. It describes how Gordon Road forms part of the distinctive grid pattern of streets developed in the late 19th century. Throughout the CA, long terraces of well-preserved three or four storey terraced properties, most of them built from 1880 onwards, are said to define the overall character of the streetscape. Many of the original buildings were large, four storey Italianate terraced houses which have since been largely converted into flats. These are concentrated in Edgar Road, with slightly less prestigiously detailed houses (though of a similar size) in Gordon Road.

33. In terms of building styles and materials, the Appraisal describes how the largest and highest status buildings are to be found in Edgar Road, with slightly smaller terraced houses, with less decoration, in Gordon Road and parts of Sweyn Road. All of these are largely stuccoed with Italianate details (for the earlier examples) or more Gothic details (for the houses which date from around the 1890s onwards). It goes on to say that *"The terraced houses which face Gordon Road are three storeys high without half basements. They also have canted bay windows but these are only two storeys high, with the sashes separated by brick piers with capitals decorated with leaf mouldings in the Gothic style"*.
34. It may be seen from this how the windows are an important feature within the houses contributing to the special architectural or historic interest of the area.
35. There is consensus between the parties that many of the properties in Gordon Road and the wider CA no longer have timber framed windows. The appellant provides photographs to illustrate the high number which he estimates to be up to 85%. Many of the properties have been converted into flats. The Council recognises that the replacement of timber windows over time has led to a dilution of the character and appearance of the area. This is reflected in the Appraisal which says that "changes to windows and front doors, usually uPVC" are among the most significant negative features of the CA in Gordon Road.
36. The Appraisal identifies that the immediate threat from poor quality new development relates principally to alterations to the existing historic buildings, all of which are considered to be 'positive' and therefore of sufficient architectural and historic interest to merit special treatment. It notes how *"In the past, some of these buildings have suffered from the insertion of modern windows or front doors, usually in uPVC."*
37. The conclusion drawn is that it *"is important that any new development in the conservation area is in keeping with its special character and appearance. New development which pays minimal respect to local building traditions and which detracts from the special character and appearance of the conservation area, results in the loss of the special qualities that the designation is intended to protect. It is therefore critical that any development which occurs within the conservation area complements the qualities of its context defined within the Conservation Area Character Appraisal."*
38. Among the recommended actions are that *"appropriate external materials and finishes will be expected on all new development. Traditional materials typical of the conservation area, identified within the appraisal, will be encouraged to complement the local built heritage. Where modern materials are proposed these should be in harmony with traditional materials."* These measures identify how the preservation and enhancement of the CA can be achieved albeit aspirational where permitted development rights exist.
39. The appellant draws my attention to an Appeal Decision² from 2011 for Claremont Villas in Leeds, where the Inspector allowed replacement upvc windows where, as in this case, there was no Article 4 Direction in place to remove permitted development rights. That was in circumstances where the many replacements carried out in the remainder of the terrace were all upvc. In that context the development was found to preserve the character if not enhance it. Each and every appeal will depend on its individual circumstances

² Appeal ref: APP/N4720/C/11/2147943 dated 19 July 2011

and it is not easy to draw comparisons. The decision is not determinative.

40. In this case, and regardless of how few complaints, the thick frames with smooth and shiny surface are obviously upvc. They lack the detail and finesse of the replaced timber frames. As modern style additions they are unsympathetic to the traditional appearance and historic character of the property and terrace. The disparity between the past and present windows is exacerbated by the windows opening outwards rather than in traditional sliding sash style.
41. Although numerous properties in the road have upvc windows they are not good examples to follow. Moreover, many of these will pre-date the CA designation. Indeed, the planning permission produced by the appellant for upvc windows at flats lying opposite the appeal property, was granted in 2013 before the designation. Circumstances have now changed and with it the statutory duty to preserve and enhance the area.
42. The opportunity to improve the character and quality of the area has not been taken. Instead, the introduction of upvc windows throughout the building adds to the harm already caused by the replacement of timber frames elsewhere. The significance of the CA has been diluted further. In consequence the windows neither preserve nor enhance the character or appearance of the CA and as such the statutory requirements in section 72(1) are not met.
43. For the same reasons I also find that the upvc windows have a significant adverse effect on the character and appearance of the dwelling and the surrounding area including the CA. As such, they are contrary to Policy D1 of the Thanet Local Plan insofar as it requires development which respects and enhances the character or appearance of the surrounding area, particularly in the use of materials appropriate to the locality. In addition, there is conflict with the provisions of Paragraph 124 of the National Planning Policy Framework ('the Framework') for good design and Paragraph 127.c) for development that is sympathetic to local character, including the surrounding built environment.
44. Great weight should be given to the conservation of designated heritage assets as set out in Paragraph 193 of the Framework. The magnitude of harm in this case is less than substantial. In such circumstances, the significance of harm to the CA should be weighed against the public benefits (Paragraph 196).
45. The appellant and tenants identify benefits from increased comfort with less heat loss and reduced bills as illustrated in EPC's showing a significant improvement in thermal efficiency for two of the flats. A condensation problem has been resolved and security improved with keyed window locks. Tenants also confirm how the 'A' rated upvc windows reduce exposure to noise pollution. These are benefits to the owners and occupiers rather than to the wider public. Furthermore, it is possible that improvements could have been secured through other means whilst retaining timber frames.
46. By all accounts the timber frames were rotten which will have done nothing to boost the appearance of the property or CA. The appellant also argues that there is now uniformity in the windows across the whole building. These factors may have resulted in an improvement upon the previous condition of the building, but it does not warrant their replacement with windows of unsatisfactory design, appearance and materials. Moreover, there is nothing before me to demonstrate that the windows could not have been replaced with timber frames similar to the

original. Consequently, these matters, even if they were considered public benefits, carry little weight in support of the development.

47. I conclude there is no public benefit before me sufficient to outweigh the harm I have identified, harm which, given the weighty requirements of the Act, carries great weight.
48. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires development to be in accordance with the development plan unless there are material considerations which indicate otherwise. Although the upvc windows deliver practical, economic and financial advantages to the occupiers and owners, the benefits described do not outweigh the conflict with the development plan.

Other Matters

49. The appellant argues that the Council did not instruct the contractor to cease the work but allowed it to continue. That is not borne out by the Council's letter to the appellant of 13 November 2018 advising that the replacement of the timber windows with upvc amounted to a breach of planning control. The letter indicated that a retrospective planning application was unlikely to be looked upon favourably. I note that the appellant sought to regularise the position and that his local MP wrote to the Council to urge a meeting after the notice was issued. However, the fact remains that the windows are unauthorised. Whilst I understand the appellant is most aggrieved with the Council's approach, this would not be reason to grant permission and allow the harm to continue particularly given the importance of preserving/enhancing the CA.
50. The appellant insists that despite leaflet drops and advertising undertaken by the Council, he and his company remained unaware of the CA designation. There is no substantive evidence before me that the breach was intentional unauthorised development as suggested by the Council.

Conclusion on ground (a) and the deemed planning application

51. For the reasons given above, I conclude that the appeal on ground (a) and the application for deemed planning permission should not succeed.

Ground (f)

52. The ground of appeal is that the steps required by the notice to be taken are excessive. 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)).
53. The appellant argues that it is excessive to require reinstatement of the rear elevation when the reasons for issuing the notice describe injury to amenity arising from the new front elevation windows only. As set out in my procedural notes, the Council confirms this was a drafting error. It intended to include the rear elevation in the reasons. The appellant must have known this to make a case on the other grounds of appeal. Furthermore, the Council has given its reasons in this appeal and the appellant has taken the opportunity to respond.
54. The appellant argues that the Council has acted unreasonably and declined to

consider a retrospective planning application or even to meet to discuss the matter. Whether it was expedient to issue the enforcement notice does not influence the merits of the ground (f) appeal.

55. I have considered the position given that it is accepted that one second floor window in the north facing side projection was previously upvc. There is no power to require improvements or restoration beyond the previous lawful condition of the property. Quite when that window was first replaced with upvc is unclear and so I cannot be satisfied that it was lawful.
56. The Council does not say if it intended to encompass the single storey rear extension. The allegation concerns the installation of upvc windows *in replacement of timber windows*. There is nothing before me to indicate that the extension had timber windows at any time. I find it plausible that as a modern addition it was built with upvc windows as the appellant suggests. Accordingly, this part of the building should be excluded from the requirements.
57. In this instance, the notice requires removal of the upvc windows which is consistent with an intention to remedy the breach as well as injury to amenity mentioned in the reasons, albeit with regard to the front windows only. The breach would not be remedied if all other rear upvc windows were allowed to remain. There is no obvious alternative that would overcome the planning difficulties and the requirements are not excessive.
58. I shall vary the notice to make it clear that the requirements do not extend to the rear single storey extension. To that limited extent only, the appeal on ground (f) succeeds.

Ground (g)

59. The ground of appeal is that the time given to comply with the requirements of the notice falls short of what should reasonably be allowed.
60. It is desirable that the breach of planning control is remedied without unnecessary delay in order to address the harm that arises from it, as identified under ground (a). In line with Government advice at Paragraph 58 of the Framework, effective enforcement is important to maintain public confidence in the planning system.
61. In view of the ongoing global coronavirus pandemic, this may well delay the ability of the appellant to source and engage contractors to undertake the works. No-one can be certain how long day-to-day life will be affected. In the circumstances, it is appropriate to extend the compliance period further.
62. The appellant refers me to the significant cost of replacing all the windows with softwood double-glazed sliding sash windows as per the quote provided. If other quotations are obtained the cost could be less. I note that a couple of tenancies were terminated due to service of the notice. It appears that those flats have been rented out since. The appellant fears that the flats will become unaffordable to their tenants as the rents will need to be raised to pay for the costs. That is a matter within the appellant's control.
63. Whilst I recognise that the appellant company may need time to finance the works, the period of 3 years sought is far too long to allow the breach of planning control to go unaddressed. It seems to me that a period of 12 months is reasonable and proportionate. It strikes the right balance between the

competing public and private interests without placing a disproportionate burden on the appellant whilst also reflecting the changed circumstances.

64. Section 173A(1)(b) gives the Council power, should it be necessary, to extend the period further although I emphasise that is entirely a matter within the discretion of the Council.
65. I shall vary the notice to allow 12 months. To that extent the appeal on ground (g) succeeds.

KR Seward

INSPECTOR