



Appeal Decisions

Site visit made on 5 May 2021

by Debbie Moore BSc (HONS), MCD, MRTPI, PGDip

an Inspector appointed by the Secretary of State

Decision date: 26 May 2021

Appeal A: APP/A0665/F/20/3255977

Walnut Tree Farmhouse, Primrose Lane, Alvanley, Frodsham WA6 9BW

- 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 Mr Alistair Marsden against a listed building enforcement notice issued by Cheshire West & Chester Council.
- The enforcement notice was issued on 3 July 2020.
- The contravention of listed building control alleged in the notice is without listed building consent, the replacement of a small pane casement window on the first floor of the north western elevation with French doors and railing.
- The requirements of the notice are:
 - 1) Remove the French doors and railing on the first floor of the north western elevation;
 - 2) Replace the French doors with a small pane timber casement window with a glazing pattern of 18 panes (consisting of two vertical rows of three panes per panel) that are divided by true structural glazing bars and replicate the size of the ground floor window on the north-west elevation. The replacement timberwork shall be finished in a green paint colour that matches the existing windows on the listed building; and
 - 3) Make good the surrounding building around the replacement window with a render finish to match the existing building.
- The period for compliance with the requirements is 9 months.
- The appeal is made on the grounds set out in section 39(1)(e) and (i) of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the listed building enforcement notice is upheld with a correction.

Appeal B: APP/A0665/Y/20/3255979

Walnut Tree Farm, Primrose Lane, Alvanley WA6 9BW

- The appeal is made under section 20 of the Planning (Listed Buildings and Conservation Areas) Act 1990 against a refusal to grant listed building consent.
- The appeal is made by Mr Alistair Marsden against the decision of Cheshire West & Chester Council.
- The application Ref 19/04483/LBC, dated 17 December 2019, was refused by notice dated 14 February 2020.
- The works proposed are described as "replacement of casement window with French doors and removable railing to provide means of fire escape (partially retrospective). Resubmission of application 19/01146/LBC".

Summary of Decision: The appeal is dismissed and listed building consent is refused.

Appeal A on ground (e) and Appeal B

Preliminary Matters

1. Section 38(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (LBCA Act) sets out that a listed building enforcement notice shall specify the alleged contravention and require such steps as may be specified in the notice to be taken (a) for restoring the building to its former state; or (b) ... for executing such further works specified in the notice ... to alleviate the effect of the works which were carried out without listed building consent.
2. The notice has been served under s38(2)(a) and its purpose is to restore the building to its former state. Restoration to its former state would be the former 'authorised' state, that is, its state at the time of listing or as approved through listed building consents.
3. I understand from the appellant's statement that the windows were installed in the 1980s. This accords with what I saw on site. From the information before me, I am not aware of any listed building consent for 1980s replacement windows. These appeals relate to the more recently installed French doors on the first floor of the north western elevation and I am not concerned with the other windows. Nonetheless, the issue requires me to clarify the statutory purpose behind the notice. Given that the details of the relevant window at the time of listing are limited, the notice should have been served under s38(2)(b), which the Council accepts.
4. I have considered whether I can use my powers under section 41(1) of the LBCA Act to correct the notice so its purpose would be to alleviate the effect of the works, s38(2)(b). The appellant considers the notice cannot be corrected in this way without injustice since the arguments put forward in an appeal against a notice under s38(2)(b) are sufficiently different to those put forward when appealing a notice served under s38(2)(a).
5. The correction to the notice would require me to consider the appellant's ground (i) appeal, that the steps required would not restore the character of the building to its former state, under ground (j) – that the steps required exceed what is necessary to alleviate the effect of the works. In that respect I accept the appellant's point. However, the matters raised under ground (i) actually concern the validity of the notice and, therefore, they are more appropriately considered as part of preliminary matters. As such, it is not necessary for me to convert the ground (i) appeal to ground (j) since neither would be relevant. Given that the entirety of the appellant's arguments are evaluated below, and the terms of the notice are no more onerous, I consider that I can make the required correction without injustice.
6. The appellant indicates that requirement 2 is inaccurate as it fails to detail the openable elements of the window. I do not consider this renders the notice invalid as it is clear from the wording what the appellant has done wrong and what they must do to alleviate the effect of the works¹. Whether or not the casement window is side hinged and fully openable, or whether only the centre panel is openable, would not affect the style or proportions of the window or the pattern of panes, which are the crucial elements and are specified clearly.

¹ *Miller Mead v MHLG* [1963] 2 WLR 225.

7. It is also suggested that the requirement to paint the window frames in a green colour to match the existing cannot be complied with since that paint is no longer available. The notice is seeking a colour to match the existing windows on the building, not an exact colour from a particular manufacturer. I consider it highly likely that a suitable paint colour to match the existing can be readily obtained.
8. The appellant also argues that the notice should be considered a nullity as it requires the installation of a window that would not comply with Building Regulations. The Building Regulations set standards for design and construction that apply to most new buildings and many alterations to existing buildings. However, there is no general requirement to upgrade all existing buildings to meet these standards. The reinstatement of a window to replicate what existed previously would mean that the building's compliance with the Regulations would be no more unsatisfactory.
9. Even if I were to accept the appellant's argument on this matter, caselaw has established that such circumstances would not mean the notice was ultra vires, as suggested. In *McKay*² a notice which was valid on its face included requirements which would themselves have been a breach of section 2 of the Ancient Monuments and Archaeological Areas Act 1979, and so a criminal offence. It was held to be a nullity and so not correctable or variable. However, in the case of *South Hams DC*³, the Court of Appeal specifically disagreed with the decision in *McKay*. They held that if the requirements of a notice did put the recipient in that position, which he was unable to resolve, he would have a defence to the notice if prosecuted. Such a notice was therefore valid and not a nullity.
10. The appellant further argues that there is a discrepancy between the planning officer's delegated report and the appeal statement in respect of whether or not the previous window would have met Building Regulations requirements. I am referred to the case of *Dill*⁴, in which it was found that the appellant had the right to have the question of whether a building included on the statutory list was, in fact, a building for the purposes of the LBCA Act. The Inspector had not addressed this question and the challenge succeeded in the Supreme Court. The case is only marginally relevant to the point the appellant makes, which concerns the fairness of the Council's approach. The perceived discrepancy is no reason for me to quash the notice. Neither is the appellant's allegation that the Council have refused to engage in discussions to consider an alternative scheme, as expediency to take enforcement action is a matter for the Council not the Inspector.

Background and Main Issues

11. The appeal property is a grade II listed, former farmhouse. One of the first floor windows in a gable elevation facing onto Helsby Road has been replaced with French doors and an associated safety railing that was fixed to the exterior of the building. At the time of my site visit, the railing had been removed.
12. The terms of the appeal against the listed building enforcement notice are derived from the allegation and so Appeal A, ground (e), seeks listed building

² *McKay v SSE* [1994].

³ *South Hams DC v Halsey* [1996] JPL 761.

⁴ *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20.

consent for the replacement of a small pane casement window on the first floor of the north western elevation with French doors and railing. Appeal B is an appeal against the Council's refusal of listed building consent for the replacement of a casement window with French doors and a removable railing to provide means of fire escape.

13. The main issue for both appeals is whether the works would preserve a Grade II listed building, Walnut Tree Farmhouse, and any of the features of special architectural or historic interest that it possesses.

Reasons

14. Walnut Tree Farmhouse was listed in 1970 and dates from the 17th century. Its form and architectural features reflect the local vernacular and are typical of a farm dwelling of the period. The arrangement and proportions of the fenestration contributes to the architectural interest. Hence, I find that the significance of the listed building, insofar as it relates to these appeals, to be primarily associated with its local vernacular style and architectural features.
15. The window that existed prior to the installation of the French doors replicated the window immediately below it on the north western elevation. The window had a horizontal emphasis with 18 small panes arranged in three rows of six. I understand that the central panel of the casement was side hinged and was openable. The replacement French doors have a vertical emphasis with 24 small panes in four rows of six. They are fully opening and, for safety reasons, there was a metal railing fixed to the exterior of the building. For the purposes of Appeal B, the appellant has offered to replace the railing with an internal removable guard of height 1100mm.
16. The appellant indicates that the harm resulting from these unauthorised works is negligible given that the doors were installed in 2013 and were not noticed by the Council or local residents until relatively recently, despite being in clear view from the road.
17. As set out above, the windows contribute to the special interest of the listed building due, in part, to their proportions. While the pre-existing frames and glazing were not historic, the window design was considered to be in-keeping with the architecture of the listed building. The replacement French doors display a vertical emphasis, which is at odds with the historic window proportions. Also, the French doors at first floor level are a relatively modern feature which does not reflect the building's 17th century origins. The external railings emphasised the uncharacteristic appearance of the alteration. However, their removal and replacement with an internal railing would not negate the harm as the French windows themselves remain inappropriate.
18. Consequently, I find that the works as carried out (Appeal A) or proposed (Appeal B) would fail to preserve the special interest, and hence the significance, of the listed building. Paragraph 193 of the National Planning Policy Framework 2012 (the Framework) advises that when considering the impact of development on the significance of designated heritage assets, great weight should be given to their conservation. Given the relatively localised impact, I find the harm to be less than substantial but nevertheless of considerable importance and weight.

19. Under such circumstances, paragraph 196 of the Framework advises that this harm should be weighed against the public benefits of the works. The appellant is of the opinion that the works are beneficial because the replacement doors provide a means of escape for the occupants in the event of a fire. Although the other bedrooms have windows, the appellant considers these less useable either due to the size of the opening or their height above ground level.
20. Although this is essentially a personal benefit as opposed to a public benefit, I appreciate the appellant's anxiety about the situation, given previous fires at the property. However, I consider it entirely possible that a window with sufficient openable elements could be manufactured to sit within a space of its former proportions. The enforcement notice is non-specific on this matter and it would be feasible to comply with its terms while still providing a fully opening casement window as specified. I am aware that the occupants have limited mobility. Escape via a first floor window in the event of a fire is highly undesirable and emergency egress would be problematic even if the French doors were retained, due to the height of the drop to ground level and, in the case of Appeal A, the need to climb over the external guard.
21. Historic premises tend to be provided with a range of fire safety measures that can be put in place without harm to the special interest of the building concerned to offset areas of non-compliance. The appellant elaborates that other options have been considered and discounted as they would cause more harm to the listed building. The option of a protected stairwell is briefly discussed, but there is very little information in relation to other improvements that could be adopted.
22. Given the above, I conclude that the works (Appeal A) and the proposal (Appeal B) would fail to preserve the special interest of the Grade II listed building, thus failing to satisfy the requirements of section 66(1) of the LBCA Act 1990, paragraph 193 of the Framework and development plan policies insofar as relevant.
23. The matters raised in relation to Appeal A on ground (i), have been considered above as they related to the validity of the notice.

Conclusion

24. For the reasons given above I conclude that the appeals should fail.

Formal Decisions

Appeal A

25. It is directed that the listed building enforcement notice is corrected by the replacement of the words "to restore the Listed Building to its former state" in paragraph 5 with "to alleviate the effect of the works which were carried out without listed building consent".
26. Subject to this correction, the appeal is dismissed and the listed building enforcement notice is upheld. Listed building consent is refused for the retention of the works carried out in contravention of section 9 of the LBCA Act 1990 as amended.

Appeal B:

27. The appeal is dismissed and listed building consent is refused for replacement of casement window with French doors and removable railing to provide means of fire escape (partially retrospective). Resubmission of application 19/01146/LBC.

Debbie Moore

Inspector