



Appeal Decision

Site visit made on 4 August 2021

by K Stephens BSc (Hons) MTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 September 2021

Appeal Ref: APP/T5150/C/20/3257126

32 Kempe Road, London NW6 6SJ

- 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 John Turnbull against an enforcement notice issued by the Council of the London Borough of Brent.
- The enforcement notice was issued on 30 June 2020.
- The breach of planning control as alleged in the notice is: *Without planning permission the installation of an air-conditioning unit to the rear of the premises.*
- The requirements of the notice are:-
 - Step 1: Remove the air conditioning unit from the rear of the premises.
 - Step 2: Remove all debris and items arising from this removal and remove all materials associated with the unauthorised development from the premises.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (c) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought under ground (a) an application for planning permission is deemed to have been made under section 177(5) of the Act.

Decision

1. 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 1990 Act as amended.

Procedural Matters

2. In Schedule 3 of the enforcement notice (the Notice) the reasons describe the unauthorised development as being on the "side" of the premises. However, more crucially, the alleged breach described in Schedule 2 and the steps to be taken in Schedule 4 of the Notice both refer to the air-conditioning unit (the 'AC unit') being on the "rear" of the premises. On my visit I saw the AC unit was indeed at the rear of the premises and both parties have presented their cases on this basis. It is clear that reference to "side" in Schedule 3 is a typographical error. This does not, in my view, render the Notice invalid or a nullity. I find no prejudice has been caused.
3. Since the appeal was initially lodged, the appellant has withdrawn the appeal on ground (d).
4. During the course of the appeal, a revised National Planning Policy Framework (the Framework) was published on 20 July 2021. It officially replaces the previous version published in February 2019. The parties have had the opportunity to comment on the revised Framework and in reaching my decision I have had regard to it.

Background

5. A number of planning permissions have been granted for various extensions and alterations to the property. A Certificate of Lawfulness application¹ for “existing air conditioning unit on roof of rear outrigger of dwellinghouse” has been refused.
6. The appellant refers to there having been a previous AC unit at the premises, which was marginally smaller than the one currently in situ and to which the Council had apparently raised no objection. It was removed to facilitate the approved alterations.
7. The appeal property is a two-storey period terraced dwelling, located within the Queens Park Conservation Area (‘the CA’). The AC unit the subject of this appeal has been installed at the rear of the property on the flat roof of the two-storey rear outrigger, below which is a small single-storey extension. The AC unit stands in front of a brick wall upstand that forms part of an approved scheme of works. From the submitted evidence the AC unit measures approximately 940mm wide, 460mm deep and 823mm high.

The Appeal on Ground (c)

8. Ground (c) is that the matters alleged in the notice do not constitute a breach of planning control. It is a legal ground of appeal, distinct from any planning merits. The onus of proof lies with the appellant and the test of the evidence is on the balance of probability.
9. The key questions are whether ‘development’ has taken place which requires planning permission and, if so, whether planning permission is granted or the development is otherwise deemed to be lawful.
10. There is no disagreement between the parties that the installation of the AC unit amounts to a building operation as defined by section 55(1) of the Act. However, section 55(2) goes on to clarify at subsection (a)(ii) that the carrying out of operations which do not materially affect the external appearance of the building shall not be taken to involve development of the land. The issue in dispute is whether the AC unit *materially* affects the *external appearance* of the building [my emphasis]. A judgement is to be made depending on the facts of the case.
11. In *Burroughs Day*² the Court held that it is not just the exterior of the building that is to be considered, but the effect on the external *appearance* [my emphasis]. This must be judged in relation to the degree of visibility of the alterations by observers at different points outside the building. Alterations that are capable of being seen from any vantage point on the ground or in or on any neighbouring building(s) are capable of affecting the external appearance. Vantage points need not be public, but they should not be unusual. External appearance must be materially affected and the effect must be more than *de minimis*. Materiality must also take into account the nature of the building being altered and the nature of the alteration. Furthermore, the effect on the external appearance must be judged in relation to the building as a whole, in

¹ LPA ref: 19/4470 refused 13 February 2020.

² *Burroughs Day v Bristol CC* [1996] 1 PLR 78; 1 EGLR 167

this case the dwelling 32 Kempe Road, and not by reference to a part of the building taken in isolation.

12. Being sited at the rear of the terraced premises, the AC unit cannot be seen from Kempe Road, nor could I see it from the ground in the appellant's back garden on my visit. Due to the location of the appeal property as part of the terrace along Kempe Road it cannot be seen from intersecting streets Peploe Road or Milman Road. However, submitted photographs from a number of third parties demonstrate the AC unit is visible from the rear of a number of properties on Keslake Road, which look towards the rear elevations of Kempe Road properties. Although some of these photographs appear to be zoomed-in, on my visit I was able to clearly see other AC units on the rear of a property on Keslake Road. The adjacent neighbour can also see the AC unit from some of its windows, even if some of these views are upwards.
13. I accept that the rear of the building cannot be seen as a whole from close up or far vantage points. Nonetheless, it is a prominent addition to the building given its elevated position close to the eaves line. Moreover its presence is all the more evident given its industrial form, metal construction, and modern appearance which is visually in stark contrast with the period design and features of the building. Furthermore, it is a sizeable structure with volume that has been added to a rear of a two-storey dwelling. In my judgement, the AC unit cannot be regarded as *de minimis*.
14. Taking these various factors into account, I conclude as a matter of fact and degree that the AC unit materially affects the external appearance of the building as a whole and is not excluded from the definition of development by way of section 55(2)(a)(ii).
15. Comparisons with the previous AC unit, which is no longer present, or the comments from the Council's Heritage Officer, are not relevant for the purposes of assessing whether the AC unit, the subject of this appeal, materially affects the external appearance of the building.
16. Section 57(1) of the Act goes on to state that planning permission is required to carry out any development of land. Section 58 of the Act grants planning permission for certain developments by various means and Orders.
17. The Town and Country (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) is one such Order that grants planning permission for certain types of development, described as "permitted development". Schedule 2, Part 1 of the GPDO permits various development within the curtilage of a dwellinghouse, such as extensions, roof alterations, porches, chimneys, flues and microwave antenna. None of the Classes relate to the installation of AC units or the like on dwellings and there are no other means or Orders that allow such installations.
18. In light of the above and on the balance of probabilities, I find the AC unit that is the target of the enforcement notice is not 'permitted development' and requires express planning permission, which has not been granted. Therefore there is a breach of planning control.
19. The appeal on ground (c) fails.

The Appeal on Ground (a) and the Deemed Planning Application

20. The appellant has made an appeal on ground (a) – that planning permission ought to be granted for the matters alleged in the notice.

Main Issues

21. The main issues in this case are:-

- Whether the AC unit would preserve or enhance the character or appearance of the CA, and
- Whether the AC unit harms the living conditions of occupiers of neighbouring properties with regards to noise.

Reasons

Character and appearance of the CA

22. The appeal property is a two-storey terraced period dwelling within the Queens Park CA, which is a designated heritage asset. It is an example of a planned estate displaying a unified pattern of streets, which I observed was a predominantly residential area. Despite some variety in design and detailing of the properties, there is a general uniformity and rhythm. The significance of the CA is derived from its history and architecture.
23. At the rear, the property has a flat-roofed two-storey outrigger, and a small single storey rear extension built around part of the outrigger. I saw that two-storey rear outriggers were a characteristic feature of properties in the terrace that provide a consistency of design. They were also a characteristic feature of the rear of properties on Keslake Road that back onto Kempe Road. Due to the property's location within the terrace it positively contributes to the character and appearance of the CA. There is an Article 4 Direction removing a number of householder permitted development³ rights from the appeal property and others in the CA.
24. On my visit I could see a number of properties had AC units, although I am informed these are beyond the scope of enforcement action due to the passage of time. I also saw some satellite dishes and number of properties have added dormer windows. However, in the main the rear of the properties on Kempe Road and Keslake Road that face each other are generally free of clutter, and this also makes a positive contribution to the relative uniformity of the terrace in the CA.
25. The appeal development introduces clutter in the form of an industrial looking metal box to the rear of the property and to the terrace as a whole. Whilst the AC unit is read against the existing rear wall, its light cream colour presents a visual contrast to the buff coloured brick. It is also prominently located high up on the building. Although there are no views of the AC unit from the street or other public vantage points, it is nonetheless visible from the rear of nearby properties and those in Keslake Road, even if some of those views are more oblique the further away they are or filtered by intervening vegetation when the trees are in leaf. In my view the AC unit is visually detrimental to the property. As the proposal would harm the appeal property and its rear

³ The Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).

elevation, which is an integral part of the CA, it follows that the contribution that the host property makes to the CA has been diminished as a result.

26. In accordance with paragraph 199 of the Framework, I attach great weight to this matter. Due to the harm, the appeal development does not preserve or enhance the character or appearance of the CA, as required by Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. Whilst the harm caused to the significance of the CA would be less than substantial, paragraph 202 of the Framework states that the harm should be weighed against the public benefits. Whilst the AC unit would likely make living conditions more comfortable for the appellant and his family inside the dwelling, this does not amount to a public benefit sufficient to outweigh the harm that is caused to the CA.
27. For the reasons above, I find the AC unit fails to preserve or enhance the character or appearance of the CA. Accordingly it is contrary to Policy DMP1 of the London Borough of Brent Development Management Policies document (DMP). Although a general policy and not specifically about AC units, it seeks to ensure the siting, type, materials and design, amongst other things, of development provides high levels of amenity and complements the locality. It would also be contrary to the Queens Park Conservation Area Design Guide (2013) which states that alterations must maintain the quality of the consistent character of the CA.
28. The Supplementary Planning Document No.2 "Residential Extensions and Alterations" (SPD2) offers detailed design guidance on particular types of extension and alterations but does not refer to various miscellaneous alterations such as AC units. Hence it is not directly relevant to this main issue.

Living conditions

29. The Council contends that the AC unit causes unacceptable noise nuisance for neighbouring residents. It also refers to the AC unit generating 'other forms of pollution' but does not specify what these are.
30. I could hear the AC unit hum as I stood at the window in the roof above the unit, although the air vent in the room was more audible. I could hear the hum of the unit when standing in the rear garden. When I asked the appellant to turn the AC unit off, the cessation of the hum was noticeable by its absence as all went quiet. I have no information as to whether or how often the unit may click on and off.
31. There are windows adjacent at the same level as the AC unit and in the roof of the adjoining terraced properties. Being on the upper floors of the property it is likely these windows serve habitable rooms such as bedrooms.
32. In its Final Comments, the Council has reproduced extracts of some of the product specifications of the previous AC unit and the current one, and contends the current one is noisier. It seems there is some confusion between the parties over the terms cited and the values attributed to them. From my reading of the 'sound power' levels the current AC unit is about 3dBA noisier than the previous model of AC.
33. I have little evidence from either party that the AC unit does or does not cause unacceptable noise levels. Neither party has provided a noise survey or any

measured noise readings. There are no observations from the Council's Environmental Protection Officers or details of the noise complaint received from previous occupiers of neighbouring property 34 Kempe Road (No.34).

34. The appellant has suggested a condition could be imposed requiring the submission to and approval of details by the Council for a screen with acoustic properties to be sited on the west side of the unit.
35. In his Final Comments the appellant expands on this to suggest a condition be imposed requiring the unit to be screened in a louvred box or a box faced with London stock brick slips (or tiles) for their appearance and sound reduction properties. However, the appellant's photo mock-ups show a brick slip or louvred screen only across the main/front elevation of the AC unit – not as a box around the AC unit. The louvered option would appear to have gaps in the screen, whereas the brick slip option appears to present solid screen.
36. However, there is no substantive evidence before me to demonstrate whether any mitigation measures would be necessary, what form any acoustic screening should take, and what difference such measures would make. Without details it is not possible to determine if noise levels cross the no, or lowest, 'observed effect levels' and advice in the national Planning Practice Guidance.
37. Based on the limited evidence before me, I cannot be satisfied that noise levels from the AC unit are within acceptable limits as to not cause harm to the living conditions of the occupiers of neighbouring properties. Accordingly, this the element of the appeal development would be contrary to DMP Policy DMP1, which seeks amongst other things to ensure development does not unacceptably increase exposure to noise.

Alternative schemes and solutions

38. I have powers to consider obvious alternative schemes and solutions which may be acceptable on planning and amenity grounds, as the Courts have held that enforcement action should be remedial rather than punitive⁴. In addressing alternatives under ground (a), I must consider whether the alternative scheme(s) amounts to the '*whole or any part of those matters*' stated in the enforcement notice as constituting a breach of planning control, for which planning permission may be granted under section 177(1).
39. The erection of screening around the AC unit, whether louvred or faced in brick slips, or whether that is a box around all sides or just a screen along one side would amount to new operations, as the box or screens are not built. The nature and extent of those works cannot, in my view, properly be considered to form part of the matters enforced against when the Notice was issued.
40. As part of the ground (f) appeal, the appellant suggests the AC unit could be moved about 1m in order to be more centrally located on the flat roof – this would take it further away from No.34. However, if it was moved this could give rise to other implications on which there would have been no consultation or opportunity for neighbours to comment. I cannot be satisfied it would overcome my concerns on noise. Moreover, moving the unit 1m would not overcome the harm to the CA I have identified.

⁴ *Tapecrown Ltd v FSS & Vale of White Horse DC* [2006] EWCA Civ 1744

41. Furthermore, I could not impose a condition requiring the Council to agree any details. The deemed planning application is made in respect of the development as alleged and built, so there is no mechanism for incorporating any revised plans or to impose a condition which purports to modify the detail of the development. In any event there are several options and different materials presented. Without the necessary evidence to support any of the alternatives, a condition could not be worded with the necessary precision.

Other Matters

42. There are letters from a number of nearby residents who say they cannot see or hear the AC unit. That may be the case, but that does not mean there is no unacceptable harm. Furthermore, planning permission runs with the land and neighbouring occupiers can change, so issues with noise may arise.
43. References to previous AC units that were once been in place but have now been removed are of little relevance as they do not represent a lawful 'fallback' position.

Conclusion on Ground (a) Appeal and the Deemed Planning Application

44. For the reasons above, the appeal on ground (a) should fail and the deemed planning application should be refused.

The Appeal on Ground (f)

45. The appeal on ground (f) is that the requirements of the notice exceed what is necessary. To determine this, it is essential to first understand the purpose of the notice. Section 173(4) of the Act provides that the purpose of the notice shall be either to remedy the breach of planning control or to remedy any injury to amenity. The notice requires the AC unit to be removed from the premises. The purpose of the notice is therefore to remedy the breach of planning control.
46. For an appeal on ground (f) to succeed the appellant must show that the requirements of the notice are excessive to remedy the breach and that 'lesser steps' would achieve the same end.
47. Under the ground (a) appeal I have considered whether permission could be granted for any screening around the AC unit, either louvred or faced in brick slips to match the wall behind, or relocating the AC unit further away from the neighbouring property, as suggested by the appellant. There is no scope for me to revisit that conclusion or any other aspect of the planning merits through a ground (f) appeal.
48. In any event, retention of any part of the development would not remedy the breach of planning. Therefore, I find that no 'lesser' steps have been put forward that would remedy the breach and restore the building to its condition before the breach took place. To that end, it is essential and not excessive to require that the AC unit is removed and the property made good.
49. The appeal on ground (f) therefore fails.

Overall Conclusion

50. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

K Stephens
INSPECTOR