



Appeal Decision

Site visit made on 7 September 2021

by Roy Curnow MA BSc(Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 22 November 2021

Appeal Ref: APP/B1605/C/21/3276214

Land at 15 Deep Street, Prestbury, Cheltenham, Gloucestershire GL52 3AW

- 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 Watin Limited against an enforcement notice issued by Cheltenham Borough Council ('the Notice').
 - The enforcement notice, numbered 17/00144/DCUA, was issued on 4 May 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission, the erection of single storey extension to the rear of the main building known as 15 Deep Street, Prestbury, Cheltenham GL52 3AW.
 - The requirements of the notice are: Dismantle and remove the unauthorised extension in its entirety together with all resulting material from the land; and Restore the ground level to previous levels using appropriate material.
 - The period for compliance with the requirements is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is varied by removing "6 months" from Part 6, 'Time for Compliance', in the Notice and replacing this with "9 months". Subject to the variation, 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.

Procedural Matters

2. The appeal was initially made in the name of 'Company Secretary Watin Limited'. The reference to the Company Secretary was omitted following correspondence with the main parties.
3. The Council had omitted to submit certain policies referred in its Notice and in submissions, and I requested a copy of Cheltenham Plan Policies D1 and HE1 and Joint Core Strategy Policies SD4 and SD8 on the 11 November. The Council replied and submitted these on the same day. I have taken these into account in my decision.

Reasons

Whether the Notice is a Nullity

4. A Notice must, under S173(2), enable the recipient to know what the matters referred to in the Notice are. A Notice is to be considered a nullity where it is defective on its face, missing some vital element that S173 states must be included.

5. The Appellant's case concerns the plan attached to the Notice. This, he claims is unclear as it does not specifically show which part of the building is to be demolished, as the building has been extended on a number of occasions.
6. This vagueness, it is submitted, does not allow the recipients of the Notice to identify the development in question and, therefore, comply with its requirements. The Appellant raised this with the Council as part of its concerns with an earlier Notice. That Notice was subsequently withdrawn, and whilst some issues have been addressed in this re-issued Notice the matter of identifying the extension was not.
7. The Appellant acknowledges that the plan attached to the Notice identifies the land correctly, this was wrong in the earlier withdrawn Notice. The Notice refers to "the erection of a single storey extension to the rear of 15 Deep Street". There could be little doubt as to which of the property's elevations this refers to.
8. The evidence shows that a single storey conservatory and porch extension had been added to the property in the past and that the Council did not have an issue with this. In his final comments, the Appellant suggests that the extension was built in two parts: the first being the conservatory and porch, to which the remainder of the extension was later added. He argues that the Notice does not tell him whether the conservatory and porch could remain and the outbuilding reinstated. The arguments put forward here overlap significantly with the Appellant's Ground (f) case; however, it is apposite to address them here.
9. The evidence shows that prior to the works being undertaken to create the extension, there was a conservatory and outbuilding to the rear of No 15. The Appellant's Statement of Case states that it is only the roof of the conservatory that has been removed. It is for the Appellant to prove his case, and in this regard I have not been given a drawing or substantive details that illustrates how much of the conservatory remains. However, I am aware of the points made elsewhere in the Appellant's submissions that refer to "the subsummation of a previous conservatory¹", that "the extension subsumes/replaces a brown UPVC conservatory²", "In our view *replacing* the ill-suited former conservatory³" (my emphases) and that the extension "subsumes the former conservatory⁴". These statements, together with what I saw at my site visit, all point, on the balance of probability, to there being little remaining of the conservatory, which was replaced through the erection of the extension.
10. I find that the requirements of the Notice are clear; it seeks the removal of the extension in its entirety.
11. From what I saw at my site visit, reading the Notice as a whole, including its attached plan, its recipients would have been aware of what part of the building the Notice referred to. It is not hopelessly ambiguous and uncertain in the manner set out in the judgement in *Miller-Mead v MHLG* [1963] 2 WLR 225.

Ground (d)

¹ Paragraph 5.3 Statement of Case

² Paragraph 6.60 *ibid*

³ Paragraph 6.67 *ibid*

⁴ Paragraph 6.69 *ibid*

12. An appeal made under ground (d) is that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. As the Notice concerns operational development, the time limit in S171B(1) applies.
13. However, as the Council had previously issued a Notice, which was subsequently withdrawn, the terms of S171B(4)(b) apply. This allows for 'taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach'. Therefore, so long as the LPA issued an EN in respect of the breach within the appropriate four year period, they have a further four years to issue another EN in respect of the same breach.
14. Thus, for the appeal on this ground to succeed, the Appellant needs to demonstrate that the development was substantially completed four years prior to the issue of the Notice (the 'relevant date'). Therefore, the relevant date is 4 May 2017.
15. In this ground, the onus lies with the Appellant to make its case on the balance of probability.
16. As stated by the Appellant, there is no statutory definition of the term "substantially complete" in the 1990 Act. He points to guidance in Circular 10/97 'Enforcing Planning Control' as being of assistance; though this is no longer current, having been withdrawn. The question must be addressed in the light of the judgement in *Sage v SSETR & Maidstone BC* [2003] UKHL 22. Amongst its findings were that a building could not be regarded as substantially completed for the purposes of s171B(1) even if outstanding works affected only the interior.
17. The Appellant's evidence is principally in the form of a statutory declaration made by Hekmat Kaveh Baghbadrani. In this, Mr Baghbadrani describes himself as a representative of Watin Ltd who had direct dealings with the site during the periods that are relevant to this appeal. His declaration was made on 25 August 2021.
18. He refers to conversations and correspondence with Council staff dating back to as early as August 2016 and opines that the Council had the opportunity to discuss the matter amicably for some 5 years, but chose to take enforcement action. He recalls talking to an enforcement officer on 3 or 4 November 2016 and suggests that the work was finished in its current form within 5 months of that conversation. His declaration, in respect of the ground (d), finishes with "I believe the property was in its current form by end of February, early March 2017". That is to say, before the relevant date.
19. He attached a 'time line' to his declaration⁵. Amongst other things, it cross-refers to correspondence and conversations with Council staff, the submission of applications, and the service of enforcement notices by the Council. However, there is nothing in this time line that proves that the extension was substantially complete by the relevant date.
20. This statutory declaration quotes from the Officer's report into an earlier application for the extension that states "The extension has been built and is

⁵ Exhibit HKB3

nearly complete...". However, this is merely an Officer's description of how they felt work had progressed on site and cannot be held to be the Council's formal position on the matter of substantial completion. That is set out in the Notice. I find likewise with regards to the reference to similar comments made by third parties in representations made to the Council regarding the extension.

21. This statutory declaration refers to the building being "*now* immune from notice having been substantially completed for over 4 years" [my emphasis]. The matter of the building being immune from enforcement action at the time of the statutory declaration being made is quite different from that of it being so on the relevant date. As such, this does not take the Appellant's case further forward, and I find similarly with regards to the reference to a list of works that "have been completed", as it does not state when they were completed.
22. The statutory declaration goes on to state that "the only two trades outstanding are the plastering and decoration" and, on the ground (d) matter concludes by stating that "For all these reasons I believe the property was in its current form by end of February/early March 2017".
23. A further statutory declaration has been provided by Mr Johnathan McGuinness. This states that, between June 2016 and October 2018, he was the contracts manager and electrical contractor for a number of projects undertaken by the Appellant company, including the extension that is the subject of this appeal.
24. Mr McGuinness gives a recitation of events relating to his work, including correspondence with Council officers, and their visits to the site. His conclusion on the ground (d) matter is that "according to my recollection, notes and contemporaneous photograph Exhibit JM5 and reference to Google earth satellite images It is clear to me that the property was substantially completed by the beginning of March 2017...". He bases his definition of substantially complete on all of the walls, windows, doors, cladding and most importantly, in his opinion, the roof and roof lights were all completely finished. However, he believes that not all internal works were finished, and he acknowledges that the back wall was not waterproof at that stage as a neighbour had refused access to fit lead flashing.
25. The Council attached three photographs⁶ to its statement. These were recorded as being taken on 6 July 2017; that is to say, after the relevant date. Amongst other things, they show: doors and windows in the extension without glazing; piles of timber and builders' rubble directly outside an unglazed door; piles of what appear to be reclaimed bricks and new concrete blocks in an area in front of the extension, which is seemingly cordoned off from the yard by steel site fencing; and the deep fascia board not fixed to the building. In my view, these photographs show that the building was not complete at the time they were taken.
26. Three further photographs were submitted⁷, timed and dated 12 September 2017, showing the interior of the extension. Amongst other things, they show: bare-blockwork walls; walls to which no plasterboard had been affixed, showing insulation in place in the cavity; and the timber roof structure fixed in place but no insulation or ceiling boards in place.

⁶ Appendices 6A-6C

⁷ Appendix 7

27. In its final comments, the Appellant states that the Council's photographs of 6 July show the roof trim in place and this is the last part of the roof to be fixed, showing it in a complete state. I am not sure what he means by "trim". However, that part of the roof running vertically downwards from its eaves – I refer to this as the fascia board, above – is not present in the photographs, though the roof appears to be covered. As a result of the fascias not being in place, the roof timbers are visible and there is a sizeable gap between these and the roof covering. It would not, therefore, have been watertight at the time of the photographs, and this provides evidence that the building was not substantially complete at that time.
28. I find that the photographs taken on 6 July and 12 September 2017 to be determinative in this ground (d) appeal. In this respect, I note that – save for his reference to the roof trim – the Appellant does not counter what the Council states these show, nor when they were taken. Although I acknowledge that Mr McGuinness states that, to his knowledge no-one from the Council visited the site, this is not to say that there was no visit. For example, the Council might have used its powers under S196A of the 1990 Act.
29. The evidence shows that work on the site ceased in March 2017. Therefore, what I saw at my site visit would largely reflect the state of the building at that time. I was able to see into the building through its windows and glazed doors. The wall facing onto the rear yard of the property was not ready for plastering and decoration. Areas of the walls had no plasterboard or similar on which to plaster, and I could see the stud work framing with insulation between. Again, I find that this indicates that the building was not substantially complete on the relevant date.
30. Whilst not providing direct and convincing evidence of the date of substantial completion, the various receipts submitted by the Council do not provide evidence that the materials referred to were being used elsewhere. I find the Appellant's explanation of there being more secure storage at another site to be compelling in this regard.
31. The aerial photograph attributed to May 2017⁸ appears to show the roof covering in place. However, given the limitations of a vertical vantage point, I cannot conclude from this that the extension was substantially complete at that time.
32. In my assessment of the evidence, I give due weight to the two statutory declarations before me. The main evidence on the other side of the argument is the photographic evidence submitted by the Council. Save for reference to roof trim, the evidence in the photographs was not specifically challenged. The two statutory declarations are based on the signatories' interpretations of substantially complete. It is not so much that I doubt their veracity, but that I disagree with these interpretations.
33. I find that the dated photographs, and the evidence of my site visit, provides clear evidence that the extension was not, on the balance of probability, substantially complete on the relevant date. For the above reasons, the ground (d) fails.

Ground (a)

⁸ Exhibit JM5 to Jonathan McGuinness's Statutory Declaration

34. Essentially, an appeal under this ground is that planning permission ought to be granted for the development against which the Notice is directed.
35. The main issue is the effect of the development on the character and appearance of the local historic environment, involving: the host building; the Prestbury Conservation Area (PCA); and the setting of a listed building.
36. 15 Deep Street is a semi-detached building that lies adjacent to the B4632, a busy road running from the centre of Cheltenham. It has accommodation set over three floors, including within its roof space. The evidence shows that it dates from about 1800. Its rendered and painted front elevation is largely symmetrical, whilst its side elevation is of coursed local stone and brick. Its rear elevation has been altered and added to over time and, save for the extension that forms the subject of the appeal, is finished in brick. As stated, when the extension was added, there was an extant single storey conservatory and porch extension on the building's rear elevation, constructed from brick and uPVC. In addition, there was a brick outbuilding sited close-by.
37. By reason of its architecture and prominent position on the corner of the B4632, No 15 is a building that adds greatly to the local townscape. It has been identified as a non-designated heritage asset.
38. No 15 lies within the PCA and, adjacent to its rear garden, 9 Deep Street, 'Reform Cottage' is a grade II listed building. The PCA and No 9 are designated heritage assets.

Effect on 15 Deep Street

39. Whilst there have been alterations to it, the rear elevation to No 15 has interest and value. Notwithstanding the use of uPVC and what appears to have been a polycarbonate roof, this was not adversely affected by the previous conservatory. This was a relatively small addition that had a neutral effect on the building. The red brick outbuilding, which appears to have been close to the conservatory, was of a traditional design and added to the character and appearance of the area to the rear of the property.
40. The Council states that the extension that has been erected measures 13.2m long by 7.3m wide. However, these are the maximum dimensions and its width reduces considerably for most of its length. It is said that it has a height, to its flat roof, of around 2.7m. The wall onto the garden of No 15 are finished in dark stained or painted timber boarding with timber windows and doors. Although I did not visit the adjoining property, it seems that the face of the wall onto that property had not been finished due to a dispute.
41. Guidance on extensions is given in the Supplementary Planning Document (SPD). It does not rule out the use of flat roofs. Broadly, its terms, and those of Policy SD4 'Design Requirements' from the Gloucester, Cheltenham and Tewkesbury Joint Core Strategy 2011-2031, Adopted 11 December 2017, ('JCS'), and Policies D1 'Design' and HE1 'Buildings of Local Importance and Non-Designated Heritage Assets', of the Cheltenham Plan 2020, ('CP'), seek high quality design and give support to developments that respect their settings and host buildings.
42. The extension is overly long, dominating the rear elevation of No 15. It unbalances the rear of the host property and, rather than respecting it, causes significant harm to it.

43. The manner in which the width of the extension decreases beyond the furthestmost line of the previous conservatory reflects, to a degree, the previous relationship between the outbuilding and conservatory. Neither the width nor the height of the extension are excessive, and I find that the use of timber cladding, which is similarly used on an outbuilding at the property, and a metal flat roof to be appropriate on the property.
44. However, the points I make in the previous paragraph do not mitigate the ill-effect of the length of the extension. This causes harm to the host property, a non-designated heritage asset, contrary to JCS Policy SD4, CP Policies D1 and HE1 and the SDP. The Government's National Planning Policy Framework (2021) sets out that the creation of buildings that are of a high quality and beautiful is fundamental to planning and a key aspect of sustainable development. The extension does not accord with this part of the Framework, nor its paragraph 203 that relates to non-designated heritage assets.

Effect on the Setting of Reform Cottage

45. Whilst the effect on the setting of Reform Cottage is not referred to in the 'Reasons for Issuing the Notice', it was referred to in the Council's statement. This gave the Appellant an opportunity to counter the Council's claims; it did not, however, merely stating that as there was no mention in the Notice it should not be introduced at the appeal stage. I am, nonetheless, required to undertake the statutory test set out in Section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ('LBCAA'). This requires that special regard or attention shall be paid to the desirability of preserving the setting of listed buildings.
46. The Council provided the Appellant and I with a copy of the statutory listing for Reform Cottage. It is a two-storey detached cottage that dates from the 17th century and might have been converted from a tithe barn associated with Llanthony Priory. It has timber-framed walls finished in timber and pebble-dash, set under a thatched roof.
47. No 9 is set well back from Deep Street and, as a result of the erection of later buildings, it is not clearly seen from the road. Its setting, especially in visual terms, is relatively limited as it is fairly close to properties with up to three floors of accommodation. However, there can be no doubt that given its proximity, the extension lies within its setting, and I was able to see the relationship between the two at my site visit.
48. The use of a flat, metal roof extension to No 15 does not cause harm to the setting of No 9 *per se*. What has been built exceeds the height of a boundary wall or fence that might be erected under permitted development rights along the boundary. However, the extension is set into the ground at No 15 and so its height does not have an adverse effect on the setting of No 9, which is preserved.
49. Thus, the development accords with the statutory test of S66(1) and the terms of JCS Policy SD8 that requires the setting of designated heritage assets to be conserved and enhanced.

Effect on the Prestbury Conservation Area (PCA)

50. The PCA is a designated heritage asset and is of great significance. It represents the historic heart of the village of Prestbury. Whilst the village has

been incorporated into Cheltenham over time, it retains a distinct and separate character. The PCA is centred on the Grade II* listed church that lies fairly close to the appeal site, and is characterised by its visually dominant buildings of historic and architectural importance.

51. Although I did not see the use of a metal roof on extensions or buildings elsewhere in the PCA, nor was my attention drawn to any, I did not find that its use was harmful to it. It had a neutral effect and is merely seen as a further change in the use of building materials that have occurred through time across the PCA.
52. I did see some other flat roofed buildings and extensions which had a negative effect on the PCA. An example of this was a garage very close to the listed church, which was within its setting and clearly visible from it and its environs. However, in this case I agree with the Appellant in that the extension is little seen in the PCA from public vantage points. It does not therefore, in my judgement, have an adverse effect on the character or appearance of the PCA; these would be preserved. Thus, the development meets the statutory test in S72(1) of the LBCAA.

Conclusion on Ground (a)

53. For the reasons set out, above, my findings on the effect of the development on the character and appearance of the local historic environment are as follows. The character and appearance of the PCA is preserved, as is the setting of the Grade II listed No 9. However, there is significant harm to the host dwelling, a locally important non-designated heritage asset, by reason of the length of the extension. I have not been provided with evidence, including by way of public benefits, that outweighs this harm.
54. As set out, above, the development therefore is contrary to the terms of JCS Policy SD4, CP Policies D1 and HE1 and the SDP, and the terms of chapter 16 of the Framework.

Ground (f)

55. An appeal under this ground is made on the basis that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
56. I have addressed the matter of whether the Notice is a nullity, above.
- 57.** The Notice has been issued to remedy the breach of planning control. I have been given nothing substantive to show that there is an obvious alternative or any lesser step that might achieve the purpose of the Notice. Therefore, the Ground (f) fails.

Ground (g)

58. The case put forward here is, should the Notice be upheld the period for compliance should be extended to 12 months. This is because the works would require the use of machinery that would be ill-suited to use in the wet winter months. Extending the period would allow the work to be undertaken during the spring and early summer and would result in less mess and disruption to

neighbours. Furthermore, it is claimed that as a result of Brexit and the pandemic, there is an on-going shortage of materials and labour.

59. The Council states that as the Appellant claimed that the work to substantial completion was undertaken in 4 months, 6 months is reasonable. It would, however, understand if the period were to be extended.

60. I recognise the merits of the arguments that have been put forward; however, I am not convinced that the 12 months that are requested are necessary to undertake the works. Extending the period to 9 months would give the early spring and much of the summer to undertake the work and provide ample time to source plant, materials and labour. In the light of the comments made by the Council, I am aware that it has powers under S173A(1)(b) of the 1990 Act to extend the period for compliance.

61. To the extent set out, above, the ground (g) succeeds.

Conclusion

62. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a variation and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Roy Curnow

Inspector