

Appeal Decisions

Site visit made on 25 November 2020

by Grahame Kean B.A. (Hons), Solicitor HCA

an Inspector appointed by the Secretary of State for Housing, Communities and Local Government

Decision date: 14th February 2022

Appeal A Ref: APP/P4605/C/20/3256810

Appeal B Ref: APP/P4605/C/20/3256811

Appeal C Ref: APP/P4605/C/20/3256812

130-132, Fentham Road, Birmingham, B23 6AN

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mrs Baljinder Gill
 - Appeal B is made by Mr Tirath Singh Hayer
 - Appeal C is made by Mrs Balbir Kaur
 - The appeals are made against an enforcement notice issued by Birmingham City Council.
 - The notice was issued on 4 June 2020.
 - The breach of planning control as alleged in the notice is: Without planning permission, the erection of two storey rear, first floor rear and single storey rear extensions, in the approximate position marked in green on the attached plan.
 - The requirements of the notice are:
 - (i) Demolish the two-storey rear, first floor rear and single storey rear extensions; and restore the premises to its [sic] condition prior to the breach of planning control taking place in line with those works approved under 2004/08248/PA & 2007/00880/PA.
 - (ii) Remove from the premises all demolished building materials and rubble arising from the compliance with requirement (i) above.
 - The period for compliance with the requirements is: six months after this enforcement notice takes effect.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a) (c) (d) (f) and (g) of the Town and Country Planning Act 1990 as amended (the Act). Appeals B and C are proceeding on grounds (c) (d) (f) and (g).
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Summary of Decision

1. The appeals are dismissed and the enforcement notice is upheld with corrections.

Background

2. The appeal site is in a residential area of mainly traditional terraced houses. Commercial units adjoin the site along Slade Road and a new shop unit was erected at 335-343 Slade Road following planning permission in 2017. The site is in the Slade Road Local Centre.
 3. The appeal site, 130 and 132 Fentham Road, are a pair of modern semi-detached properties granted planning permission for their erection in 2005 with two-storey gable features at the front and original two-storey rear elements, added to by two-storey side extensions. No 128 is also owned by the
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appellant(s), a traditional terraced property with an original two-storey rear wing and single-storey rear extension.

4. The rear garden of the appeal site is covered in hardstanding and there are now a single storey rear extension, and two-storey and first floor rear extensions, including roof alterations to increase accommodation in what can be regarded a third storey of the premises, visible from Clarence Road to the south.

The notice

5. The allegation in the notice as to "*the erection of a two-storey rear, first floor rear and single storey rear extensions*" is said to incorrectly describe the operations. The appellant states that no two-storey extension was erected, nor has there been a first-floor rear and single-storey rear extension, and since the unlawful building work was improperly identified, the requirements of the notice must also be imprecise.
6. The Council points out that the description in application Ref 2016/10625/PA to retain the development was for a two-storey and first floor rear extensions and single storey rear extension. Those plans (existing) show what is in situ, including that an additional storey has in effect been provided in the roof space. It certainly appears in essence as a very large three-storey structure, although whether a structure is to be formally regarded as having, for example two or three storeys, can often be an exercise in casuistry. No doubt the appellants had their own reasons for stipulating the number of storeys in the application and nowhere in their statement of case (SoC) do they refer to three storeys.
7. If on the other hand the appellants mean to say that they have merely built upon the original existing structure such that "*no two-storey extension has been erected*", that contention does not hold because what has been erected is a new element or elements that have entirely subsumed and remodelled the original rear projections.
8. The appellants do not state what they consider is relevant as an alternative description for what is alleged. It is unnecessary to alter the allegation or, therefore the steps which unambiguously require the appellants to restore the premises to their condition prior to the breach of planning control taking place in line with those works approved under permissions Refs 2004/08248/PA and 2007/00880/PA.

Ground (c) – that the matters alleged in the notice are not a breach of planning control

9. The appellants' agent with regard to this ground of appeal simply states that "*parts of the extension could be Permitted Development for which consent is not required and, therefore, no breach has occurred.*"
10. The agent who is professionally qualified would be well aware that the question to be answered is whether, from the start of the development for which reliance on permitted development rights are claimed, until the time at which it has been substantially completed, the building which is undergoing works has been enlarged, improved or altered by more than the specified allowances. If so, the works cease to be protected by permitted development rights and can be enforced against.

11. It is clear that the works as a whole do not meet the requirements of permitted development as defined by Class A of Part 2 of Schedule 2 of Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO). This part of the appellant's case that the development alleged in the notice does not constitute a breach of planning control, is without any substantive evidence or argument in support.
12. By section 57(1) TCPA 1990, planning permission is required for the carrying out of development. Section 55(1) TCPA 1990 provides that the making of a material change of use is "development". By section 171A(1) TCPA 1990, carrying out development without the required planning permission constitutes a breach of planning control.
13. Since the matters alleged in the enforcement notice constitute development for which planning permission is required and no such planning permission has been granted, I find that they are a breach of planning control. Therefore, the appeal on ground (c) fails.

Ground (d) – that it was too late to take enforcement action

14. The appeal on this ground 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.
15. The time limits in respect of the carrying out of building operations are set out in s171B(1) as "*after the end of the period of 4 years beginning with the date on which operations are substantially completed*". Where there has been more than one operation, clearly separable from a later operation, the first may be outside and the second operation inside the four-year period.
16. The enforcement notice was issued on 4 June 2020. Therefore it is for the appellant to show that the matters alleged in the notice, if they had been substantially completed four years prior to that date, were clearly separable from other operations. The onus is on an appellant to demonstrate his case on this ground on the balance of probability, using evidence that is precise and unambiguous.
17. As to the evidence, the agent stated that "*dates and evidence would be provided by means of statements*". However the only statement ostensibly from the appellant(s) was in an email sent belatedly by the agent after exchange of the statements of case, because of a mix up over the appendices. It is attached to an email and headed "*Statement of Paramjit Hayer*" but appears to be typed and 'signed' by the agent in the sense that his name is typed at the foot of the statement, but not that of Mr Hayer. Although I accord this due weight, I do not attach weight equivalent to a statement incontrovertibly made by Mr Hayer himself. There were no other statements provided by the appellants.
18. The appellants' statement of case (SoC) has it that the ground floor extension to the rear of Nos 128 and 130 was erected in 2015 and was immune from enforcement action, having taken place over 4 years ago. Further, that the first and second floor extensions were commenced in early 2016, and the building operations on the building shell were substantially completed by May 2016 at which time the building shell was wind and weathertight.

19. Mr Hayer's 'statement' is mostly consistent with the SoC. He is said to have lived at the appeal premises since 17 March 2013 with his wife Baljinder Gill and in April started to extend the upper floors of the house, the ground floor having been extended in March 2015. It is also said on his behalf that the building was weathertight with roof and windows complete by May 2016 and the upper floor extension and roof was finished on 21 May 2020. Mr Hayer had been in occupation during all the construction works, but his wife moved out "*in early 13/5/16 [sic]*" and returned on 17 August 2016.
20. The Council acknowledges having been told by Mrs Gill when the notice was issued that there was an error in that the single storey part of the extension had been completed in 2015 and she had the completion certificate. She stated she would be happy for us to re-issue a notice as it would still cover the other works which were she stated, weather tight at the end of June 2016. The Council decided not to withdraw the notice as its requirements could be amended if appealed but said it would consider whether to under-enforce in respect of the single-storey part of the extension if all other requirements have been completed.
21. No completion certificate has been submitted in this appeal. A full buildings regulations application was made but related to Permission 2005/02126/FP for the erection of pair of semi-detached houses with garages and habitable roof spaces. The Council had no notification of works under consideration in this appeal.
22. Complaints were made about the works, the earliest on 22 June 2016 to the effect that a three-story extension had recently been erected on the rear of the property. It was said "*[they] are just putting the roof on the build*". One complaint stated that "*a major block of flats*" had been built, "attached to the back of their house", well-hidden and on the other side of the garden. "*They have built 3 floors in the last 2 weeks. They will have the roof on by the end of next week.*" I note the discrepancy on one complaint as to the subject address but am satisfied from its nature that it relates to the appeal premises.
23. The written complaints above specifically mention the roof not being on the property. Also Google images and aerial photographs show the works not being underway in May 2016. The Council officer met the agent on site and received an aerial image on which he noted at the time: "*4th June 2016. This was completed, but only up a few months then ripped down*". The image shows the single storey extension with no roof on and it would appear that works were in progress for a different build to what was ultimately constructed.
24. On the appellants' behalf it was said in the final comments that the Council's record of complaints only indicated dates of reports and record creation as opposed to evidence of works on site, but the key complaints are separately appended to the Council's SoC and their content is not disputed as a matter of record. The final comments state that neighbours had taken issue with works on a garden wall, implying that the complaints were a retaliatory, and so presumably (although it is not stated) unfounded reaction to the extensions the subject of the notice. There is no evidence to substantiate these comments and I give them no weight. The aerial images and dates thereof are not disputed.
25. As to the single storey rear extension there is some evidence that a structure had been completed before the issue of the enforcement notice, but I am satisfied from what I have seen and read that it was erected over a larger area

than the single storey element now standing. The rest of that element had been subsumed into the large new build rear extension and the element now standing to the side has clearly been remodelled. It is materially different from that which it had been originally, for example in the appearance of the roof. To all intents and purposes it is a new element that has been formed contemporaneously with the rest of the development the subject of the notice.

26. On the basis of the submitted evidence, it has not been shown to be more probable than not that the erection of the two-storey rear, first floor rear and single storey rear extensions at the premises had been substantially completed for a continuous period of four years prior to the notice being issued. As such, when the notice was issued enforcement action could have been taken in respect of the breach of planning control alleged.

27. The appeal on ground (d) fails.

Ground (a) and the deemed application for planning permission

Main Issues

28. The main issues are the effect of the development on:

- a) the character and appearance of the existing dwelling houses and the street scene; and
- b) the living conditions of occupiers of 333 Slade Road with regard to a potential loss of privacy.

Character and appearance

29. I am satisfied that the state the premises were in prior to the unauthorised works being carried out, was consistent with the development granted planning permissions under Ref 2004/08248/PA (construction of two semi-detached dwelling houses) and Ref 2007/00881/PA (erection of first floor side extension), and I have considered the plans approved under those permissions.

30. Therefore under this ground I am concerned solely with the planning merits of the differences between the originally permitted pair of semi-detached houses plus the permitted side extensions, on the one hand, and the unauthorised development that has taken place in situ.

31. My reading of the statements and consideration of the images supplied have been supplemented by a site inspection of the appeal site, both within the premises, and its immediate environs. The photographs from within Clarence Road give only a snapshot from a particular angle and one is slightly misleading, no doubt unintentionally, in appearing to accentuate unduly the height of the building on Clarence Road in the foreground.

32. I find that the extension is not totally visible from Clarence Road. However it is sufficiently visible to create an impression of a two or three-storey large back addition to the existing terraced houses on Fentham Road, notwithstanding the difference in levels with Clarence Road. To my mind it has an over-dominating effect on the street scene, for example it overpowers the small gable dormers in the roofscape of the rear of the buildings on Slade Road which although recent, are more commensurate with the character of existing dwellings in the area. The boundary wall on Clarence Road does not mitigate the overall

appearance of the unauthorised development which is a large discordant structure amid the surrounding development.

33. The bulk of the structure projects down into the plot and is conspicuously at odds with its surroundings. Overall it has a significantly adverse effect not only on the street scene but also due to its vastly disproportionate scale and bulk, on the host property.
34. Permitted development rights are referred to in the case on ground (a) both in terms of existing and proposed legislation. But whatever their status, they do not apply to an unlawful development. The appellants accept that the extension works are deeper than permitted development rights would allow. There is no other alternative development that is identified as a "fall-back" position that can properly be taken into consideration, the previous flats proposal, as with the alternative sketch design proposals are significantly different from what has been built. In my judgement they would not fall within "the whole or part" of the matters alleged to constitute the breach of planning control for the purposes of s177(1) of the Act. I have considered the single-storey rear extension to the rear of the boundary with No 128, but by reason of its size and location its retention would in my view destroy the carefully designed symmetry of the pair of semi-detached dwellings previously approved.
35. The development is an egregiously excessive addition to a fairly modest pair of dwellings, not in keeping with their original character and appearance. There has also been a significant detrimental impact on the character and appearance of the area surrounding the premises.
36. I find that the scale, bulk and design of the proposal would have a detrimental impact on the character of the street scene. The harm caused is contrary to Birmingham Development Plan 2017 (BDP) Policy PG3 because it fails to maintain a positive sense of place and local distinctiveness or respond to the local area context. It would also conflict with the Birmingham UDP 2005 (UDP), saved Policy 3.14C-D in that it has an unacceptably deleterious impact on local character and fails appropriately to respect the area surrounding it.
37. The extension works are out of keeping with the character and appearance of the prevailing dwelling houses in the area including the host dwellings, causing harm contrary to BDP Policy PG3 and UDP Policy 3.14C-D as aforesaid.

Living conditions

38. In 2016 the enforcement officer found the distance from the rear of the development to the boundary wall with 333 Slade Road to be 10.25m, when accompanied by the appellants' representative. In considering the proposal to retain the development, the distance was taken to be 9.6m and in that respect the Council found no detrimental impact in terms of light or outlook. However, when assessed under the 2019 proposal to convert the dwellings to flats, it was noted that the 'three-storey' extension of the building, which would contain habitable rooms at each level on the south elevation, would be separated by c10.5m from the boundary with No 333 and the consequent impact on the private amenity of the garden would be wholly unacceptable in terms of the loss of light and privacy.
39. I have read the policy guidance on the various methods of calculating the separation distances in particular circumstances, including the so-called "45

degree code” and its application. Standards can provide a useful guideline in the design process, however the main focus should be on achieving the objectives behind the standards. It is important for residents to enjoy rear privacy to safeguard their amenity and allow their private space to be useable. Distance separation particularly for family houses with gardens is in my view a key factor to consider. These views are reflected in the policy guidance itself.

40. I have therefore judged this matter principally from my own view of the distance from the amenity space at No 333 that was pointed out to me, which includes a residential garden, and the rear habitable second floor, ie top floor or as it has been referred to the “3rd storey” windows of the unauthorised development. I am firmly of the view that a loss of privacy results from the close proximity of the garden to these windows which would cause unacceptable harm to the reasonable enjoyment of that space by its occupants. It is a consideration that should override the development plan but I do not consider that the latter in any case is complied with in this respect. No condition that allowed for alterations to resolve this issue could adequately address the harms without a substantial redesign of the property.
41. I find that the separation distance from the rear habitable second floor windows to the residential garden of 333 Slade Road is inadequate and causes loss of privacy, unacceptably detrimental to occupants’ living conditions. The harm caused is contrary to BDP Policies PG3 in that it unduly impedes the functionality of private external spaces and Policy TP27 in that the development is not of high design quality. It also undermines pride in the neighbourhood. It also conflicts with saved UDP Policy 3.14C and supplementary planning guidance in failing properly to safeguard the useability of private amenity space of neighbouring property.

Other matters

42. The appellant family or families is/are said to be reliant on the traditional corner shop for their livelihood and to have adapted the homes in order to accommodate family needs for more space. The need to increase accommodation for the appellants’ family or families is acknowledged, however that does not provide compelling support for a development that so unacceptably harms the character and appearance of the area.

Conclusion on ground (a)

43. Taking into account the above considerations and all other matters which have been put before me, the appeal on ground (a) does not succeed.

Ground (f) – that the requirements of the notice are excessive

44. Section 173 of the Act states that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first (s173(4)(a)) is to remedy the breach of planning control which has occurred. The second (s173(4)(b)) is to remedy any injury to amenity which has been caused by the breach. An appeal on ground (f) is limited by the Council’s purpose in issuing the notice.
45. It is clear from the notice that a complete remedy is sought to the breach of planning control that has occurred, including restoration of the land to its former condition. The purpose of the notice therefore falls within s173(4)(a).

46. The appellants refer to aspects of the work alleged to be immune from enforcement action, however I have dealt with these points in the appeal on ground (d) above.
47. Also referred to in ground (f) is the claim that notice incorrectly identifies the breach of planning control and therefore also the requirements of the notice are imprecise. I have dealt with this matter at the start of this Decision.
48. The dwellings do not currently enjoy permitted development rights. The appellants did try to address alternative proposals in planning applications including deploying arguments relating to permitted development, but no alternative design has been agreed upon. The agent has also picked out the instance where, in refusing the 2016 application the neighbour's living conditions were found to be acceptable. However I have dealt with this point. To take it as an indication that some sort of extension to the property would be acceptable, and as such the requirements of the notice are excessive, is misconceived because no specific alternative scheme that would provide an obvious remedy to the breach of planning control is evident.
49. I consider that the requirements of the notice in this case do not exceed what is necessary to remedy the breach. They do not prevent the appellant doing what he is lawfully entitled to do in the future once he has complied with the notice. The appeals on this ground therefore fail.

Ground (g) - that the period for compliance with the notice is too short

50. The appellants request a period of 12 months to be substituted for the period for compliance in the notice. However they appear unwilling or unable to date reduce the scale of the development to an extent that might be agreed upon in a subsequent planning application, despite the fact that both they and the Council in my view have been genuine in their attempts to resolve matters. Therefore it is difficult to appreciate what will be gained by extending the compliance period expressly to this end, even if consideration might be given to matters beyond what is strictly reasonably necessary to comply with the notice.
51. Similarly, the uncertainty about how the Covid-19 pandemic might have affected matters has receded considerably to the extent that, although I have it in mind, there is no convincing reason now to delay matters for that reason.
52. The family may need to move out of the property but it is said, without elaboration, only in part. I have been given no details of alleged construction material shortages, or why any alternative temporary accommodation might have to take 3 months to find. If and I have no reason to doubt, that the demolition and building works would take 3-4 months, I consider that the overall period for compliance of 6 months is reasonable. Therefore the appeals on this ground do not succeed.

Overall Conclusion

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

Formal Decision

54. It is directed that the enforcement notice be corrected by replacing "its condition" with "their condition"; inserting "Planning Permissions Refs" before "2004/08248"; and replacing the ampersand with "and".
55. Subject to these corrections the appeals are 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.

Grahame Kean

INSPECTOR