



Appeal Decision

Site visit made on 8 August 2022

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 20 September 2022

Appeal Ref: APP/E5900/C/21/3289905

Land at 216 Brick Lane, London E1 6SA

- 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 1990 Act as amended).
- The appeal is made by Mr Kazi Kalimur Rahaman against an enforcement notice issued by London Borough of Tower Hamlets.
- The notice was issued on 4 November 2021.
- The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised replacement of six (6) traditional timber framed sash windows with six (6) uPVC double glazed casement windows on the front elevation of the first, second and third floors of the property.
- The requirements of the notice are to: (a) Remove the six (6) unauthorised uPVC double glazed casement windows at first, second and third floors from the front elevation of the property, as indicated in the site plan 1A in Appendix 1 and in photographs 2C and 2D in Appendix 2. (b) Install six (6) traditional timber framed sash windows at first, second and third floors of the front elevation of the property, as indicated in photograph 2A in Appendix 2. (c) Make good any damage to the host building and remove all debris occurring from compliance with steps 1 and 2 above.
- The period for compliance with the requirements is: Three months (3).
- The appeal is proceeding on the grounds set out in section 174(2) (a), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with a correction and a variation in the terms set out below in the Formal Decision.

Procedural Matter

1. It is the convention in enforcement notices to identify the address to which the notice relates with the prefix 'Land at'. The enforcement notice (the notice) in this case does not follow that convention and, in deference to the normal convention, I will correct the notice to refer to 'Land at'.
2. The power under section 176(1) of the 1990 Act as amended provides that a notice may be corrected provided that no injustice would be caused by doing so. I am satisfied that no injustice would be caused by correcting the notice in the above respect.

Background

3. The appeal property, No 216 Brick Lane (No 216), which most likely dates from around the Victorian period, is located within the Brick Lane and Fournier Street Conservation Area (the CA). It is a four-storey, two-bay, mid-terrace

building which is traditionally constructed of buff-coloured London stock brick. It has a commercial use on the ground floor and residential use on the upper three floors.

4. The appeal concerns the replacement of six, single-glazed, painted timber, one over one, sliding-sash windows with six, double-glazed, uPVC, top-hung casement windows on the first, second and third floors of the front elevation of the property.

The appeal on ground (c)

5. The appeal on ground (c) is that the matters stated in the notice do not constitute a breach of planning control. On this ground of appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.
6. In respect of ground (c) the thrust of the appellant's case is that the installation of the replacement windows does not materially affect the external appearance of the building and, therefore, it does not constitute development that requires planning permission. On this basis, the appellant contends that there has been no breach of planning control.
7. Section 55 of the 1990 Act as amended defines 'development' for the purposes of the Act. Section 55(2) sets out operations or uses of land which shall not be taken for the purposes of the Act to involve development of the land. These include (a) the carrying out for the maintenance, improvement or other alteration of any building of works which, (ii) do not materially affect the external appearance of the building.
8. In *Burroughs Day v Bristol CC* [1996] EGCS 126, it was held that for works to 'materially affect' the external appearance of a building, the changes must be visible from a number of vantage points and material to the appearance of the building as a whole. Any decision on this matter requires consideration of 'materiality' as a matter of fact and degree, which inevitably involves a measure of subjective judgement.
9. The matters stated in the notice concern six windows on the front elevation of No 216 which is located within an architecturally mixed and vibrant urban context. Nonetheless, the architectural simplicity of the building's principal façade above ground floor level causes its fenestration on this elevation to be a key feature of the property as a whole. The replacement windows are fundamentally different to the previous units in a number of ways, namely, their double-glazed form, their top-hung opening style, their bulkier frames and component parts, the inclusion of trickle vents, their flat profile and their modern synthetic uPVC base material.
10. These differences, and the resultant overall change to the external appearance of the building, are clearly visible and readily perceived from a number of vantage points along the street. On this basis, I am satisfied that, as a matter of fact and degree, the matters stated in the notice materially affect the external appearance of the building as a whole and constitute development as defined under section 55 of the 1990 Act as amended. As such, under section 57 of the 1990 Act as amended, they require planning permission.
11. Moreover, given that the matters stated in the notice concern flats and not a dwellinghouse, there is no permitted development under the Town and Country

Planning (General Permitted Development) (England) Order 2015, (as amended) and therefore no deemed permission has been granted.

12. I conclude that, on the balance of probability, the matters stated in the notice do constitute a breach of planning control. Accordingly, the appeal on ground (c) fails.

The appeal on ground (a)

13. The appeal on ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case maybe, the condition or limitation concerned ought to be discharged.

Main issues

14. The main issues are i) the effect of the replacement windows on the character and appearance of No 216; and ii) whether the replacement windows preserve or enhance the character or appearance of the CA.

Reasons

15. As set out above, No 216 is a traditional, four-storey, mid-terrace, brick building. Relevant to the appeal, the property's fenestration on the upper floors is a key feature of the building. Prior to the development, the building's windows on the first, second and third floors of the front elevation comprised six, single-glazed, painted timber, one over one, sliding-sash units, which complemented and contributed in a positive way to the property's traditional character and appearance.
16. No 216 is located within the CA. As such, I have had regard to section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which requires that special attention be given to the desirability of preserving or enhancing the character or appearance of the conservation area.
17. The character appraisal for the CA¹ sets out that it is one of the most important historic areas in London which has evolved over a long period of time, and within which the architectural and urban character varies considerably. The appraisal advises that the CA's character along Brick Lane is created by a general consistency of height and architecture, especially amongst the terraces, and a complex, fine-grain mix of land uses, with richness being provided through the variety of the individual terraces and their detailing.
18. From the evidence before me, the character and appearance and thus the special interest and significance of the CA largely stem from its historic street pattern, along with the wealth of its traditional buildings which denote its historic development. The many narrow streets, such as Brick Lane, which possess buildings of a multiplicity of ages, architectural styles and features, sizes, traditional materials and uses, combine to create a densely developed area, with a diverse and visually interesting townscape and vibrant atmosphere.
19. Pertinent to the appeal, from my observations on site, even though some traditional buildings in the area have had their original windows replaced, this has mostly been done with units that are respectful in form, style and materials

¹ Brick Lane and Fournier Street Conservation Area – Character Appraisal and Management Guidelines, 2009.

to the age, character and appearance of the buildings and the surrounding townscape. Moreover, whilst I noted the presence of uPVC units in both modern and historic properties in the area, it did not appear to be the predominant material for fenestration. Consequently, in my judgement, inappropriate replacement windows and/or uPVC units do not form part of the established character and appearance of the CA.

20. By virtue of its age, architectural style and use of traditional materials, No 216 adds considerably to Brick Lane's historic and aesthetic charm. In doing so it positively contributes to the character and appearance of the CA as a whole and thereby to its significance as a designated heritage asset.
21. The replacement windows are profoundly different to the previous traditional units in their double-glazed form, top-hung opening style, larger frames and component parts, inclusion of trickle vents, flat profile and modern synthetic uPVC base material. As a result, they appear as flat, bulky, starkly modern and inharmonious insertions which undermine the building's intrinsic traditional character and appearance.
22. Moreover, their presence, which is readily visible and unduly conspicuous from the adjacent public route, also notably jars with the traditional, painted timber, sliding sash form of the windows in the immediately adjoining buildings and in historic buildings in the wider area.
23. I recognise that the fenestration on the front elevation of No 216 is but one feature on a single building within the CA. I am also mindful of the building's context, being in a conservation area with a very diverse character and appearance that has changed over time, which is undeniably different to that of the analogy used by the appellant of a Cotswold village conservation area, where the original form, design and features of buildings survive and are a strong contributory factor to its character and appearance.
24. Nevertheless, given the important contribution that the fenestration makes to No 216's character and appearance, as well as the building's prominence within the street scene, it reasonably follows that the identified adverse effects of the development to the building also fail to preserve the character and appearance of the CA as a whole, albeit in a modest way. In doing so, the replacement windows do not sustain, but rather incrementally harm, the CA's significance as a designated heritage asset.
25. In coming to my decision I have had regard to the appellant's submission that some 70% of the properties along Brick Lane between Bethnal Green Road and Bacon Street have either uPVC or replacement windows that are not original². I acknowledge the presence of uPVC and replacement windows in buildings in the locale. Nonetheless, as outlined above, in my opinion, inappropriate replacement windows and/or uPVC units do not form part of the established character and appearance of the CA.
26. Moreover, from the limited evidence before me, I cannot be certain that the examples cited by the appellant are not time immune from enforcement action, or that they were not considered under a different legislative and/or policy context. As such, their presence does not justify acceptance of harmful development.

² In particular 137, 147, 155, 159, 163, 198, 220, 222, 224 and 228 Brick Lane.

27. With reference to paragraphs 201 and 202 of the National Planning Policy Framework 2021 (the Framework), in finding harm to the significance of a designated heritage asset, the magnitude of that harm should be assessed. Given the nature and extent of the development, I consider the harm to the CA as a whole to be 'less than substantial'. However, this should not be equated with a less than substantial planning objection and is of considerable importance and weight. In accordance with paragraph 202 of the Framework, this harm needs to be weighed against the public benefits of the proposal.
28. Economic benefits would have been generated by the manufacture and installation of the replacement windows. In addition, environmental and social benefits would potentially be accrued from an enhancement in the thermal efficiency of the building and a consequent improvement to the area's housing stock. However, given the size and nature of the development, these identified benefits are very modest.
29. Overall, the weight that I ascribe to the public benefits generated by the development, is not sufficient to outweigh the considerable importance and weight that I attach to the harm I have found.

Other Matters

30. I note the appellant's comments about the Council's alleged lack of diligence and consistency in approach to what they describe as, unauthorised advertising or inappropriate minor development within the CA and particularly along Brick Lane. However, of themselves, these matters are not within the remit of my considerations in the context of this appeal.

Conclusion on ground (a)

31. Drawing all of the above together, I find that the replacement windows have a harmful effect on the character and appearance of No 216; and fail to preserve or enhance the character or appearance of the CA. As such, the development conflicts with policies S.DH1 and S.DH3 of the Tower Hamlets Local Plan 2031, adopted January 2020 (the THLP) and policy D4 of the London Plan 2021 (the LP 2021). Together these policies seek development to deliver high quality design which respects and positively responds to its context; and, to preserve or, where appropriate enhance the borough's designated and non-designated heritage assets in a manner appropriate to their significance.
32. The Council also cites conflict with Policy D.DH2 of the THLP and Policy D8 of the LP 2021. However, these policies concern streets, spaces and the public realm. As such, I do not consider them to be directly relevant to the development or the appeal.
33. In addition, the development also fails to meet the requirements of section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and the provisions within the Framework which seek to conserve and enhance the historic environment.
34. I conclude that planning permission ought not to be granted for the matters stated in the notice. Accordingly, the appeal on ground (a) fails.

Appeal on ground (f)

35. The appeal on ground (f) is 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.
36. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the 1990 Act as amended sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place, or (b) remedying any injury to amenity which has been caused by the breach.
37. In this case, the requirements of the notice are to: (a) Remove the six (6) unauthorised uPVC double glazed casement windows at first, second and third floors from the front elevation of the property, as indicated in the site plan 1A in Appendix 1 and in photographs 2C and 2D in Appendix 2; (b) Install six (6) traditional timber framed sash windows at first, second and third floors of the front elevation of the property, as indicated in photograph 2A in Appendix 2; and (c) Make good any damage to the host building and remove all debris occurring from compliance with steps 1 and 2.
38. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred by restoring the land to its condition before the breach took place.
39. The appellant submits that the white painting of the reveals for each window emphasises the openings unnecessarily and that the removal of the white paint would be sufficient to remove the alleged harm.
40. However, it is the replacement windows, specifically their double-glazed form, top-hung opening style, bulky flat appearance and synthetic uPVC base material, which form the development and constitute the breach. Anything less than removing the replacement windows and installing traditional timber framed sash windows as indicated in photograph 2A in Appendix 2 would not remedy the breach and restore the property to its condition before the breach occurred.
41. I conclude that the steps required by the notice to be taken do not exceed what is necessary to remedy the breach of planning control, but are proportionate given the purpose of the notice. Accordingly, the appeal on ground (f) fails.

Appeal on ground (g)

42. The appeal on ground (g) is that any period specified in the notice in accordance with section 173(9) of the 1990 Act as amended falls short of what should reasonably be allowed. In this instance, the period for compliance of the notice's requirements is stated to be three months.
43. The appellant submits that, given the requirements of the notice, a longer lead-in time will be needed, principally, to obtain licenses for any scaffolding and for the manufacture of any bespoke new windows. As such, they consider that a

period of nine months for the compliance of the requirements of the notice would be more reasonable.

44. In its statement, the Council acknowledges the appellant's submissions on this matter and confirms that it is willing to compromise and accept an extension of the compliance period to six months.
45. In considering this ground of appeal, there is a need to balance the public interest in securing the expeditious compliance with the notice against the private interest bound up in the development subject to the notice.
46. Due to the requirements of the notice, I am persuaded that the period specified for compliance falls short of what should reasonably be allowed. However, given the difficulties caused by the Covid 19 pandemic to working practices over the past two years, I do not give any substantial weight to the length of time it took the Council to issue the notice in my consideration of what would be a reasonable compliance period.
47. Taking the submissions of both parties into account, I am satisfied that a period of six months for compliance of the requirements of the notice is a reasonable and proportionate response to the breach of planning control that has occurred.
48. Consequently, I conclude that the compliance period specified in the notice falls short of what should reasonably be allowed. The appeal on ground (g) succeeds to that extent and I will vary the notice accordingly. Having regard to section 176(1) of the 1990 Act as amended, I am satisfied that no injustice would be caused by varying the notice in this respect.

Conclusion

49. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with a correction and 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.

Formal Decision

50. It is directed that the enforcement notice is corrected by:
 - in paragraph 2 of the notice, insert the words 'Land at' before the words '216 Brick Lane, London E1 6SA'.
51. It is directed that the enforcement notice is varied by:
 - in paragraph 6(i) of the notice delete the word and number 'THREE (3)' and insert the word and number 'SIX (6)'.
52. Subject to the correction and 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.

F Cullen

INSPECTOR