



Appeal Decisions

Site visit made on 6 June 2023

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21 July 2023

Appeal A Ref: APP/H5960/C/22/3296747

30 Burstock Road, London, SW15 2PW

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr John Thursfield against an enforcement notice issued by London Borough of Wandsworth.
 - The notice was issued on 3 March 2022.
 - The breach of planning control as alleged in the notice is without planning permission and within the last four years the installation of an enclosure at roof level to facilitate formation of a roof terrace and the installation of dark framed windows on the front elevation at the Property.
 - The requirements of the notice are to:
 1. Remove the enclosure consisting of planters which have been fixed together to create an enclosed terrace area at roof level;
 2. Remove the wooden flooring laid on the roof to create a surface for people or furniture to stand on;
 3. Remove the Velux dome rooflight access point along with associated fixtures and fittings;
 4. Remove the dark-framed windows at front, side and rear elevations and reinstate the timber frame casement windows painted in white to match those previously in situ; and
 5. Remove from the site all debris arising from compliance with steps 1-4.
 - The period for compliance with the requirements is twelve weeks.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b) and (c) 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.
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Appeal B Ref: APP/H5960/X/22/3298573

30 Burstock Road, Wandsworth, London, SW15 2PW

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development.
 - The appeal is made by Mr John Thursfield against the decision of London Borough of Wandsworth.
 - The application ref 2022/0931, dated 3 March 2022, was refused by notice dated 27 April 2022.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is replacement of timber framed windows with aluminium framed windows.
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Decisions

Appeal A

1. It is directed that the enforcement notice is corrected and varied by:

- Deleting requirement 3 from section 5.
 - Deleting requirement 4 from section 5 and substituting with 'Remove the dark framed windows from the front elevation of the Property and reinstate the timber frame casement windows painted in white to match those previously in situ; and'.
 - Deleting the numbers '1-4' from requirement 5 of section 5 and substituting with the numbers '1-3'.
 - Renumbering requirements '4' and '5' from section 5 as '3' and '4' respectively.
2. Subject to the correction and variations, the appeal is allowed insofar as it relates to land edged red on the plan and the installation of dark framed windows on the front elevation at the property and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the installation of dark framed windows on the front elevation at the property at 30 Burstock Road, London, SW15 2PW.
3. The appeal is dismissed and the enforcement notice is upheld as corrected and varied insofar as it relates to land edged in red on the plan and the installation of an enclosure at roof level to facilitate formation of a roof terrace and planning permission is refused in respect of the installation of an enclosure at roof level to facilitate formation of a roof terrace at 30 Burstock Road, London, SW15 2PW on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal B

4. The appeal is dismissed.

Background

Appeals A and B

5. The appeals relate to No 30 Burstock Road, which is a two storey dwellinghouse within the Oxford Road Conservation Area.

Preliminary Matters

Appeal A

6. The appeal form cites grounds (a) and (c). However, the appellant has raised issues which may be construed as a ground (b) appeal. The Council has had an opportunity to consider the representations made by the appellant and I have therefore determined the appeal with the additional ground.
7. For legal grounds (b) and (c) the onus lies with the appellant to make his case on the balance of probabilities.

Appeal B

8. An application under s191(1)(b) of the 1990 Act seeks to establish whether, at the time of the application, any operations which have been carried out are lawful. S191(2) of the 1990 Act explains that operations are lawful if - (a) no enforcement action may be taken in respect of them because they did not involve development or require planning permission or because the time for

enforcement action has expired; and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

9. The enforcement notice (subject to Appeal A) was issued on the same date as the application for a lawful development certificate (LDC). The Council does not argue that the installation of the windows was in contravention of the enforcement notice then in force. Even if they were, it would make no difference to the outcome of Appeal B, which I have dismissed for other reasons, as explained below.
10. Although the appellant contends that the Council has failed to justify its reasons for the refusing the LDC, the burden of proof lies with the appellant to make his case on the balance of probabilities.
11. I have noted the appellant's views, and that of a neighbouring occupant, regarding the effect of the replacement windows on the character and appearance of the area. However, planning merits can form no part of the assessment of an application for a LDC, which must be considered in the light of the facts and the law. Nevertheless, I have considered those submissions in respect of Appeal A.

Appeals A and B

12. The appellant has confirmed that the pre-existing timber windows were replaced in June 2018. Consequently, they were not substantially complete either four years before the date of the enforcement notice or the date of the LDC application, so as to be immune from enforcement action through the passage of time, pursuant to S171B(1) of the 1990 Act.
13. Therefore, whether the Council's decision to refuse to issue the LDC, subject to Appeal B, was well-founded turns on the same reasoning as the ground (c) appeal¹ of Appeal A, insofar as they both relate to the installation of replacement windows on the front elevation. That is, whether the installation constitutes 'development' requiring planning permission, and, if so, whether the 'development' already benefits from a grant of planning permission. My reasoning below, on that matter, therefore applies to both Appeal A (on ground (c)) and Appeal B.

Appeal A on Ground (b)

14. A ground (b) appeal is that the breach of planning control alleged in the enforcement notice has not occurred as a matter of fact.
15. The alleged breach in this case is the installation of an enclosure at roof level to facilitate formation of a roof terrace and the installation of dark framed windows on the front elevation at the property.
16. By the time of my site visit, the roof level 'enclosure' had been removed, as had the timber surfacing. Nevertheless, s174(2)(b) of the 1990 Act is worded in the past tense, and the question is whether the breach had occurred by the date of issue of the enforcement notice.
17. The appellant does not argue that the installation of the windows or the positioning of planters on the roof, which the Council says formed an enclosure, did not occur. The appellant's argument is that the roof is not used and is

¹ That the matters alleged in the notice do not constitute a breach of planning control

incapable of use as a roof terrace and that scaffolding boards were laid on the roof (but not attached to it) to prevent the planters damaging the roof. He explains that access to the roof is via a ladder and small hatch and is required for maintenance of the planting and not to facilitate the use of the flat roof as a roof terrace.

18. However, the alleged breach relates to facilitating formation of a roof terrace (operational development) rather than use. In that regard, I find it unlikely that the appellant would position planters around the periphery of the roof (and lay timber over its surface) unless it was for the purposes of creating an enclosure facilitating its safe use as a roof terrace. With such an enclosure in place, the roof is evidently capable of being used as a terrace. Moreover, no evidence is provided to substantiate that the planters were intended as an environmental and ecological contribution.
19. The ground (b) appeal fails.

Appeal A on Ground (c) and Appeal B

Windows

20. S55(1) of the 1990 Act provides a broad definition of 'development' and includes building operations in, on, over or under land. S55(2)(a)(ii) excludes from the definition of development works for the maintenance, improvement, or other alteration of any building which do not materially affect its external appearance.
21. It was held in *Burroughs Day v Bristol CC* [1996] EGCS 126 that, for works to materially affect external appearance, the changes must be visible from a number of vantage points and material to the appearance of the building as a whole. Materiality means an impact capable of having some effect in planning terms and is a matter of fact and degree.
22. Even though forming one of four linked houses, the 'building', for the purposes of the 1990 Act is the dwelling at No 30. The photographs show that the pre-existing windows on the front elevation were white painted timber with relatively slender sections. The distinctive pattern of window casements matched those of the adjoining property. The replacement aluminium windows are finished in dark grey, have noticeably wider sections and the casement positioning is not entirely the same.
23. Given the clear difference in the appearance of the windows in terms of the thickness, colour and the texture of the materials, and the partial change to the casement arrangement, and being on the front elevation, at both ground and first floor level, the installation of the windows, as a matter of fact and degree, has a material effect on the external appearance of the building as a whole and amounts to development requiring planning permission.
24. Subject to conditions and limitations, Article 3 and Schedule 2, Part 1, Class A of the GPDO² grant planning permission for the enlargement, improvement or other alteration of a dwellinghouse. That provision includes general alterations such as new windows.

² The Town and Country Planning (General Permitted Development) (England) Order 2015 as amended

25. I appreciate that the replacement of windows is not listed in the limitations in paragraph A.2 (relating to article 2(3) land), nevertheless, Condition A.3(a) requires that the materials used in any exterior work must be of a similar appearance to those used in the construction of the exterior of the existing dwellinghouse.
26. MHCLG Technical Guidance³ explains that the condition is intended to ensure that any works to *'alter or improve a house result in an appearance that minimises visual impact and is sympathetic to existing development. This means that the materials used should be of similar visual appearance to those in the existing house, but does not mean that they need to be the same materials.'*
27. The Technical Guidance also states that *'it may be appropriate to replace existing windows with new uPVC double-glazed windows or include them in an extension even if there are no such windows in the existing house. What is important is that they give a similar visual appearance to those in the existing house, for example in terms of their overall shape, and the colour and size of the frames.'* Clearly, the condition is not therefore intended to only deal with facing materials such as brick and render, as suggested.
28. Whilst the overall shape of the windows are the same, the materials, colour and size of the sections are materially different to the pre-existing windows, in breach of condition A.3(a). On the balance of probabilities, for the purposes of Appeal A on ground (c) and Appeal B, the installation of dark framed windows on the front elevation, constitutes a breach of planning control under s171A(1) of the 1990 Act, for which the Council could take enforcement action.
29. Appeal A on ground (c) fails in that regard.
30. The appellant has provided limited evidence of the pre-existing windows in the rear elevation. In the absence of evidence, such as photographs, I am unable to make the above assessments with regards to any replacement windows so as to confirm their lawfulness or otherwise. As the onus lies with the appellant to make his case, that leads me to find that his evidence is not sufficiently precise and unambiguous to demonstrate, on the balance of probabilities, that any replacement windows in the rear elevation did not amount to development, or that they benefit from a grant of planning permission by virtue of the GPDO.
31. I therefore also conclude that the Council's refusal to grant a LDC in respect of the replacement of timber framed windows with aluminium framed windows was well-founded and that Appeal B should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Appeal A on Ground (c)

Enclosure at roof level to facilitate formation of a roof terrace

32. The other aspect of the alleged development is the installation of an enclosure at roof level to facilitate the formation of a roof terrace. As noted, by the time of my site visit the 'enclosure' and timber surfacing had been removed. Nevertheless, it is evident from the photographs that the planters positioned around the periphery of the roof were relatively tall and robust with a uniform

³ Ministry of Housing, Communities & Local Government Permitted development rights for householders – Technical Guidance – September 2019

appearance. The photographs show that they were positioned immediately adjacent to each other and bolted together to effectively create a single, continuous structure acting to enclose an area of timber surfacing positioned on top of the flat roof.

33. The photographs also appear to show pre-drilled holes in the bottom of the planters, which could be for drainage or fixing purposes. Even if the planters were not physically attached to the roof, being bolted together suggests they were intended to have a significant degree of permanency. Moreover, given their size and likely weight, particularly when filled, it is very likely that even if they were not physically fixed to the roof, they would be held in place by their own weight. Indeed, I find it improbable, for safety reasons, that the planters would be left in an exposed rooftop position unless the appellant was certain that they could not be readily moved.
34. Given the above characteristics it is likely that the planters, once in place, were intended to have little or no mobility and a significant degree of permanency as a rooftop enclosure. Therefore, having regard to their size and extent, permanency and attachment, the planters would have amounted to operational development.
35. The appellant states that a number of planters were initially moved rearward, in recognition of the Council's concerns over their visual impact, thereby indicating that they did not constitute an enclosure with a degree of permanence. However, it is not explained whether those which were moved were not then similarly bolted together and kept in place by their own weight or that they were not intended to remain in that new alignment. Therefore, although I accept that they would have been capable of being moved, that would not have been a straight forward task.
36. I have noted the appeal decision⁴ submitted by the appellant which found that planters in the particular circumstances of that case did not amount to development. However, those planters were evidently significantly smaller than those previously at No 30 and there is no indication that they were bolted together. That decision does not therefore serve as a direct or reasonable comparison to that which is before me.
37. I find, as a matter of fact and degree, that the roof level enclosure, formed by planters, amounted to development requiring planning permission. It is not suggested that planning permission has been granted so it follows that the installation of an enclosure at roof level to facilitate formation of a roof terrace is in breach of planning control, on the balance of probabilities. Consequently, Appeal A on ground (c) also fails for those residual matters.

Appeal A on Ground (a)

Main Issues

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

- the character and appearance of the site, the surrounding area and the Oxford Road Conservation Area (CA); and

⁴ Appeal Ref: APP/H5390/X/15/3140544

- the living conditions of neighbouring occupants, with particular regard to privacy.

Reasons

Character and appearance

39. As explained in the Oxford Road Conservation Area Appraisal and Management Strategy (CAAMS), the significance of the Conservation Area as a heritage asset is derived from the variety of high-quality Victorian housing of various types and sizes, and the dense residential area with a green appearance. The CAAMS highlights that issues of particular concern within the CA include roof extensions and the loss of original windows.
40. The appeal dwelling forms the end property in a short terrace of four. However, due to their contrasting designs and the geometry of the front building lines, the four appear as two pairs of semi-detached properties.
41. The section of Burstock Road immediately surrounding the appeal site is mixed with formal, regular Victorian terraces on one side and a mixture of newer post-war buildings, including that of the appeal site and neighbour on the other, alongside characteristic Victorian dwellings.

Windows

42. I have found under ground (c) that the change from the pre-existing, white painted timber windows to dark grey aluminium windows on the front elevation, has resulted in a material change to the appearance of the dwelling. However, it does not necessarily follow that the change is unacceptable.
43. Although CAAMS advocates wherever possible the repair of original features such as timber windows, rather than their replacement, the appeal property is not a characteristic Victorian house, being post war and inconsistent with the significance of the CA as a heritage asset. It is also seen within a length of Burstock Road which includes a number of uncharacteristic redevelopment sites with varying styles and materials. Indeed, this part of the eastern side of the road does not have the quality and cohesiveness of the terrace on the opposite side of the road or the townscape quality of other nearby streets such as Montserrat Road, which make a positive contribution to the significance and quality of the CA, as identified by the CAAMS.
44. Moreover, being positioned towards the northern end of Burstock Road, the property is also seen in the transition to the predominantly commercial scale and character of Putney Bridge Road, with its wider variety of built form and use of materials, including dark grey aluminium windows.
45. Based on similar observations, the Inspector for the previous appeal⁵ at No 30 found the appeal site to make a neutral contribution to the significance of the CA being '*markedly different from the development which surrounds it, and that difference has been exaggerated by the difference in materials and finishing between it and its immediate neighbours.*' Those observations, which are consistent with my own, were evidently made with the replacement aluminium windows in place.

⁵ Appeal Ref: APP/H5960/D/20/3255061 – relating to the construction of a new two storey building to provide a garage and ancillary accommodation

46. Moreover, the front elevation of the dwelling is largely obscured when entering Burstock Road from the north by the recently constructed garage and ancillary accommodation sited to the front side of the property. Furthermore, the building line and that of the adjoining dwelling runs at a tangent away from the back of the footway, rather than parallel to it as per other properties in the road, making it much less visible in the street scene.
47. Views of the principal elevation are therefore largely restricted to those closer to the property and then it is primarily seen in conjunction with the new ancillary building which also has dark framed aluminium windows, approved by the Council. Given the strong visual relationship of the two buildings within the appeal site frontage, it is clearly beneficial to have visual consistency in the fenestration. Indeed, windows with a contrasting colour, size and texture would be more obvious and harmful.
48. In light of the characteristics of the appeal site and the context in which it is experienced and, having regard to the great weight that should be given to the asset's conservation, I conclude that the installation of dark framed windows on the front elevation of the property does not result in harm to the character and appearance of the appeal site or surrounding area and has a neutral effect on the character and appearance of the CA as a whole, thereby preserving, rather than harming its significance. It follows that the development does not conflict with DMPD⁶ Policies DMS 1, DMS 2 and DMH 5, CS⁷ Policy IS 3, the Council's Housing SPD⁸ or CAAMS, or the development plan as a whole. Those state, amongst other things, that applications will be granted where they sustain, conserve and, where appropriate, enhance the significance, appearance, character and setting of the heritage asset itself, and the surrounding historic environment.

Roof enclosure

49. The photographs show that because of the height, extent and solidity of the pre-existing enclosure, it would have appeared more akin to a roof extension from street level, bearing no relationship, other than colour, to the design and composition of the dwelling. It evidently added significant bulk and would have appeared as a highly prominent and visually jarring feature above the roof line, thereby significantly unbalancing the semi-detached pair.
50. Even if the enclosure was moved backwards prior to the enforcement notice being issued, there is nothing to show that the above stated harm was avoided or significantly mitigated.
51. The overall effect would have resulted in significant harm to the character and appearance of the appeal dwelling and street scene, thereby failing to preserve or enhance the CA, contrary to DMPD Policies DMS 1, DMS 2 and DMH 5, CS Policy IS 3, the Council's Housing SPD and CAAMS.
52. In this case I conclude that the alleged development would lead to less than substantial harm to the CA taken as a whole. In such circumstances DMPD Policy DMS 2 and the National Planning Policy Framework require that any identified harm is weighed against any public benefits the development might secure.

⁶ Wandsworth Local Plan Development Management Policies Document Adopted March 2016

⁷ Wandsworth Local Plan Core Strategy

⁸ Wandsworth Local Plan Supplementary Planning Document Housing

53. In that regard, even if the planters were intended as an 'environmental and ecological contribution' as stated, it is not shown that any gain is such that it would justify the harm arising or prevail over the great weight that should be given to the conservation of the heritage asset.

Living conditions

54. Although I have no evidence of actual use, the appellant, under ground (a), is deemed to have made an application for planning permission in respect of the matters stated in the notice, namely the installation of an enclosure at roof level to facilitate formation of a roof terrace. It is therefore necessary to consider the effect of the same on the living conditions of neighbouring residents.
55. In that regard, even though the enclosure and timber surfacing had been removed, I was able to see from standing on the roof that users would have been able to achieve clear and uninterrupted views into the rear gardens of the neighbouring properties.
56. Therefore, such development, which facilitates the formation of a roof terrace, would lead to a significant loss of privacy for occupiers of neighbouring properties from overlooking – both actual and perceived.
57. Accordingly, if reinstated, the roof level development would result in serious and unacceptable harm to the living conditions of neighbouring residents, contrary to DMPD Policy DMS 1. That policy states, amongst other things, that planning permission will be granted for development which does not harm amenity.

Conditions

58. The Council has not suggested I impose any condition relating to the windows and I consider none are necessary.

Appeal A Conclusion on Ground (a)

59. For the reasons given above I conclude that Appeal A should succeed in part only, and I will grant planning permission for the installation of dark framed windows on the front elevation of the property, but otherwise I will uphold the notice with a correction and variations and refuse to grant planning permission in respect of the installation of an enclosure at roof level to facilitate formation of a roof terrace. The requirements of the notice will cease to have effect so far as they are inconsistent with the planning permission which I will grant by virtue of s180 of the 1990 Act.

Other Matters

60. As noted, the enclosure consisting of planters and the timber surfacing placed on top of the roof have been removed, as per the requirements of the notice. However, s181(1) of the 1990 Act provides that compliance with any of the requirements shall not discharge the notice. If there is a later breach of the requirements, s181(1) and (3) mean that remains enforceable under s179.
61. In that context, I am mindful that the appellant has not made an appeal on ground (f) (for Appeal A), which is that the requirements of the enforcement notice are excessive.

62. The first two requirements are, in short, to remove the enclosure consisting of planters and the timber flooring. Such is the height of the roof, it is very unlikely that occupiers would utilise it as a terrace, without the enclosure, even with the existing rooflight retained, not least because access is not straight forward and can only be achieved via a ladder, placed on a staircase.
63. In those circumstances it is not necessary, for the purposes of remedying the breach of planning control, to also require the removal of the roof light, as per requirement 3, which will allow access to the roof to be retained for maintenance purposes. I will therefore delete that requirement.
64. Requirement 4 is to remove the dark-framed windows from the front, side and rear elevations and reinstate the timber frame casement windows painted in white to match those previously in situ. However, the allegation refers only to the windows on the front elevation. Therefore, requiring the windows in the side and rear elevations to be replaced is excessive for the purposes of remedying the breach of planning control. I shall therefore delete those aspects of the requirement.
65. Despite my decision on ground (a), as it relates to the windows, it is still necessary to retain requirement 4 (as corrected). Nevertheless, as explained, the requirements of the notice will cease to have effect so far as they are inconsistent with the planning permission which I will grant for the front windows by virtue of s180 of the 1990 Act.

Richard S Jones

INSPECTOR

Appendix 1

List of those who have appealed

Reference	Case Reference	Appellant
Appeal A	APP/H5960/C/22/3296747	Mr John Thursfield
Appeal B	APP/H5960/X/22/3298573	Mr John Thursfield