



Appeal Decision

Site visit made on 26 February 2024

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 19th APRIL 2024

Appeal Ref: APP/L5810/C/22/3302664

Land at 35 Pensford Avenue, Richmond, TW9 4HR

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr David Chalmers (H and H Concierge) against an enforcement notice issued by Richmond Upon Thames London Borough Council.
- The enforcement notice was issued on 8 June 2022.
- The breach of planning control as alleged in the notice is failure to comply with a condition imposed on a planning permission ref 19/1079/HOT granted on 3 June 2019.
- The development to which the permission relates is: Partial demolition of the rear of the house, construction of part single, part two-storey side and rear extensions with new roof over, and side dormer. Excavation of basement.
- The condition in question is no U0062807 which states that: The development hereby permitted shall be carried out in accordance with the following approved plans and documents, where applicable. 1901, 02, 03, 04, 05, 06, received on the 1st of April 2019.
- The notice alleges that the condition has not been complied with in that: Without planning permission and within the past 10 years the installation of windows on the south elevation at first and second floor levels comprising individual large panes (as shown in the picture at Appendix 2) that are of a materially different design to the casement windows approved in drawing no. 1901-06 of planning permission reference 19/1079/HOT granted by the Council on 03/06/2019 ("the Planning Permission"). This is in breach of condition U0062807 ('Decision drawings') which requires the development be carried out in accordance with the approved drawings. A copy of the Planning Permission is attached at Appendix 3.
- The requirements of the notice are to: Remove the existing windows and frames at first and second floor levels on the south (flank) elevation and replace them with windows and frames to match in facsimile those shown in drawing no.1901-06 of the Planning Permission.
- The period for compliance with the requirements is: Three calendar months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (e), (f), (g) of the Town and Country Planning Act 1990 as amended.

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

Preliminary Matter

1. The appellant has commented that plans referred to in the notice are not the most recent approved plans, citing an approved non-material amendment application¹ ('NMA1 Application'). However, since the original permission still stands and the only changes made in the NMA1 Application relate to the rear elevation, it is not necessary to correct the notice in this regard as the alleged breach and requirements remain clear.

The appeal on ground (e)

2. This ground of appeal is that copies of the enforcement notice were not served as required by s172 of the Town and Country Planning Act 1990 ('1990 Act').

¹ Ref: 19/1079/NMA1

The appellant's argument is that the letter addressed to them attaching the enforcement notice was sent to a different address rather than to the appeal property address. The Council has confirmed that this other address was taken from recent Land Registry entries and that a letter was also sent to the appeal property addressed to the owner/occupier at the appeal property address. I find then that the enforcement notice was properly served and the appellant has in any event been able to make a valid appeal. The ground (e) appeal therefore fails.

The appeal on ground (b)

3. The appeal on ground (b) is that the matters alleged in the notice have not occurred; the onus is on the appellant to make their case on the balance of probability.
4. The matters alleged are failure to comply with the approved plans condition no. U0062807 of planning permission 19/1079/HOT. The Council's position is that this condition was breached by installation of large single pane windows on the south elevation at first and second floor levels that are of a materially different design to framed casement windows approved in Drawing no. 1901-06.
5. Photographs attached to the notice show the south side first and second floor windows as having a single large pane of glass. Drawing no. 1901-06 by contrast, shows this second floor fenestration as two framed windows, with the first floor fenestration being divided by a white frame into six panes. The appellant submits that, when the notice was issued, works to these windows were incomplete as they had not yet installed the 'frames' (which would appear to mean window trims, rather than frames, and which were proposed in a non-material amendment ('NMA') application²).
6. In a ground (b) appeal, I must consider whether the matters alleged have occurred by the date of the notice. At that date, single pane windows were installed on the south side elevation at first and second floor levels which were not in accordance with Drawing no. 1901-06. Although window trims were subsequently added, the breach of condition had therefore as a matter of fact occurred at the date of the notice.
7. Whilst I acknowledge that a NMA application was pending, this seemed to relate to window trims to be added to the single large panes of glass (rather than 'frames') and so enforcement action was not premature and the Council later also determined the NMA proposal to represent a material amendment. Although unfortunate if the appellant received advice that window trims would be acceptable, the Council is not bound by informal assurances of its officers.
8. The ground (b) appeal fails for the reasons given.

The appeal on ground (c)

9. The appeal on this ground is that the matters alleged do not constitute a breach of planning control. Again, the appellant must make their case on the balance of probability.
10. The Council's position on this ground is that the windows in question were, as at the date of the notice, materially different to those shown on Drawing no.

² Ref: 19/1079/NMA2

1901-06 and therefore are a breach of condition no. U0062807. The appellant argues that the condition has not been breached on the basis that, when the notice was issued, works to the windows were incomplete as the appellant was intending to add window trims. The appellant submits that the windows, as altered after issue of the notice, are in compliance with Drawing no. 1901-06 and so not a breach of condition.

11. The ground of appeal in s.174(2)(c) is that the matters alleged in the notice 'do not constitute a breach of planning control' (my emphasis). The use of the present tense means that I need to consider whether the matters alleged represent a breach as at the date of this appeal. However, I am required to consider whether the matters alleged *in the notice* are a breach of planning control, not the matters alleged as subsequently altered.
12. Drawing no. 1901-06 shows the second floor south elevation window as having a thick white frame dividing the window into two panes. The first floor south elevation window on this drawing has 6 panes of glass with thick white framing. The matters alleged in the notice were installation of 'individual large panes' to these windows (as shown in photographs at Appendix 2 to the notice). In view of these clear visual differences between the approved fenestration and that enforced against, the latter are materially different to those shown in drawing no. 1901-06 and so represent a breach of condition U0062807.
13. The appellant does not seek to argue that the windows enforced against would not be development per the s55(2)(a) of the 1990 Act on the basis that they do not materially affect the external appearance of the building. In my view, the form of fenestration is of importance to the character of the building as a visually significant detail. The design of fenestration enforced against is at odds with the thicker frames and smaller panes on the same side elevation and much of the rest of the building and is visible from numerous public vantage points. It has thus materially affected the external appearance of the building and so represents development requiring planning permission.
14. Whilst the appellant has not raised the matter of permitted development ('PD') rights, the Council details its basis as to why the fenestration enforced against (and that as subsequently altered) does not represent PD under Schedule 2, Part 1 Class A of the Town and Country Planning (General Permitted Development) (England) Order 2015 ('Class A'). This is on the basis that the windows attacked by the notice are not of similar appearance and do not use similar materials to other windows on the appeal property.
15. I find as a matter of fact and degree that the windows in question are not comprised of similar materials to those used in the external surfaces of the dwelling as I saw from my site visit that the surface of these appeared to be flaking, in contrast with the more robust and well-finished surface of existing uPVC windows (which is the closest comparative external material). Further, as the windows in question are on a side elevation of the property and are not obscure glazed, they would not comply with condition A.3(b) of Class A which stipulates that *'any upper-floor window located in a wall or roof slope forming a side elevation of the dwellinghouse must be— (i) obscure-glazed, and (ii) non-opening unless the parts of the window which can be opened are more than 1.7 metres above the floor of the room in which the window is installed'*. The windows attacked by the notice are not therefore lawful pursuant to PD rights.

16. The matters alleged as at the date of the notice do constitute a breach of planning control and the ground (c) appeal fails.

The appeal on ground (f)

17. This ground of appeal is that the requirements of the notice exceed what is necessary.
18. Section 173 of the 1990 Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. The first is to remedy the breach of planning control which has occurred; the second is to remedy an injury to amenity which has been caused by the breach. The fact that the notice in this case requires the then existing windows to be removed and windows matching those in the approved Drawing no. 1901-06 to be installed suggests that its purpose is to remedy the breach of planning control.
19. The appellant's submissions on this ground are that their understanding is that the 'glass is compatible but that there is an issue with the frames' and that it is not necessary for the windows and the frames to be replaced, and replacement of the 'frames' only would be enough. In view of the trims affixed to the windows following the issue of the notice, I take this as meaning that, in the appellant's view, affixation of window trims to the same proportions as in the approved drawing would be enough to achieve compliance with the approved plans and so remedy the breach of planning control. The Council's view is that the installation of framed/casement windows to these same proportions is necessary per the approved Drawing No 1901-06 i.e. window trims will not achieve compliance.
20. Looking at approved Drawing no. 1901-06, this does not explicitly indicate that the windows attacked by the notice, or indeed any others, would be framed/casement windows (as opposed to single panes of glass with trim added). However, 'existing' elevations on Drawing no. 1901-03 also do not specifically identify pre-existing windows as framed/casement windows. As such, in my view the only reasonable inference from Drawing no. 1901-06 is that this indicated framed windows on the first and second floor south elevation, rather than trims.
21. From a distance, the trims installed to the first floor window appear visually similar to the casement windows shown in the approved plans. However, on a closer view from the pavement, it is apparent that trims have been applied to the glass. These make for a materially different appearance to the casement windows seen on other elevations of the appeal property by reason of their lack of detailing and crude finish. The trims applied to the second floor window presently do not match the proportions of those in the approved Drawing no. 1901-06 and introduction of differently proportioned trims would still have a materially different appearance to framed/casement windows for the reasons outlined as regards the first floor windows.
22. I am mindful of the availability of fallback PD rights under Class A as detailed above. The GPDO does not grant planning permission retrospectively and so varying the enforcement notice to seek to achieve compliance with Class A would not remedy the breach of planning control. If compliance with Class A could have been achieved only by installation of obscure glazing in substitution for the clear glazed windows attacked by the notice, this could have represented an appropriate lesser step. However, since I found that the

materials used in the window trims are not sufficiently similar to materials used in the external surfaces of the dwelling, obscure glazing would not be enough to render these PD under Class A, and it is not appropriate in the context of this appeal to consider alternative window designs.

23. As such, the affixation of window trims would not represent a lesser step that would remedy the breach of planning control and so the ground (f) appeal fails.

Other Matters

24. The appellant has raised issues about the Council's handling of the enforcement process but these are not for me in dealing with this appeal. The appellant has also expressed concern that the appeal notification was misleading in that it indicated that the 'size of the whole window opening' is at issue rather than 'the appearance of the window frames'. It is clear though from the Council's description of the breach that the issue relates to the windows attacked by the notice being single pane glass, rather than casement windows. As such, no prejudice resulted from the wording in the consultation letter nor the absence of photographs attached to the letter.

The appeal on ground (g)

25. The appeal on ground (g) is that the period for compliance with the notice (three months) falls short of what is reasonable.
26. The appellant outlines that an additional period would be required to liaise with the Council in relation to an acceptable form of replacement fenestration and to identify and schedule a new supplier. A period of 8 months is requested. Taking into consideration these factors cited by the appellant, along with the appellant's personal circumstances, a longer compliance period is warranted. A period of 12 months would be reasonable in the circumstances and I shall vary the notice accordingly. The ground (g) appeal therefore succeeds.

Conclusion

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

Formal Decision

28. It is directed that the enforcement notice is varied by in paragraph 6 the deletion of the words 'Three calendar months' and substitution of 'Twelve (12) months'. Subject to the variation, the appeal is dismissed and the enforcement notice is upheld.

V Bond

INSPECTOR