



Appeal Decision

Site visit made on 15 July 2024

an Inspector appointed by the Secretary of State

Decision date: 25 July 2024

Appeal Ref: APP/Q1445/C/23/3333739

Flat 2, 67 Upper North Street, Brighton BN1 3FL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (as amended).
 - The appeal is made by Mr Sanjar Qiam against an enforcement notice issued by Brighton & Hove City Council.
 - The notice was issued on 24 October 2023.
 - The breach of planning control as alleged in the notice is: The replacement of timber windows with UPVC windows at the front elevation of the Property.
 - The requirements of the notice are:
 - Remove the UPVC windows from the front elevation of the Property and replace with timber framed windows, with all profiles and detailing to match the previous timber windows (as shown on Appendix A).
 - The period for compliance with the requirement is 6 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (c), (d), (f) of the Town and Country Planning Act 1990 (as amended). Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. It is directed that the enforcement notice be corrected by:
 - deleting the allegation under section 3 (the matters which appear to constitute the breach of planning control) and its replacement with:

“Without planning permission, the replacement of the bay timber windows with UPVC windows at first and second floor levels on the front elevation of the property.”
 - deleting the requirements under section 5 (what you are required to do) and its replacement with:

“Remove the bay UPVC windows from the front elevation of the property at first and second floor levels and replace with timber framed windows, with all profiles and detailing to match the previous timber windows (as shown on Appendix A).”
2. Subject to these corrections, the appeal is dismissed, and the enforcement notice is upheld.

Matters concerning the Notice

3. The allegation in the Notice, refers to the replacement of timber windows with UPVC windows at the front elevation of the property. However, it is clear, from Appendix A of the Enforcement Notice and the Planning Officer’s Report, that

the new replacement windows are the bay windows at first and second floor levels on the front elevation of the property. The appellant appears to have understood the allegation and, in my opinion, the misdescription does not render the notice unclear. It is necessary however to correct the allegation of the notice. Furthermore, since the requirements of the Notice should closely follow the allegation, it is necessary to also make consequential corrections to the requirements. These would not cause injustice and I can therefore use my powers under the provisions of s176(1)(a) to achieve this correction.

Preliminary Matters

4. Arguments relating to the planning merits of the unauthorised development that has been undertaken, including reasons why the UPVC windows were installed and the benefits of the development, can only be taken into consideration in an appeal made on ground (a). Since there is no ground (a) appeal I cannot take into account the planning merits of the development put forward by the appellant in their submissions.
5. The appellant states that a complaint was not submitted by a member of the public, but by a Council Officer. However, it is not unusual for Planning Officers to notify the Planning Enforcement Team on potential breaches of planning control and there is no restriction in planning legislation or the Council's Local Planning Enforcement Plan, 2022 (LEP) to prevent Council Officers from doing this. Indeed, the LEP explains that the Council has a duty to determine whether a breach of planning control has taken place and if so whether it is expedient to take enforcement action.

The Appeal on Ground (b)

6. This ground of appeal is that the matter stated in the notice which may give rise to the breach of planning control, has not occurred. This has not been demonstrated. On the contrary, the appellant states that "*since fitting timber frames was not possible or economically feasible, the Appellant fitted double glazed uPVC windows.*"
7. Since the appellant accepts that the UPVC windows have been installed, the matters as alleged by the notice have occurred as a matter of fact. The appeal therefore fails on ground (b).

The appeal on Ground (c)

8. Ground (c) arises where an appellant seeks to argue that the matters alleged by the enforcement notice do not constitute a breach of planning control. The onus of proof lies with the appellant, the relevant test of the evidence being the balance of probability.
9. Under s55(1) of the 1990 Act, 'development' comprises 'two limbs':
 - 1) The carrying out of building, engineering, mining, or other operations in, on, over or under land (operational development);
 - 2) The making of any material change in the use of any buildings or other land.
10. It is clear that the allegation is referring to 'operational development,' and that the installation of replacement windows relates to a 'building operation.' Operational development' comprises activities which result in some physical

alteration to land which has some degree of permanence. The term 'building operations' is defined for the purposes of the 1990 Act in s55(1A) as including:

- (a) demolition,
- (b) rebuilding,
- (c) structural alterations of or additions to buildings, and
- (d) other operations normally carried on by a person in business as a builder. The list is not exhaustive.

11. S55(2)(a) of the 1990 Act excludes from the definition of development works for the maintenance, improvement, or other alteration of any building which:
 - (i) affect only the interior; or
 - (ii) do not materially affect the external appearance of the building. (Materially affecting the external appearance means an impact capable of having some effect in planning terms.)
12. With regard to s55(2)(a)(i), the replacement UPVC windows does not affect only the interior of the building.
13. Turning to s55(2)(a)(ii), the appellant states that the windows are of the same size, scale and shape as the previous windows which were replaced. Photographs submitted by the Council show the differences between the former timber framed windows and the current UPVC ones, with the current UPVC window frames appearing chunkier than the former timber windows.
14. The former second floor timber framed windows comprised 8 panel frames with glazing bars separating the top quarter of each window from their lower section. The former first floor timber windows were of a similar design to those on the second floor. However, the configuration of the windows has changed in so far as the second-floor windows, which previously consisted of 8 panels now comprise 6 panels with the glazing bar positioned toward the middle of the windows. On the first floor, the 8 panels have also been changed to 6 panels with door handles installed on the external elevation. These UPVC windows are positioned in a prominent location on the front elevation, where they are visible from public vantage points on Upper North Street.
15. Therefore, as a matter of fact and degree, these works materially affect the external appearance of the building as a whole, and therefore are not exempt from the definition of 'development' under s55(2)(a).
16. I therefore find that, on the balance of probabilities, the matters stated in the notice amounts to a building operation for the purposes of s55 of the 1990 Act. Planning permission is required for this development. There is none in place, and, given the property relates to a flat, the works are not permitted development. Therefore, based on all the evidence before me, there has been a breach of planning control and the appellant has not discharged the onus to demonstrate otherwise.
17. Accordingly, the appeal fails on ground (c).

The appeal on Ground (d)

18. The onus is on the appellant under ground (d) to make the case that, at the time the enforcement notice was issued, it was too late to take action against the matters stated in the notice. The enforcement notice, as corrected, is directed at the replacement of timber windows with UPVC windows at first and second floor levels on the front elevation of the property.
19. Consequently, the appellant needs to show that the matters alleged in the notice occurred at least 4 years before it was issued (which was 24 October 2019). If the Council has no evidence of its own, or from others, to contradict or otherwise make the version of events less than probable, there is no good reason to dismiss the appeal, provided the appellant's evidence alone is, on the balance of probability, sufficiently precise and unambiguous.
20. However, the appellant has not provided any clear and conclusive evidence that the UPVC windows were more than four years old at the time the notice was served. The appellant states that the previous windows had French doors at first floor level, which were installed more than 10 years ago. Nevertheless, the allegation in the Notice relates to the installation of UPVC windows, and Google Street View imagery shows that the previous timber framed windows were in place in August 2021. It seems to me that this dated photograph provided by the Council gives the most clear, unambiguous and cogent evidence.
21. It is well established in planning law that the onus rests with the appellant to make out his or her case. However, on the evidence before me, I find that burden has not been satisfactorily discharged in this particular case.
22. On the balance of probability, I conclude that at the time the notice was issued it was not too late to take enforcement action against the alleged breach of planning control.
23. The ground (d) appeal therefore fails.

The appeal on Ground (f)

24. The appeal on this ground are "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 (i.e., the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach".
25. The enforcement notice requires the removal of the UPVC windows and the restoration of the property to its condition prior to the breach of planning control, and therefore, the purpose of the notice is to remedy the breach of planning control rather than only remedy any injury to amenity.
26. The appellant states that the costs of the works required by the Notice is in excess of £70,000, and that the scale and costs of the works exceed what is necessary to remedy any breach of planning control which may be constituted by those matters. The appellant further explains that these windows were installed as part of necessary refurbishments works to upgrade the windows and also highlight that there are already a number of UPVC windows within the conservation area. However, given that the ground (a) appeal has lapsed, I

cannot assess the planning merits of the case, and I have to consider the purpose of the notice as issued. As the notice does no more than seek remedy of the breach, it is not excessive.

27. It is not therefore possible to vary the notice in the ways suggested by the appellants whilst achieving the purpose of the notice. There are no lesser steps drawn to my attention or any obvious alternatives that would remedy the breach of planning control which is the purpose of the notice.

28. On this basis, the Ground (f) appeal fails.

Conclusion

29. For the reasons given above I consider that the appeal should not succeed. I shall uphold the enforcement notice with corrections.

R Satheesan

INSPECTOR