



Appeal Decisions

Hearing held on 21 April 2010
Site visit made on 21 April 2010

by **Stuart M Reid** D Arch (Hons) RIBA

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

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email: enquiries@pins.gsi.gov.uk

Decision date:
17 June 2010

Two appeals at 18 Hampton Place, Brighton BN1 3DD

- The appeals are made under section 39 of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended by the *Planning and Compensation Act 1991*.
- The appeals are made by Ms Judy Bow against 2 listed building enforcement notices issued by Brighton & Hove City Council.

Appeal A: APP/Q1445/F/09/2114221

- The Council's reference is 2003/0319.
- The notice was issued on 16 September 2009.
- The contravention of listed building control alleged in the notice is the erection of a metal flue from the basement of the 19th (sic) rear extension, across the lightwell and up the main rear wall of the building to above eaves level.
- The requirements of the notice are to:
 1. Remove the solid metal flue situated at the rear elevation of 18 Hampton Place, Brighton.
 2. Remove any associated pipework.
 3. Remove all resultant rubble and debris from the site.
 4. Make good any damage caused.
- The period for compliance with the requirements is 20 weeks.
- The appeal is made on the grounds set out in section 39(1)(b), (c), (e), (g), and (h) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended.

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

Appeal B: APP/Q1445/F/09/2118552

- The Council's reference is 2003/0319.
- The notice was issued on 11 November 2009.
- The contravention of listed building control alleged in the notice is:
 1. The erection of New Single Storey Garden Room Extension at the rear of the property.
 2. The replacement of roof of 19th Century Extension.
- The requirements of the notice are to:

1. The New Single Storey Extension at the rear:

 - 1.1 Completely demolish the new extension.
 - 1.2 Completely remove the new extension's floor slab and foundations and backfill with clean topsoil the land to the same level of the existing of the lawn of the garden of No. 18 Hampton Place.
 - 1.3 Lower the northern boundary wall (adjoining the grounds of the St Mary Magdalene School) to its original height as shown highlighted in blue in drawing Ref No. 307.01 accompanying planning application Ref. No. BH2007/01336 (see at Appendix 2 for copy of plan) by removing all the new brickwork (18 courses) on top of the pre-existing

modern brick wall down to its original brick on edge coping as shown in the attached Photograph 3 and removing the new brickwork (10 courses) on top of the surviving original brick-bungaroosh wall as shown in the attached Photograph 4. Reinststate and make good the boundary wall by exposing, cleaning and making good the pre-existing brickwork and brick-bungaroosh on both sides to match the original work. Form a half round cement coping on top of the brick-bungaroosh part of the wall and reinststate and make good the surviving brick on edge coping on the brick part of the wall. Lime mortar with one part hydraulic lime to three parts sharp sand and shingle shall be used to make good the brick-bungaroosh work and one part cement and three parts builders' sand shall be used for the modern brickwork. The colours and the grading of the sand and proportion and grading of the shingle shall be such that the mortars' colours and textures match the originals.

1.4 Lower the eastern boundary wall, where it currently abuts the garden room extension and the site boundary with St Mary Magdalene's School, to the same height as the remainder of the east boundary wall of the garden. Expose, clean and make good the reduced eastern boundary wall original brickwork and its brick on edge coping to match the rest of the east boundary wall with the garden of No. 18 Hampton Place.

1.5 Block up the resultant opening in the east wall of the 19th Century extension by rebuilding the demolished wall in masonry, following the works carried out in paragraphs 1.1 & 1.2 above.

1.6 Render the exterior masonry of the east wall of the 19th Century extension, including the blocked up opening with smooth hydraulic lime and sand render using a mix of one part hydraulic lime to 3 parts fine builders' sand. Replaster the interior of the east wall in smooth putty lime and sand plaster using a mix of 1 part putty lime to 3 parts fine builders' sand.

1.7 Paint the exterior of the rebuilt wall and reinstated north garden boundary wall with smooth white breathable masonry paint to match the rest of the building. Paint the interior wall in breathable emulsion paint.

1.8 Remove all resultant rubble and debris from the site.

2. Alterations to the 19th Century Ground Floor Rear Extension:

The 19th Century Ground Floor Rear Extension is highlighted in green on the plan attached to the notice, see at Appendix 2.

2.1 Remove the concrete tiles and plastic guttering from the pitched roof on the north side. Lay natural slates to the pitched roof with concealed over fascia eaves strip ventilation to under the roof.

2.2 Remove all projecting fascia boards and soffits on the south and east sides and felt roof covering from the flat roof and plastic rainwater goods and cut back projecting roof rafters of the flat roof so that they are flush with the outer face of the wall and cut back the timber board roof cladding to leave a 40 mm overhang. Fix 15 mm thick fascia boards directly to the cut back roof rafters of the flat roof to match the previous detail as shown in the attached photographs 1 and 2. The fascias shall not drop below the level of the bottom of the roof rafters and shall leave a 25 mm ventilation gap between their top edge and the underside of the roof cladding board. Lay lead to the flat roof. The lead shall be turned down over a timber board which shall be fixed to the edge of the roof cladding board to provide an overlap of 75 mm over the fascia and a turned up lead drip edge of 5 mm. A 25 mm ventilation gap shall be maintained behind the downturned lead and its backboard. The exposed timber fascias on the south and east sides shall be painted in primer, undercoat and topcoat in smooth gloss exterior quality white paint to match the colour of the walls. The existing fascia board on the north side above the pitched roof shall be painted in primer, grey undercoat and topcoat in smooth gloss exterior quality grey (BS 4800 Colour Code BS 18 B 25) paint.

2.3 Replace all rainwater goods in cast iron with half round guttering, and paint in primer, undercoat and gloss white topcoat paint to match the background wall's colour. The walls exposed as a result of works carried (*sic*) shall be repaired and made good by rendering using hydraulic lime and sand render in a mix of 1 part hydraulic lime and 3 parts fine builders' sand and painted to match adjacent finishes in breathable smooth

white exterior quality masonry paint.

2.4 Remove all resultant rubble and debris from the site.

- The period for compliance with the requirements is 20 weeks.
- The appeal is made on the grounds set out in section 39(1)(b), (c), (d), (e), (f), (g) and (h) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended.

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

Procedural matters

1. I have a general duty to examine the terms of a notice to see if it is valid, and, if it requires correction, to correct it, if it is capable of correction, under the powers available to me by reason of section 41(1) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended, if I am satisfied that the correction will not cause injustice to the appellant or the local planning authority.
2. Section 38(2) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended states that a listed building enforcement notice shall specify the alleged contravention and require such steps as may be specified in the notice to be taken within such period as may be so specified –
 - (a) for restoring the building to its former state; or
 - (b) if the authority consider that such restoration would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider necessary to alleviate the effect of the works which were carried out without listed building consent; or
 - (c) for bringing the building to the state in which it would have been if the terms and conditions of any listed building consent which has been granted for the works had been complied with.
3. The requirements in the listed building enforcement notice for Appeal B deal in considerable detail with works to the listed building that have been specified by the Council. The notice requires in principle the demolition of the new extension, and the replacement of the roof of the 19th Century extension. However, these are very detailed requirements, for example specifying mortar and render mixes, wall heights, copings, cleaning of areas of brickwork, and paint specifications and colours.
4. No evidence was put to me by the Council that these works would restore the building to its former state, that is, its former authorised state¹, as no detailed evidence was put to me to show what the former state was, apart from the photographs attached to the listed building enforcement notice. They seemed to be requirements which, whilst desirable in terms of how the building might have been constructed, and beneficial in terms of restoring it to its original condition, would be very likely to exceed what is necessary for restoring the building to its former authorised state, that is, when it was listed on 20 August 1971. That is all that the law permits as a requirement in a case such as this.

¹ This is its state when listed, subject to any listed building consents issued since it was listed.

5. In the light of the judgement in *Bath City Council v Secretary of State for the Environment and Grosvenor Hotel (Bath) Ltd* [1983] JPL 737, where it was held that an improvement could not be secured to a listed building compared to its state before the unauthorised works were carried out, I shall delete the whole of the requirements in Appeal B. I shall, in its place, require the restoration of the building to the state it was in before the unauthorised works were carried out. This correction to the notice would not cause injustice to the parties.
6. The ground (f) appeal in Appeal B was withdrawn before the opening of the Hearing. During the Hearing the appellant withdrew the Appeal B ground (b), (c), (d), and (g) appeals, on the basis that a sufficient period of time would be allowed for the relevant works to be carried out under ground (h). The Council were in agreement with the period sought, 52 weeks, as am I, and I therefore only deal with, for Appeal B, the ground (e) and ground (h) appeals below.

Appeal A

The appeal on ground (b)

7. For this ground of appeal to succeed it is for the appellant to show that the matters alleged to constitute a contravention of section 9(1) or (2) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended have not occurred.
8. Section 7 of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended states that, subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised.
9. The listed building consent for a false chimney to cover the solid metal flue has time expired. It is evident that the works alleged in the listed building enforcement notice have been carried out, as the solid metal flue is clearly visible on the rear elevation. The presence of the flue has altered the special interest of the listed building. There is no consent or authorisation for the flue or its retention, and it is therefore unauthorised. As a matter of fact the appeal on ground (b) does not succeed.

The appeal on ground (c)

10. For this ground of appeal to succeed it is for the appellant to show that those matters (if they occurred) do not constitute such a contravention.
11. A ground (c) appeal is a simple legal test as to whether the works alleged in the notice have affected the character of the listed building. It is not a test of harm, nor whether the works have a positive or a negative effect. The solid metal flue is visibly present on the rear elevation, and for that reason it affects the architectural character of the listed building.
12. As a matter of fact and degree, I consider that the appearance of the listed building has been materially altered by the works, and that the architectural and historic character of the listed building has been affected. No authorisation for the flue has been granted. It follows that the appeal on ground (c) does not succeed.

The appeal on ground (e)

13. Ground (e) is that listed building consent ought to be granted for the retention of the solid metal flue.
14. The appeal building is listed in Grade II, as part of a terrace from 8 to 18 (even) Hampton Place, with their attached railings, and it has Group Value. It is an early 19th century stucco dwelling, part of a row which steps elegantly down the hill towards the seafront. It is in the Montpelier and Cliftonhill Conservation Area.

Main issue

15. I consider that the main issue in this appeal is the effect that the solid metal flue has on the special architectural or historic interest of the appeal building, and on the special architectural or historic interest of the conservation area within which it is situated.

Reasons

16. For the avoidance of doubt, the ground (e) appeal can only relate to the retention of what is alleged in the listed building enforcement notice, that is, the solid metal flue. It cannot be extended to deal with the time-expired listed building consent for a false chimney to encase it, as that is not part of the allegation.
17. As the ground of appeal is that listed building consent ought to be granted for the works, I am required in determining these appeals to take account of section 16(2) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended which states that, in considering whether to grant listed building consent for any works, special regard shall be had to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.
18. As the building is in a Conservation Area, I am also required to take account of section 72(1) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended which states that, with respect to any buildings or other land in a conservation area, special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.
19. The Courts have accepted that section 54A of the *Town and Country Planning Act 1990* as amended (which has been repealed and replaced by section 38(6) of the *Planning and Compulsory Purchase Act 2004*) does not apply to decisions on applications for listed building consent, since in those cases there is no statutory requirement to have regard to the provisions of the development plan. Policies in the Development Plan reflect the thrust of the statutory requirements, and I shall deal with them as a material consideration.
20. In determining these appeals I shall also take into account relevant Government advice that is contained in Planning Policy Statement 5: *Planning for the Historic Environment* (PPS5) and PPS5 *Planning for the Historic Environment: Historic Environment Planning Practice Guide*, which reflect the thrust of the advice in the now cancelled Planning Policy Guidance: *Planning and the Historic Environment* (PPG15).

21. The solid metal flue was part of the subject of an appeal against the refusal of listed building consent in 2005, when it was held to be acceptable if it was concealed by a false chimney to match the chimneys of other similar listed properties in the area. The false chimney has not been constructed, and the solid metal flue is still visible in the surrounding area, in the rear garden of the appeal building, and from the gardens of nearby properties, as well as the school.
22. As a shiny metal flue it is incongruous, unattractive, and out of keeping with the terrace of attractive listed properties and their traditional chimneys. It fails to respect the special interest of the building, and, due to its alien character, it is harmful and damaging to the historic and architectural qualities of the appeal building. For the very same reasons it fails to preserve or enhance the character or appearance of the Conservation Area.
23. Having special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses, and paying special attention to the desirability of preserving or enhancing the character or appearance of the Conservation Area, I conclude that listed building consent should not be granted for the unauthorised works. The appeal under ground (e) therefore does not succeed.

The appeal on ground (g)

24. For this ground of appeal to succeed it is for the appellant to show that the requirements of the notice exceed what is necessary for restoring the building to its condition before the works were carried out.
25. The appellant wishes to keep the flue, although it is not connected to anything. She wishes to complete the works as the original listed building consent. However, the original consent has time expired, and it is not possible to know if the same works would receive listed building consent if an application were to be made now. Because of that uncertainty, it would not be right to allow the retention of the flue, as, if no consent were to be forthcoming, the building would remain with the harmful flue attached to it if this ground were to succeed. For that reason, the appeal on ground (g) fails.

The appeal on ground (h)

26. For this ground of appeal to succeed it is for the appellant to show that the period specified in the notice as the period within which any step required by the notice is to be taken falls short of what should reasonably be allowed.
27. The appellant wishes to carry out the works to the flue in association with the other works dealt with under Appeal B, and for which a period of 52 weeks is sought. For the reasons I give in connection with Appeal B, and so that the flue works can be carried out at the same time, I shall extend the period to 52 weeks. To that limited extent the appeal on ground (h) succeeds.

Appeal B

The appeal on ground (e)

Main issue

28. I consider that the main issue in this appeal is the effect that the works have on the special architectural or historic interest of the appeal building, and on the special architectural or historic interest of the conservation area within which it is situated.

Reasons

29. It was agreed at the Hearing that the works were little different to those dealt with at appeals ref APP/Q1445/E/07/2055079 and APP/Q1445/A/07/2055076, where the Inspector dismissed the appeals as conflicting with Policies HE1, HE3 and HE6 of the *Brighton and Hove Local Plan 2005*, which sought to preserve the architectural and historic character or appearance of listed buildings, and conservation areas, and the settings of listed buildings. The policies before me are identical, although Policy HE4 is also now relevant. From what I have seen and heard I have found no reason to disagree with the conclusions and decisions of the previous Inspector.
30. Having special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses, and paying special attention to the desirability of preserving or enhancing the character or appearance of the Conservation Area, I therefore conclude that listed building consent should not be granted for the unauthorised works. The appeal under ground (e) therefore does not succeed.

The appeal on ground (h)

31. The appellant seeks time to carry out the recently approved listed building consent works, which will deal with most if not all of the matters raised in the listed building enforcement notice. Having discussed the appellant's proposed programme at the Hearing (Document 3), I consider it is reasonable in the circumstances to allow 52 weeks for the works to be completed, and I will extend the period in the notice accordingly. To that limited extent the appeal on ground (h) succeeds.

Conclusions

32. For the reasons given above I conclude that both appeals should fail. I shall vary the period in the notice from 20 weeks to 52 weeks in Appeal A and similarly in Appeal B. I shall correct the listed building enforcement notice for Appeal B, to delete the requirements in their entirety, and to replace them with a requirement to restore the building to its former state.
33. For the avoidance of doubt this requirement for restoration only relates to the allegation concerning the erection of a new single storey garden room extension at the rear of the property, and the replacement of the roof of the 19th century extension, and not to any other allegation or works in connection with this building.

34. It should be noted that Section 44(1) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended states that if, after the issue of a listed building enforcement notice, consent is granted under section 8(3) –
- (a) for the retention of any work to which the notice relates; or
 - (b) permitting the retention of works without compliance with some condition subject to which a previous listed building consent was granted,
- the notice shall cease to have effect in so far as it requires steps to be taken involving the works not being retained or, as the case may be, for complying with that condition.
35. Moreover, section 38(5) of the *Planning (Listed Buildings and Conservation Areas) Act 1990* states that the local planning authority may-(a) withdraw a listed building enforcement notice (without prejudice to their power to issue another); or (b) waive or relax any requirement of such a notice and, in particular, may extend the period specified in accordance with section 38(3), and the powers conferred by this subsection may be exercised whether or not the notice has taken effect. Thus, the Council have the power to extend the period if the appellant is making every endeavour to comply with the requirements, but for some reason outside her control is unable to comply with the varied period in the 2 notices precisely.

Decisions

Appeal A: APP/Q1445/F/09/2114221

36. I direct that the listed building enforcement notice be varied by the deletion of the period for compliance with the requirements of 20 weeks and its replacement with 52 weeks. Subject to this variation, I dismiss the appeal and uphold the listed building enforcement notice, and refuse listed building consent for the retention of the works carried out in contravention of section 9 of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended.

Appeal B: APP/Q1445/F/09/2118552

37. I direct that the listed building enforcement notice be corrected by the deletion of the requirements in their entirety and replaced with "To restore the building to its former state", and varied by the deletion of the period for compliance with the requirements of 20 weeks and its replacement with 52 weeks. Subject to this correction and variation, I dismiss the appeal and uphold the listed building enforcement notice, and refuse listed building consent for the retention of the works carried out in contravention of section 9 of the *Planning (Listed Buildings and Conservation Areas) Act 1990* as amended.

Stuart M Reid

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

David Collins	Appellant's agent.
Richard Phelps	Appellant's agent.
Ms Judy Bow	Appellant.

FOR THE LOCAL PLANNING AUTHORITY:

Miss Evelyn Baxter	Senior Planning Investigations Officer, Brighton & Hove City Council.
Geoff Bennett	Conservation Officer, Brighton & Hove City Council.

INTERESTED PERSONS:

Mick Hamer	Local resident.
Roger Amerina	Local resident.

DOCUMENTS PUT IN AT THE HEARING

- 1 Planning permission ref BH2010/00300 and listed building consent ref BH2010/00299 for development and works at the appeal site, and associated documentation including plans, put in by the appellant.
- 2 Appeal ref APP/L3815/F/06/2024418, put in by the Council.
- 3 Programme for proposed works including approvals and tender activity, put in by the appellant.
- 4 Three photographs of the appeal building flue, put in by Mick Hamer.

