The Planning Inspectorate

Appeal Decisions

Site visit made on 10 March 2017

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 06 April 2017

Appeal A - Ref: APP/X5210/X/16/3151139
58 Doughty Street, London WC1N 2JT

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Roger Keeling against the decision of the London Borough of Camden (the LPA).
- The application, Ref 2015/3880/P, dated 14 July 2015, was refused by notice dated 16 February 2016.
- 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 development is sought is: the placing of a planter in the rear garden of 58 Doughty Street.

Appeal B - Ref: APP/X5210/C/16/3151149
58 Doughty Street, London WC1N 2JT

- 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 appeal is made by Mr Roger Keeling against an enforcement notice (EN) issued by the London Borough of Camden (the LPA).
- The enforcement notice, numbered EN14/0844, was issued on 23 May 2016.
- The breach of planning control as alleged in the notice is: the unauthorised construction of a metal planting box subdividing the rear garden.
- The requirement of the notice is as follows: to permanently remove the metal planting box from the site.
- The period for compliance with the requirement is one month.
- The appeal is proceeding on grounds (a) (c) and (f) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended.

Appeal C - Ref: APP/X5210/F/16/3151146
58 Doughty Street, London WC1N 2JT

- The appeal is made under section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Roger Keeling against a listed building enforcement notice (LBEN) issued by the London Borough of Camden (the LPA)
- The enforcement notice, numbered EN14/0844, was issued on 19 April 2016.
- The contravention of listed building control alleged in the notice is: the construction of a metal planting box subdividing the rear garden as shown as an X on the attached plan and on the attached photograph.
- The requirement of the notice is as follows: to permanently remove the metal planting box from the site.
- The period for compliance with the requirement is one (1) month.
- The appeal is made on grounds (e) and (g) as set out in section 39(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended (PLBCAA)

Summary of decisions

1. Appeal A is dismissed.
2. Appeal B is dismissed.
3. Appeal C, the Listed Building Enforcement Notice is quashed.
4. See formal decisions below.

Background information

5. The Appeals property is a four storey, plus lower ground, mid-terraced, Georgian house located on the east side of the street. It was listed in Grade II on 14 May 1974, as part of a grouping with Nos 39-47 and 49-62 Doughty Street and lies within the Bloomsbury Conservation Area (BCA).

6. The rear garden of the property backs on to No 28 Brownlow Mews, immediately to the east. The Appellant owns both properties. The metal planter box, the subject of all three appeals, is positioned between two raised planting beds within the garden, on a pathway/steps which formed a link between the two parts of the garden. The planter box, (planted with yew bushes) together with the yew bushes within the raised beds, forms a continuous visual and physical barrier across the garden. The barrier was formed in order that Nos 58 and 28 could each have a private garden area.

7. There is a detailed planning history relating to the separation of the garden and none of this is in dispute. In 2012 an EN was issued by the LPA against a 2m high steel wire mesh plant support. This was removed and thus the Appellant complied with the EN. In consultation with the LPA the Appellant then erected a bamboo cane screen which included the use of a planter box on the pathway between the two parts of the garden.

8. Initially the LPA was of the view that this second screen did not constitute development as defined by s.55 of the Town and Country Planning Act 1990 (TCPA). But, following Counsel's opinion (commissioned by the neighbours at No 59), the LPA advised the Appellant that the bamboo screen was also considered to be development which required planning permission. The screen was removed, a yew hedge was planted and a wooden planter remained in place on the pathway/step between the two parts of the garden.

9. The LPA then advised that, in their view, the planter constituted development. The planter was removed and the current planter (with castor wheels) was placed in position, separating the two parts of the rear garden. The yew hedge remained in place and the application (2015/3880P) for a LDC was then submitted for the 'moveable' planter (now the subject to Appeal A).

10. The application was refused by the LPA on 16 February 2016 for the following reason: '*On the basis of the information provided the Council is not satisfied the planting box in the centre of the rear garden is not development requiring planning permission and consider, on the balance of probabilities, that the planting box is development under s.55 of The town and Country Planning Act 1990'.*

11. The decision notice for the LDC application also included an informative which stated '*1. The Council is minded to issue an enforcement notice against the retention of the planting box as it adversely affects the setting of a Listed Building'.* The LBEN and the EN (as set out above), dated 19 April 2016 and 23 May 2016 respectively, were then issued (now the subject of Appeals C and B).

12. The planting box is 1270mm wide, 800mm deep and 721mm high and has four caster wheels which in theory allow it to be moved. It has been designed to fit between the two raised beds in a position on the link/steps. It has been filled with earth and planted with yew bushes in line with others in the raised beds. Planning permission is not required for the planting of the yew bushes and other planting could be positioned across any part of the garden to No 58.

Appeal A

13. An appeal relating to a Certificate of Lawful Use or development (LDC) is confined to the narrow remit of reviewing the LPA's reasons for refusal and then deciding whether the reasons are, or are not, *'well-founded'*. The planning merits of the case do not fall to be considered. The burden of proof in an LDC case rests with the Appellant and the appropriate test for the evidence submitted is based upon the 'balance of probabilities'.

14. This LDC was applied for on the basis that development had not been carried out and that planning permission was not, therefore, required for the planter. It is contended that the works carried out do not constitute development under s.55 of the TCPA. The LPA refused the application on the basis that the evidence submitted in their view did not show, on the balance of probabilities, that the planter did not constitute development under s.55.

15. In support of the appeal it is emphasised that the LPA initially considered that a previous planter did not constitute development. It is also stated that although Counsel's opinion (as indicated above, sought by others and not the Council), concluded that the moveable planter was operational development, or another operation due to its permanence, whether a structure constitutes development must be considered on a case by case basis. It is on this basis that I have dealt with Appeal A.

16. The courts have held that operational development comprises activities which result in some physical alteration to the land, which has some degree of permanence (*Parkes v SoS for the Environment 1978).* Other cases, (*'Cardiff Ratings Authority v Guest Keen Baldwins Iron and Steel Co Ltd 1949 and Skerritts of Nottingham Ltd v SoS for the Environment Transport and the Regions 2009*), have identified three primary factors, or tests, as being relevant to whether or not operations required planning permission. The three factors are size, permanence and physical attachment.

17. In the Town and Country Planning Act 1990 (the Act), a '*building*' is defined so as to '*include any structure or erection and any part of a building as so defined, but does not include plant or other machinery comprised in a building'.* In the case of *'R V Swansea City ex p Elitestone 1993'* it was held that any object may be a building in planning law without being incorporated into the land as part of the realty.

18. In support of the LDC application the Appellant submitted a location plan; drawings of the planter box; photographs showing the empty planter box being moved into position; its wheels and written justification (dated 25/9/2014 and 18/9/2016) that relied upon the planting box not constituting development as defined under s55 of the Act. It was stressed that the planter is not fixed to the ground. The cases of *Cardiff Ratings and Skerritts* (see above) and *Hall Hunter Partnership v FSoS 2006* are relied upon. Reference is also made to the previous enforcement notice, against the sub-division of the garden by a steel mesh fence (EN11/1123) which did not require the planter box to be removed.

19. I acknowledge that the previous enforcement notice did not require the removal of the planter. However, I must assess the current situation and consider whether or not the Council's decision not to issue a LDC was, or was not well-founded. This is a different situation overall to the previous barrier or screening solution and must be considered afresh.

20. Applying the tests referred to in *'Cardiff Ratings'* and *'Skerritts',* I acknowledge that the planter is relatively small in *'size'*. However, although it is not a large feature, it has been specifically designed and located within a defined space. It did not need to be larger than it is, since it was meant to close the gap between the raised beds and thus to separate the two parts of the garden by also providing a volume of space in which to place the yew bushes. In effect the planter, in my view, can be described as being a small *'structure or erection'* which performs the function of a short length of *'wall'* or *'enclosure'.* It may well be small but it is clearly an effective element in the overall separation of the two parts of the garden.

21. Turning to the question of *'physical attachment',* the planter is not fixed to the ground and, in theory (having wheels) it should be readily moveable. However, it has been designed and is positioned between the stone planters and, could only be easily wheeled out of place (towards No 58) if emptied of soil and planting. Due to the steps being on the No 28 side, the planter would need to be lifted out of position from this part of the garden. Even if removed the intertwined branches of yew would make the operation somewhat difficult. Having seen the planter in-situ (with its planting in place), I agree with the Council and others that required to be removed it would have to be emptied of its soil and bushes and would, therefore, require a series of operations to be carried out, rather than just simply being pushed out of place. Also, despite the wheels and lack of attachment to the ground, its physical weight keeps it in place as though it is physically fixed in position.

22. With regard to the question of *'permanence'*, as indicated above, the planter was specifically designed to fill the gap between the stone planting beds. The reason for the planter and the planting works being carried out was to create a physical separation across the entire garden of No 58. This was done so that the two parts could be used privately by the occupants of the two properties. There is no evidence to suggest that the situation is be temporary and the submissions indicate that the No 58 is let or used separately from No 28. It is not unreasonable to assume that the appellant, as owner of both properties, intends that the separation of the garden should continue for some time. My view in this respect is reinforced by the many attempts that have been made to create a physical separation of the garden.

23. Having applied the relevant tests and considered the Council's and other submissions regarding the planning status of the planter, I consider that the planter, as a matter of fact and degree, does constitute development. It is also my view that the information provided by the Appellant is not sufficiently precise and unambiguous to demonstrate that 'on the balance of probabilities' the planter does not constitute development. I consider the opposite to be the case and that planning permission is required for the development as carried out. It follows that a LDC will not be issued and that Appeal A must fail.

Appeal B on ground (c)

24. To be successful on this ground of appeal it must be shown that there has not been a breach of planning control and that planning permission is not

required for the works; that a planning permission is in place or that the development carried constitutes permitted development.

25. I have concluded in Appeal A above that the planter as installed constitutes development and, therefore, planning permission is required. Permitted development rights do not apply and there is no planning permission in place. It follows that there has been a breach of planning control and thus Appeal B must fail on ground (c).

Appeal B on ground (a)

26. This ground of appeal is made on the basis that planning permission (PP) should to be granted for the construction and positioning of the metal planting box subdividing the rear garden.

27. The first reason for refusal in the PEN is that the unauthorised works have been carried out within the last 4 years. There is no dispute that this is the case. The second reason in the PEN is as follows: '*The planting box which sub-divides the original garden plot has a detrimental impact on the character and appearance of the host building, which is listed and the historic relationship between the main house and the mews property, contrary to policies CS14 (promoting high quality places and conserving our heritage) and DP25 (conserving Camden's heritage) of the Council's Local Development Framework 2010.*

28. The above policies are the most relevant development plan policies in these appeals and the decision must be made in accordance with the policies unless material considerations indicate otherwise. The policies are up-to-date with the National Planning Policy Framework (NPPF) which is a major material consideration. In reaching my decisions I have had regard to the NPPF and in particular to sections 7 (Requiring good design) and 12 (Conserving and enhancing the historic environment). I have also had regard to relevant sections of Planning Practice Guidance (PPG). Because the appeal property is listed in Grade II and within the BCA, I have had special regard and paid special attention to the duties set out in sections 66 (1) and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (PLBCAA).

29. The main issues are firstly, the effect of the development on the character and integrity; the setting and the special architectural and historic features of the listed building and, secondly, the effect on the character and appearance of the BCA.

30. The planter is relatively small in itself and as a free standing element (with planting) within the garden, it would not affect the character or integrity of the building or the character and appearance of the BCA. However, as referred to above, the appellant has carried out building operations in a specific location and which form a barrier, wall or enclosure, by sub-dividing the garden. The planter is fundamental to the formation of the barrier.

31. Having seen the appeal site, the mews building(s) and the surrounding houses and gardens, it is evident that the layout of this part of Bloomsbury is historically and architecturally significant. Although the garden to No 57 has been partially redeveloped by extending the corresponding mews building into the garden, other houses in the Terrace have similarly sized gardens to No 58 and these add to the overall significance of the properties and the part the gardens play in establishing both the character and appearance of the BCA and the character of the listed buildings themselves. The gardens also contribute most

positively to the setting of the listed heritage assets and any development, no matter how small, has the potential to impact upon both the character and settings of the listed buildings.

32. With their typical brick boundary walls and generally open nature, the gardens are important and special historic and architectural elements within this part of the BCA. The relationship of the houses to their gardens is an important contributing factor to the overall character and appearance of the BCA, as well as to the individual contributions which they make to each dwelling. My view in this respect is reinforced by the conclusion of a previous Inspector in a decision relating to No 30 Brownlow Mews. In that case the (APP/X5210/A/08/2061626) the Inspector referred to the garden and the status between house and mews buildings and that the vestige of this relationship is an integral part of the setting of the terrace and the character of the BCA. Any new built s or enclosures created within the gardens are bound to have some effect on both the individual listed buildings and on the BCA as a whole.

33. I acknowledge the need and desire for privacy between the different parts of the garden. However, by creating the sub-division in such a contrived manner, the two parts of the garden are perceived as separate entities, rather than as a cohesive and complementary whole to the listed building. In my view this is visually harmful to the overall integrity and character of No 58 and, therefore, also detrimental to its setting. As indicated above the gardens, in themselves are in my view, special historic and architectural features of these listed buildings.

34. In sub-dividing the garden, the physical and visual link between the two parts is lost. When viewed from the upper floors of No 58, the overall impression is one of separate areas of land associated with the two properties, rather than as one garden area specifically associated with the listed No 58. Overall, therefore, I consider that the works carried out are harmful to the setting of No 58 and contrary to policies CS14 and DP25 of the LDF, as well to the NPPF policies which seek to conserve and enhance the historic environment. It follows that the barrier as created (relying as it does on the planter position) neither preserves nor enhances the character or appearance of the BCA.

35. I also consider that the method of sub-division is a poor design and one which is not sustainable because of the harm it has caused to the character setting and features of the listed building. If allowed to remain in place it could set an unfortunate precedent by encouraging other applications to sub-divide the gardens in this part of the BCA, thereby exacerbating the detrimental effect on its character and appearance.

36. I acknowledge that the yew bushes themselves, or any other plants for that matter, do not constitute development. Indeed the existing yews, on either side of the opening, steps and planter, already provide effective screening. It would appear to me that there are various options by which additional planting alone could prevent direct views from one part of the garden to the other, whilst still keeping the principle of one garden and the physical link and general appearance of the pathway and steps.

37. However, this is not a matter for me to resolve. Under this ground I can only consider whether or not planning permission should be granted for what I have concluded is development within the rear garden of No 58. Clearly the Council would not have granted planning permission in the first instance and, based on my conclusions set out above, there can be no justification in granting planning permission at this appeal stage. Appeal B, on ground (a), therefore fails.

Appeal B on ground (f)

38. An appeal on this ground is made on the basis that the requirements of the notice are excessive and that lesser requirements would overcome the objections. However, having found that the planter is contrary to policy and harmful to the listed building and the BCA, I consider that the requirement to remove it is both necessary and justified. The carrying out of the requirement in the PEN would remedy the breach and the harm caused.

39. I have taken into consideration the suggested lesser steps of ensuring that the planting is kept to a height of no more than 2.5m and that the planter be painted. However, neither of these measures addresses the fundamental issue that the planter facilitates the sub-division of the garden in a manner, which I have identified above, causes harm to the listed building, its setting and the garden itself. I do not consider, therefore, that the proposed lesser steps would overcome the harm and Appeal B also fails on ground (f).

Appeal C

40. I have concluded above that the works carried out constitute development. However, I do not consider that listed building consent is required for such works. Even though I concluded that the planter was fixed in position by its own weight it is not physically fixed (by bolts, screws, fixings or any building materials) to any part of the listed building and was not in place prior to 1948. As a matter of fact and degree, I consider that it comprises a free-standing building (or erection or structure) within the curtilage of No 58.

41. Clearly, for the reasons set out above, planning permission is required for the works carried out. In considering whether to grant planning permission the duty set out in section 66(1) of the PLBCAA is the same as in section 16(2) when considering whether or not listed building consent should be granted. In this case, therefore, in considering section 66(1), I have had special regard to the desirability of preserving the building, its setting and its features of special architectural and historic interest.

42. But, in a situation such as this, a free-standing building or structure within the curtilage of a listed building does not require a separate application for LBC. If LBC is not required then there can have been no contravention of listed building control. It follows that a LBEN should not be issued in such circumstances. There has been a breach of planning control and the question of the effect on the listed building, its setting and its features of special architectural and historic interest LBC is considered under the S66 (1) duty in relation to whether or not planning permission should be granted.

43. I consider, therefore, I do not consider that that the LBEN is a valid notice and I shall quash it accordingly. It follows that the grounds pleaded in Appeal C do not need to be considered.

Other Matters

44. In reaching my decisions in all three appeals I have taken into account all of the representations made on behalf of the Appellant, by the Council and by interested persons. These include the full and detailed planning history; the initial grounds of appeal for each case; the detailed statements relating to each appeal; the comments on behalf of the Appellant on the 3rd party representations and all of the photographs and plans.

45. However, none of these carries sufficient weight to alter my conclusions on the LDC Appeal A; on the PEN Appeal B and that the LBEN should be quashed in Appeal C. Nor is any other factor of such significance so as to change my decisions.

Formal Decisions

46. Appeal A is dismissed and a Lawful Development Certificate is not issued.

47. Appeal B is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

48. In Appeal C the Listed Building Enforcement Notice is quashed.

Anthony J Wharton

Inspector