

335 WEST END LANE, LONDON, NW6 1RS

APPELLANT: KSU HOLDINGS LTD

ENFORCEMENT NOTICE: EN20/0537

GROUND OFS OF APPEAL

General

1. This is the Appellant's appeal against an enforcement notice dated 5 July 2022 reference EN20/0537 ("the Enforcement Notice"). The appeal proceeds on grounds (a), (f) and (g) of section 174 Town and Country Planning Act 1990 ("TCPA 1990").

The Enforcement Notice

2. The Enforcement Notice identifies the alleged breach of planning control as "*without planning permission: installation of a new shopfront, including retractable awning [sic] and balustrading to decked seating area to the forecourt*". The reasons for issuing the Enforcement Notice contend that the design and materials are inappropriate, leading to claimed harm to the host building, the parade it sits in, and the West End Green Conservation Area. The steps required relate to total removal of the alleged breach of planning control.

The decision to issue the Enforcement Notice

3. The Appellant accepts that in this appeal the decision to issue the Enforcement Notice is not, per se, within the Inspector's jurisdiction. However, that does not mean that the conduct of the LPA is irrelevant (a) in relation to the Grounds of Appeal; and/or (b) on the issue of costs.
4. The Appellant contends that the LPA has failed and/or refused to engage constructively with the Appellant, notwithstanding the Appellant paying for the Council's pre-action services, which it signally failed and/or refused to provide. This goes directly to the ground (f) appeal and whether the Council has behaved reasonably in conducting these proceedings.
5. The National Planning Policy Framework ("NPPF") para 59 emphasises that LPA's should act proportionately in responding to suspected breaches of planning control. PPG ID:17b-003-20140306 reinforces the importance of that consideration. PPG ID:17b-008-20140306 states that early engagement is vitally important to establish whether those

responsible for any breach are receptive to taking action to remedy the breach. That paragraph must apply, as appropriate, to taking *sufficient steps* to remedy the planning mischief that is said to have arisen.

6. Para 2.1.4 of the PINS procedural guide (“the Guide”) requires the parties to engage constructively and where appropriate consider alternatives like mediation. It notes that agreement can often be found without the need to make an appeal. The Appellant contends that is precisely this case. Use of the pre-application procedure (which the Appellant had paid for) is obviously less onerous for an LPA than taking up formal mediation, and accordingly in this case was an alternative option the Council ought to have engaged with.
7. Had agreement been reached under ground (f), no appeal would have been necessary. Similarly, para 2.2.2 of the Guide notes that all parties have a responsibility to behave reasonably. It is not easy to see how failing and/or refusing to perform a service the Appellant contracted for (namely pre-action advice with a view to amending and rendering acceptable any breach of planning control) could be considered reasonable behaviour when the alternative (as taken by the Council) involves enforcement proceedings potentially rendering the other party liable to later criminal prosecution under section 179 TCPA 1990.
8. The main chronology in refusing and/or failing to address the application for pre-application advice is as follows:
 - a. 7.4.21: Pre-application request submitted to LPA, with drawings highlighting the changes the Appellant considered could be made.
 - b. 15.4.21: The Appellant received confirmation that the payment for pre-application advice had been processed and accepted by the LPA.
 - c. 15.4.21: Email LPA to Appellant, acknowledging the documents provided and assigning pre-application reference 2021/1812/NEW.
 - d. 19.4.21: LPA acknowledges that position by email stating *“I will aim to look at your application in detail later this week and will contact you as soon as I have . . .”*
 - e. 18.3.22: LPA writes to Appellant, having failed to provide pre-application advice, requiring removal of the development subject of this appeal within 14 days. The letter (wrongly) states that *“the pre-enquiry [sic] has no bearing on the unauthorised development . . .”*
 - f. 18.3.22: Appellant email following up, having not heard from LPA on the application for pre-application advice, and asking for confirmation that the LPA letter of 18.3.22 was invalid, and that the matter could be progressed through determination of the application for advice and a planning application (based around that advice).
 - g. 12.4.22 (about 4 weeks later): LPA letter from Head of Planning stating that enforcement action is justified (necessarily in relation to the existing, not proposed, development), but accepting that (a) the pre-application advice was

not provided; (b) the level of service provided (or not provided) was not acceptable; and (c) offering a refund.

- h. 12.4.22: LPA email from finance department offering refund.
 - i. 12.4.22: Appellant email to LPA noting that Appellant is taking legal advice in relation to the failure to provide pre-application advice despite payment; but proposing to proceed with the pre-application meeting in order that a satisfactory planning proposal could be agreed.
 - j. 12.4.22: LPA email (Head of Planning) to Appellant stating that the appointed officer will provide written pre-application advice *“on the proposal as submitted and make suggestions about how it can be brought in line with policy if there is a conflict and/or clear where we do not think there is a solution”*.
 - k. 19.4.22: Appellant email to LPA confirming that Appellant wishes to proceed with the pre-application advice application, and inviting the LPA to confirm that it would not take further enforcement steps in the meantime.
 - l. 6.5.22 LPA email (Head of Planning) to Appellant, again confirming that pre-application advice will be provided (as well as refund), but again (wrongly) asserting there is no connection between the unauthorised development and the prospect of it being made acceptable through pre-application advice.
 - m. 5.7.22: Enforcement Notice issued.
 - n. As at 15.8.22 no pre-application advice received to date.
9. Thus, notwithstanding the Council’s repeated assurances above that pre-application advice would be provided that was not done. Instead, the Council moved directly to formal enforcement processes. That was inappropriate and unreasonable.

Ground (a) - planning permission ought to be granted

10. The deemed planning appeal does not conflict with the local plan taken as a whole. The development enhances the character and appearance of the main building, the parade of which it forms a part, and the West End Green Conservation Area. The relevant local plan policies, however, do not *require* enhancement: They are satisfied by preservation of the area, and use of high quality materials that complement the local quality (see policies D1, D2 and D3 of the Camden Local Plan 2017).
11. It is acknowledged that in the appeal decision of 17 November 2020 (ref: APP/X5210/W/20/3249374) the Appeal Planning Officer (“APO”) found harms in those respects and the inspector did not disagree; but those harms were based on a series of planning judgments which this Inspector, while taking into account the previous views, is free to depart from. The Inspector is respectfully invited to take a different view to that of the APO for the reasons set out in the Appellant’s appeal statement in that appeal (“the 2020 Appeal Statement”) which is sent with this notice of appeal.
12. Moreover, the APO erred in principle in relation to the approach to a number of identified developments in the conservation area – rejecting entirely their relevance

based on an absence of *proven* express planning permission. The force of the Appellant's point was that those changes – which were referable to a number of key properties in the locality - reflected the local character and that of the conservation area, and it was a matter for the LPA to show that it was enforcing against those developments. Otherwise there was no reason to think those developments would not remain in place (and indeed that they did not enhance (or preserve) either elements of their locality or the conservation area, based on what had existed previously). This was an important and recurring error in the APO's approach (see, for example, paras 14, 17 and 20 of the decision letter).

13. This mistaken (and, at all events, not binding) approach was particularly relevant in relation to No 337 West End Land, 'Alexanders' which on the material supplied by the Appellant was (at least) immune from planning enforcement. A similar situation pertains to the very next property at No 339. No 331 was also relevant for the reasons set out in the 2020 Appeal Statement at para 5.6. The 2020 Appeal Statement also referred, more broadly, to a number of other relevant properties within the conservation area.
14. The previous inspector's approach meant that the characteristics and character of these two immediately adjacent properties, and another property nearby, were left wholly out of account in the substantive analysis. Clearly, taking them into account provides a very different context for the determination of this appeal.

Ground (f) – 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 or, as the case may be, to remedy any injury to amenity which has been caused by any such breach

15. The Enforcement Notice does not allege that the purpose provided by section 173(4)(a) is in play. The Enforcement Notice follows a refusal of the previous appeal. The Appellant therefore proceeds on the basis that the purpose for which the Enforcement Notice was served was to remedy injury to amenity.
16. In any case, the Enforcement Notice exceeded what was necessary. This could have been demonstrated had the Council engaged with the pre-action application for advice.
17. The Appellant submits with these Grounds of Appeal the drawings and plans supporting the proposed revised scheme, which it will be seen meet the concerns previously identified.
18. In particular, the revisions:
 - a. Altered the signage to reduce its size;
 - b. Changed the size and style of the front glazing/shop front;

- c. Changed the materials from entire glazing to an aluminium framed shop front;
and
 - d. Increased the distance between the slats to 95mm.
19. The Inspector is therefore specifically asked to consider those drawings and plans and to conclude that they present (should the ground (a) appeal be dismissed) a policy compliant and appropriate resolution of the planning mischief identified in the Enforcement Notice.
20. In considering ground (f) in particular, it is important to bear in mind the Appellant's rights under the Human Rights Act 1998 to the protection of property; as well as the service of the economic dimension of sustainability, which is furthered by allowing the business to continue to trade in its current configuration, and without incurring significant additional expenditure and loss of income, in this newly post-COVID era.
21. All of these considerations point to allowing the ground (f) appeal.

Ground (g) – any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed

22. The notice given is only 3 months. That falls considerably short of what should reasonably be allowed. In order to source the necessary materials and labour for the substantial changes required by the enforcement notice (in its full terms) the Appellant considers that a period of 12 months is reasonable. To take one example, to replace the windows will involve significant materials and labour, sourcing replacement windows can require, in the current circumstances and climate, a period of 3 – 6 months for those windows to be fabricated and provided. The removal of the existing windows and their replacement by the new windows will take further time.

WAYNE BEGLAN

CORNERSTONE BARRISTERS