



## Appeal Decisions

Inquiry held on 9 February and 16, 17, 18, 19 and 25 March 2021

Site visit made on 23 March 2021

**by Zoë Franks Solicitor**

**an Inspector appointed by the Secretary of State**

**Decision date: 12 May 2021**

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### **Appeal A Ref: APP/C5690/W/20/3245112**

#### **Our Lady and St Philip Neri Roman Catholic School, 208 Sydenham Road, London, SE26 5SE**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
  - The appeal is made by The Roman Catholic Archdiocese of Southwark against the decision of the Council of the London Borough of Lewisham.
  - The application Ref DC/19/111793, dated 17 May 2019, was refused by notice dated 25 October 2019.
  - The application sought planning permission for demolition and construction of three storey school including a nursery, a multi-function sports court and a running track, together with the creation of a formal pedestrian access from Home Park, the provision of cycle and scooter spaces, refuse storage and associated landscaping works to provide the amalgamation of the Infant and Junior Schools without complying with conditions 2 and 8 attached to planning permission Ref DC/16/096041, dated 7 October 2016.
  - The conditions in dispute are Nos 2 and 8 which state that: the development shall be carried out strictly in accordance with the approved application plans, drawings and documents; and that no development above ground level shall commence on site until a detailed schedule and specification, including samples of all external materials and finished including bricks, cladding, windows and external doors and roof coverings to be used on the building have been submitted to and approved in writing by the local planning authority.
  - The reasons given for the conditions are: No.2 To ensure that the development is carried out in accordance with the approved documents, plans and drawings submitted with the application and is acceptable to the local planning authority; and No.8 to ensure that the design is delivered in accordance with the details submitted and assessed so that the development achieves the necessary high standard and detailing in accordance with Policies 15 High quality design for Lewisham of the Core Strategy (June 2011) and Development Management Local Plan (November 2014) DM Policy 30 Urban design and local character.
  - **Summary of Decision: Appeal dismissed.**
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### **Appeal B Ref: APP/C5690/C/19/3242363**

#### **Our Lady and St Philip Neri Roman Catholic School, 208 Sydenham Road, London, SE26 5SE**

- 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 The Roman Catholic Archdiocese of Southwark against an enforcement notice issued by the Council of the London Borough of Lewisham.
  - The enforcement notice, numbered DC/19/111793, was issued on 25 October 2019.
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- The breach of planning control alleged in the notice is the construction of a primary school not in accordance with conditions attached to planning permission DC/16/096041 granted on 7 October 2016.
- The development to which the permission relates is the demolition and construction of three storey school including a nursery, a multi-function sports court and a running track, together with the creation of a formal pedestrian access from Home Park, the provision of cycle and scooter spaces, refuse storage and associated landscaping works to provide the amalgamation of the Infant and Junior Schools. The conditions in question are Nos 2 and 8 which state that: the development shall be carried out strictly in accordance with the approved application plans, drawings and documents; and that no development above ground level shall commence on site until a detailed schedule and specification, including samples of all external materials and finished including bricks, cladding, windows and external doors and roof coverings to be used on the building have been submitted to and approved in writing by the local planning authority.
- The requirements of the notice are: **OPTION A** 1) Construct the school in accordance with the approved 2016 scheme (DC16/096041) dated 7 October 2016 as shown on the following approved plans: PL\_003, PL\_004, PL\_005, PL\_006, PL\_007, PL\_104, PL\_105, PL\_106, PL\_204, PL\_301, PL\_302, PL\_401, L-110 Rev A (Planting Plan), L-111 Rev C, C100 Rev P, C101 Rev P1, Detailed Data Network Maps, Desk Study Report, Landscape Design, Ecological Appraisal and Initial Bat Inspection, Energy Strategy Statement Phase 3, Arboricultural Impact Assessment, Design & Access Statement, Acoustic Implications On Design, BREEAM2014 Education Pre-assessment report Rev A, Overheating Assessment, Bat Survey Report, Daylight Assessment Stage 2, Public Transport & Local Services Analysis Stage 2 (received 30th March 2016); PL\_501 Rev A, PL\_502 Rev A, PL\_503 (Received 20th May 2016) PL\_505 Rev A, PL\_506 Rev A (received 2nd September 2016); PL\_507, PL\_102 Rev A, PL\_103 Rev A, PL\_201 Rev B, PL\_202 Rev B, PL\_203 Rev B (received 9th September 2016); and Transport Assessment Addendum (EAS, September 2016), L-110 Rev E (Landscape External Works Plan); L-112 Rev C; PL\_508 (received 12th September 2016); or **OPTION B** 2) Carry out the following works to the Sydenham Road Elevation (northern elevation): Cladding a) Remove the cladding from the elevation in its entirety. b) Install a concrete composite cladding panel system of a light concrete colour that achieves an appearance and quality equivalent to that in the approved Design and Access Statement (Appearance - Section 5.6, pages 70, 72, 73 and 76) dated March 2016 prepared by Pollard Thomas Edwards and approved 'Proposed North and West Elevations' (Drawing No: PL\_201 Rev B) attached to DC/16/096041 as per Appendix EN2. Ventilation Grills c) Remove the ventilation grills at ground, first and second floor level and as identified A - G (inclusive) in the image in Appendix EN4 External Lighting d) remove the external lighting identified A-C (inclusive) in the image in Appendix EN5 Windows e) Remove the windows identified A-V (inclusive) as redlined in the image in Appendix EN6. f) Install aluminium windows without glazing bars (with coloured reveals at ground floor level) for windows A-V inclusive that achieve an appearance and quality equivalent to those in the approved Design and Access Statement (Appearance - Section 5.6, pages 69, 72, 75 & 76 Appendix EN3) dated March 2016, prepared by Pollard Thomas Edwards and approved 'Proposed North and West Elevations' (Drawing No: PL\_201 Rev B) and approved 'Proposed Street Elevations' (Drawing No: PL\_203 Rev B) attached to DC/16/096041 as per Appendix EN7. Metal Fins g) Install sequenced metal fins to the Hall Building and plant room as shown in proposed plans; 'Proposed Sydenham Road & Fairlawn Park Elevations' (Drawing No: 1485-IID-00-00-DR-A-8103), 'Proposed Playground & Hall Elevations' (Drawing No: 1485-IID-00-00-DR-A-8104), 'Condition 8 - Materials- Phase II - Details' (Drawing No: 1485-IID-00-00-DR-A-8100), 'Steel Fin Layout Plan with the Colours RAL 3004, RAL 8003, RAL 8007' (Drawing Number:FQ016-041 DGL 01 XX DR A 9210 Rev P2) submitted with application DC/19/111793 as per Appendix EN8; 3) Carry out the following works to the Playground Elevation (southern elevation): Cladding i) Remove the cladding from the elevation in its entirety j) Install a concrete composite cladding panel system of a light concrete colour that achieves an appearance and quality equivalent to that in the approved Design and Access Statement (Appearance - Section 5.6, pages 70, 71, 73, 74 & 79 Appendix EN3) dated March

2016, prepared by Pollard Thomas Edwards and approved 'Proposed South and East Elevations' (Drawing No: PL\_202 Rev B) attached to DC/16/096041 in accordance with the images in Appendix EN10 External Lighting k) Remove the external lighting identified A-D (inclusive) in the image in Appendix EN11 Windows l) Remove the windows identified A-L (inclusive) as redlined in the image in Appendix EN12. m) Install aluminium windows without glazing bars for windows A-L inclusive that achieve an appearance and quality equivalent to those in the approved the Design and Access Statement (Appearance - Section 5.6, pages 69, 71, 74 & 79 Appendix EN3) dated March 2016, prepared by Pollard Thomas Edwards and approved 'Proposed South and East Elevations' (Drawing No: PL\_202 Rev B) and approved 'Proposed Street Elevations' (Drawing No: PL\_203 Rev B) attached to DC/16/096041 as per Appendix EN13 Plant Room Doors n) Install doors to the plant room 'Proposed Sydenham Road & Fairlawn Park Elevations' (Drawing No: 1485-IID-00-00-DR-A-8103) and 'Proposed Playground & Hall Elevations with colour RAL 9023 (Drawing No: 1485-IID-00-00-DR-A-8104) submitted with application DC/19/111793 as per Appendix EN14 4) Carry out the following works to the Fairview Park Elevation (western elevation): Cladding o) Remove the cladding from the elevation in its entirety p) Install a concrete composite cladding panel system of a light concrete colour that achieves an appearance and quality equivalent to that in the approved Design and Access Statement (Appearance - Section 5.6, pages 70, 72, 76 & 77 Appendix EN3) dated March 2016, prepared by Pollard Thomas Edwards and approved 'Proposed North and West Elevations' (Drawing No: PL\_201 Rev B) attached to DC/16/096041 as per Appendix EN15 Stepped Roof Profile Element q) Remove the projecting roof element as shown on the image and to accord with approved 'Proposed North and West Elevations' (Drawing No: PL\_201 Rev B) Appendix EN16 Ventilation Grills r) Remove the ventilation grills identified A-B (inclusive) in the image in Appendix EN16 External Lighting s) Remove the external lighting identified A-B (inclusive) in the image Appendix EN18 Guttering and Drainpipes t) Remove the guttering identified as 'A' and drainpipe identified as 'B' in the image in Appendix EN19. u) Install guttering, drainpipes and it's screening that achieve a screened appearance equivalent to that in the approved the Design and Access Statement (Appearance - Section 5.6, pages 69, 72, 76 & 77 dated March 2016, prepared by Pollard Thomas Edwards attached to DC/16/096041, in accordance with the specific images in pages 69,76 and 77 of Appendix EN20 Windows v) Remove the windows identified A-N (inclusive) as redlined in the image in Appendix EN21. w) Install aluminium windows without glazing bars for windows A-N inclusive that achieve an appearance and quality equivalent to those in the approved Design and Access Statement (Appearance - Section 5.6, pages 69, 72, 76 & 77 Appendix EN3) dated March 2016, prepared by Pollard Thomas Edwards and 'Proposed North and West Elevations' (Drawing No: PL\_201 Revision B) and approved 'Proposed Street Elevations' (Drawing No: PL\_203 Revision B) attached to DC/16/096041 as per Appendix EN22; 5) Remove all materials, debris, waste and equipment resulting from compliance with the requirements above.

- The period for compliance with the requirements is 21 months for Option A and 9 months for Option B.
  - The appeal is proceeding on the grounds set out in section 174(2)(a), (f) and (g) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
  - **Summary of Decision: Notice varied, appeal dismissed and planning permission refused.**
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## Application for costs

1. At the Inquiry an application for costs was made by the appellant against the Council. This application will be the subject of a separate Decision.

## **Preliminary Matter**

2. Appeal A is considered first as its outcome has implications for Appeal B and the enforcement notice.

## **Relevant Planning History**

3. The detailed planning history is set out in the Statement of Common Ground. In brief these are:
  - i) On 7 October 2016 planning permission reference DC/16/096041 was approved for the demolition of the existing buildings and construction of a three storey school building on the site ("the Original Permission").
  - ii) On 25 October 2019 planning permission was refused that proposed to vary Condition 2 (relating to the approved plans) and Condition 8 (relating to the approval of samples of materials to be used) in connection with the Original Permission which would have permitted external changes to the development, and the reasons for refusal related to the effect of the development on the character and the appearance of the area and the level of internal noise caused by the openable windows to Sydenham Road, and is the subject of Appeal A.
  - iii) An enforcement notice was issued on 25 October 2019 and is the subject of Appeal B.

## **The appeal site and its surroundings**

4. The site is on Sydenham Road, a wide, busy road within an established residential area with nearby local shopping facilities, church, library and park. The outside of the building is unfinished but it is occupied by Our Lady and St Philip Neri Primary School ('OLSPN'). The eastern boundary of the site adjoins Home Park with the southern and western boundaries adjoining residential areas.

## **Appeal A**

5. The second reason for refusal, relating to the internal noise levels in the building, has fallen away and was not pursued during the appeal.

### *Background and Main Issue*

6. The Original Permission was granted for the demolition of the existing building on the site and construction of a three-storey school. Section 73 of the 1990 Act allows the grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted. Appeal A seeks permission to carry out the development without complying with the original conditions 2 and 8 which require that the development be built in accordance with the approved plans and documents, and that samples of all external materials to be used be approved. The application made under section 73 was to replace the specified drawings in the original condition 2 and amend the wording of original condition 8 to require the development to be built in accordance with the approved plans and schedule of materials ("the s73 Scheme"). The main issue in Appeal A is the effect that the s73 Scheme would have on the character and appearance of the area, and therefore whether the original conditions as appealed are unnecessary.

7. The main differences between the s73 Scheme and the Original Permission (which was deemed acceptable by the Council) are:
  - i) The external wall finish – the s73 Scheme proposes the use of Wetherby render in a grey colour compared to a panel cladding system as permitted under the Original Permission;
  - ii) The fenestration – the s73 Scheme proposes the retention of the windows as installed which are a different size, configuration and type of window frames, but which would be sprayed a dark grey colour over the existing white UPVC;
  - iii) The roof profile, guttering and downpipes – the s73 Scheme provides for an alternative roof profile and associated drainage arrangements including guttering and downpipes on the western elevation of the building adjoining Fairlawn Park; and
  - iv) Lighting and ventilation grilles – these are provided on the Sydenham Road elevation in the s73 Scheme but not in the Original Permission
8. The appellant's case is that the s73 Scheme will provide an acceptable development which does not cause harm to the character and appearance of the area, and is not in conflict with policy. The site is prominent and the development is significantly larger, in terms of height, scale and massing than most of the other buildings in the vicinity. The development is immediately adjacent to the pavement on Sydenham Road.

*External wall finish*

9. Due to the overall size of the development, and particularly the large visible expanses of the elevations to Sydenham Road and Fairlawn Park, the material used on the external walls will be of crucial importance in the appearance of the building and its effect on the character and appearance of the area. The Original Permission did not provide for a brick finish or a more traditional render as predominantly seen on the other buildings in the locality, but instead a panel cladding system. The Wetherby render proposed under the s73 Scheme is not a panel system, and I was able to see it as used on a building during the site visit to Torridon School ('Torridon'). Whilst the cladding used at Torridon is coloured white and orange, and therefore not the same grey colour as proposed under the s73 Scheme, it was useful to see the material as used in a school context.
10. The Wetherby render on the building at Torridon School looked modern with extremely even colouring. The Wetherby render appears uniformly textured close up, and I was also able to see the even texture on the sample that I was shown during the site visit at OLSPN, but it is not visible from more than a few meters away. Certainly when viewing the material used at Torridon, the facades appeared flat and smooth and the texture was not visible from a short distance away, and the same was true of the sample panel I saw at OLSPN. At Torridon, the render was applied without any gaps or joints giving a general impression of a smooth, flat and unbroken surface with no variation in tone or colour (other than between the white and orange elements). I am not aware of when the render was installed at Torridon but there was some discolouration, particularly around the edges of fittings within the facades but also visible across some larger flat areas. The use of the Wetherby render at Torridon



gave an overall impression of a block structure with fairly crisp edges and a flat surface. The rendered element of Torridon is not fully visible from the publicly accessed areas and highway and it is not use on a prominent street-side location as proposed at the appeal site.

11. It became apparent during the course of the appeal (following the service of the appellant's rebuttal evidence), that the appellant is seeking to remove the current James Hardie panels in their entirety and install the Wetherby Epsitec Render system in full, including the secondary support system and carrier boards. This means that the James Hardie panels and current joints would no longer remain on the development, and the appellant also made an alternative proposal to provide the appearance of blockwork. The proposal is for a grid of render feature channels, provided by 12mm deep joints at ground floor, to create the panel effect at street level and flatter, 1-2mm taped joints on the upper two storeys. The appellant's evidence was that these two types of joints together would create the appearance of blockwork across the building.
12. The appellant's case is that the upper storeys would be further away from anyone viewing the elevations and would therefore appear to have the same joints (and therefore grid structure) as provided at ground floor level. However, the northern elevation in particular can be seen in its entirety from various points each way along Sydenham Road, from Sunnysdene Street and from the buildings opposite. It is likely that the differences in the joints would be easily recognisable, particularly where the two types of joints meet each other. This would look incongruous and clumsy when reading that elevation as a whole and, would actually only accentuate the fact that it is not truly constructed of blockwork and that the joints have only been provided for cosmetic purposes. In addition, the arrangement of the joint lines, as shown on the drawings submitted with the s73 Scheme, were predicated on using at least some of the existing joints provided by the James Hardie panels. Whilst some alterations were proposed, this meant that there were some uneasy arrangements remaining from the 'as built' scheme in relation to the joints and the junctions with each other and the window openings which in places are unsymmetrical and clumsy and which would add to the harm caused by the appearance of the proposed render.
13. The external materials and finish of the elevations, including the arrangement of joint lines, is of great importance in the appearance of the development and its effect on the area. The use of the Wetherby render, which would not appear as a panel cladding system, and would have a uniform colour and appearance from more than a few metres away with no variation, would not be appropriate on the prominent corner site on a busy road. The site is highly visible, and the building is large in terms of its scale and massing. The use of the proposed render, which would not appear as a high quality material if used at such volume in this location, would cause the building to appear overly prominent and large, and cause material harm to the street scene.

#### *Fenestration*

14. The main proposed change to the existing fenestration in the s73 Scheme is to spray the frames dark grey to tone down the contrast, particularly against the proposed grey render. The proposal also replaces the blue spandrel panels with louvre panels but does not replace any of the existing windows on the northern or western elevations so that the size and configuration remains as

currently installed (although the fenestration is reduced and broken up on the southern elevation and the blue spandrel panels would also be removed).

15. The windows as fitted were not in accordance with the Original Permission and are different in terms of size, configuration, placement, depth within the elevations and design. The windows installed on the first floor of the northern elevation do not align fully with the ground floor window openings which creates an awkward and unsymmetrical arrangement and adds to the harm caused to the street scene. In addition, the design of the windows, with wider frames and subdivisions, adds to the appearance of clutter when taken with the other elements on the elevations. The windows under the s73 Scheme would remain in the same plane which contributes to the very flat appearance on the northern façade in particular (rather than providing a feeling of depth as intended by the Original Scheme) and which does not provide variety or help to breakdown the mass of the building when viewed from Sydenham Road and causes harm.
16. One of the existing frames has been sprayed grey and was less conspicuous than the original white UPVC which would blend better with a grey façade reducing the visual prominence of the windows. It was not clear from the evidence how often the frames would need to be resprayed, and it was evident from my observation during the site visit that the grey paint was starting to come away on this window which the appellants stated had been sprayed around 3 years ago. It would be possible to impose a condition to provide that the windows were resprayed regularly to mitigate the harm caused by the colour of the frames. However, this would not alter the size, configuration or placement of the fenestration which as proposed would still cause material harm to the character and appearance of the area, particularly in relation to the elevation on Sydenham Road.

#### *Roof profile, guttering and downpipes*

17. The western elevation facing Fairlawn Park is prominent as it is located on the corner with Sydenham Road and readily visible. The s73 application proposes that the roof element over the recess is removed which would help to reduce the massing of the building at that location. An additional drainpipe on this elevation is proposed and, whilst this would look different from the scheme under the Original Permission, not all of its elements would be harmful to the street scene. The roof profile, guttering and downpipes were not specifically referred to in the reason for refusal but design (and its effect on the character and appearance of the area) needs to be read as a whole and these elements were fully explored through the evidence and during the inquiry. The clumsy roof profile including the north-west corner and the pitched roof and return wall in the recess, which would be highly visible, would look clumsy and add to the feeling of bulk which would cause harm.

#### *Lighting and ventilation grills*

18. During the inquiry, the parties seemed to be in agreement regarding external lighting and this could be secured by way of a condition. The s73 scheme proposes horizontal ventilation grilles above all the ground floor windows which, whilst introducing additional fittings onto the front elevation, would provide a consistency and symmetry with the windows and would not cause additional harm to the street scene.

*Effect on character and appearance of the area*

19. For the reasons set out above, the proposals would cause material harm to the character and appearance of the area which is in conflict with development plan policies relating to the attainment of a high standard of design. The appeal should therefore be dismissed unless there are any material considerations which indicate otherwise.

*Material Considerations*

20. The appellant has argued that consideration must be had to the best interests of children in relation to the existing and future pupils of the school who may be disrupted by works to the building (including by the potential permanent closure of the school). It was more particularly raised in many of the representations made by interested parties including staff, parents, and governors and in the relayed comments from pupils. The best interests of children is a primary consideration, but it must be weighed against other planning considerations including any negative impact on the wider community and any conflict with the development plan. In this case, there is not just one child who will be affected by the outcome but many pupils, both present and future for as long as the building is used as a school.
21. The representations made clear that many existing pupils are already affected by the fact that the school building is incomplete and that the ongoing uncertainty, particularly following the previous year of school closures due to the Coronavirus Pandemic, is adversely affecting the pupils' well-being and more disruption is therefore not in their best interests. These are clearly material considerations in this decision and must be weighed against the conflict with the development plan and any other considerations. However, it is in the short and long term interests of the community as a whole, and of the current and future pupils, that the school is of a good design which is not in conflict with the development plan and the Framework.
22. Whatever the outcome in this appeal, the building is not finished and further works, with some associated disruption and uncertainty, will be required. This is notwithstanding that the appellant's case is that the s73 scheme could be completed without disrupting the pupils' learning (even though the s73 scheme now requires the removal of the James Hardie panels and additional works to the windowsills). There are several options that the appellant and school can consider when deciding on how best to proceed and how to complete the building without adversely disrupting the pupils learning. These include programming the works over several years' worth of school holidays, or by decanting either part or the whole of the school population for a shorter period of time. The appellant raised the possibility of permanent closure of the school but did not present compelling evidence as to why this would be the case, or indeed why the school would need to fully close or decant for a whole academic year. There was no suggestion that pupils would not be able to access educational facilities more generally.
23. The Public Sector and Equality Duty also applies as the decision will impact on a faith school which raises equalities issues. However, compelling evidence was not presented to show that the school would likely be unable to continue to operate as a Roman Catholic school or that this would impact on the sufficient choice of school places available to meet the needs of existing and new communities and I therefore afford limited weight to this consideration.



24. It was also put by the appellants that the s73 scheme was a proportionate solution in terms of cost. Whilst it may be one such proportionate solution, it was not suggested that it would be the only such solution. I have considered this factor but it does not outweigh the harm which would be caused by the proposal. As it is now proposed that the existing cladding would be completely removed and replaced in the s73 scheme, the main environmental and sustainability factor remaining to be considered is in relation to the replacement of the windows. Detailed evidence regarding these issues (including costs) were not presented during the course of the appeal, and whilst I accept that there would seem on the face of it to be a benefit in these terms in retaining the existing windows, it was not made clear how this would compare to the costs and environmental factors of having to respray the frames regularly and install the deeper sills and aluminium trims. I therefore afford little weight overall to this as material consideration. In addition, whilst it was agreed by the main parties that the additional PV panels provided by the s73 Scheme would be an advantage the appellant did not argue that it should be accorded significant weight overall.
25. The harm caused to the character and appearance of the area by the s73 Scheme would be significant and would not be outweighed by consideration of the best interests of children taken alone or in conjunction with the other considerations as set out above.

#### *Conclusion on Appeal A*

26. For the reasons set out above, the s73 scheme proposals would cause material harm to the character and appearance of the area which would be contrary to Development Management Local Plan Policy 30 and Core Strategy Policy 15, Policy D3 of the London Plan 2021 which are intended to secure high quality design and respond to and enhance the local area, and paragraph 127 of the National Planning Policy Framework which is also a material consideration. The other considerations do not outweigh this conflict with the development plan and policy and the appeal is therefore dismissed.

#### **Appeal B**

##### *The enforcement notice*

27. The appellant has argued that the notice is a nullity because the steps required by it are not sufficiently precise and would necessitate the later approval of details which is contrary to caselaw.
28. Option A is clear and precise and requires the breach to be remedied by making the development comply with the terms of the Original Permission, pursuant to section 173(4)(a) of the Act. The terms of the Original Permission include the approved plans and drawings so that any issues around buildability could be dealt with as minor material amendments. The Council's case was unclear regarding whether the existing building would need to be completely demolished in order to comply with Option A, but it is nevertheless an appropriate requirement where the allegation is of the construction of the school not in accordance with the conditions attached to the planning permission (including the approved plans). However, Option A will need to be corrected to remove the reference to the current approved plans.

29. Option B includes several requirements for remedial work which “achieves an appearance and quality equivalent to that in the approved Design and Access Statement”<sup>1</sup> The Design and Access Statement is referenced as an approved document on the Original Permission but cannot be read as a detailed plan, and indeed was not produced as such. The requirements that refer to the Design and Access Statement, as set out above, do not therefore tell the recipient of the notice fairly in detail what they must do to remedy the breach caused by the matters alleged. Option B should not therefore remain in the notice and should be deleted. That does not mean that whole notice is necessarily a nullity as Option A (as corrected as set out above) is a valid requirement and will remain.
30. The Council applied to vary the notice to insert Options B1 and C which both reflect the scheme proposed by Mr Hayhurst. The Council’s case is that these amendments fell within the original requirements as set out in Option B and were within the range of works available to secure compliance with the notice as originally drafted. The Council seeks to vary the notice by inserting Option B1 and C as a lesser alternative to Option A. They state that the alternative proposals are potentially within the scope of the EN and can be inserted into the notice without causing injustice. The appellant opposed the variation of the notice in this way and stated that it would cause injustice to them.
31. The Act<sup>2</sup> provides that the purpose of an enforcement notice is either to remedy the breach of planning control or to remedy any injury to amenity which has been caused by the breach. Remedying any injury to amenity caused by the breach can often be achieved by “under-enforcing”<sup>3</sup> and by not fully remedying the breach. The notice in this case states that the ‘Council seeks to remedy the breach by making the development comply with the terms of the planning permission and by remedying the injury to amenity which has been caused by the breach.’ However, it is not possible to do both of these things at the same time or by undertaking the requirements in Option B or Option B1 or C as proposed as they would not make the development comply with the terms of the Original Permission.
32. The purpose of Option A, as set out above and pursuant to section 174(4)(a) of the Act, was to remedy the breach by making the development comply with the terms (including conditions) of any planning permission which has been granted in respect of the land. This is not an under-enforcement and the purpose of the notice is therefore more than to simply remedy an injury to amenity. In contrast, Options B and proposed Options B1 and C, seek to remedy the injury to amenity by attempting to bring the building back within the design intent of the Original Permission. The proposals under Option B1 and Option C were discussed in great detail at the Inquiry but they do not ultimately remedy the breach of planning control.
33. The development that would be permitted by compliance with the proposed requirements in Option B1 or Option C would be materially different from the building permitted by the Original Permission. If the appellant wished to make these changes to the development outside of this appeal, they would require a new permission (whether by an application to vary conditions pursuant to

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<sup>1</sup> For example, Requirements: 2) b), f) and h); 3) j) and m); and 4) p), u) and w)

<sup>2</sup> Section 173(4)

<sup>3</sup> When all of the requirements of the notice have been complied with planning permission shall be treated as having been granted pursuant to section 173(11) of the Act

section 73 or a new detailed application). Any such works undertaken without a new permission would be a breach of planning control. The appellant in fact opposed this variation and was not seeking the ability to implement either of these options.

34. If the notice were varied to include Option B1 or Option C, and all of the requirements were complied with, planning permission would be treated as having been granted (pursuant to section 173(11) of the Act) without any conditions attached. The Original Permission had several continuing conditions, regarding cycle parking spaces, boundary treatments, solar panels, noise levels, bird and bat boxes, the School Travel Plan and the use of the hall for community purposes. Indeed, it was accepted by the Council and appellant that these conditions, in addition to others in relation to construction management, land contamination, the living roof and external lighting would meet the statutory and policy tests and should be included on the permission granted for the section 73 Scheme if successful, and I agree.
35. The loss of these ongoing controls, secured by conditions on the Original Permission and accepted as appropriate in Appeal A, would cause an injustice to other parties. In addition, whilst interested parties have had the opportunity to participate in the appeal process, they have been deprived of a full consultation in relation to the schemes as proposed by Options B1 and C and which are substantially different from the scheme permitted by the Original Permission, especially when considered without any conditions attached. This would not be fair, and would be contrary to the caselaw principles regarding amendments made on appeal and regarding consultation which still apply generally in this case (although not in relation to the ground (a) appeal or the deemed application for planning permission)<sup>4</sup>.
36. In conclusion, for the reasons set out above, the notice is not a nullity but should be corrected to remove the reference to the approved plans from Option A and to entirely remove Option B from the Requirements, and should not be varied to insert the proposed Option B1 and/or Option C.

*Ground (a) and the deemed application for planning permission*

37. The main issue in this ground of the s174 appeal is the effect of the development on the character and appearance of the area. An appeal under this ground is that planning permission ought to be granted for the matters stated in the notice as a breach of planning control. In this case the deemed application for planning permission is for the development permitted without the condition being enforced against i.e. the school 'as built' at the time the notice was served.
38. As set out above, the development has not been completed externally, although it is being used as a school and is fully functional internally. The teaching block is mostly completed and is clad in James Hardie cladding with white UPVC windows of a different size, layout and configuration to the consented scheme. There are ventilation grills and external lights on the Sydenham Road elevation and the pitched roof overhangs the recessed element of the Fairlawn Park elevation which also has guttering and a downpipe which are not part of the Original Permission.

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<sup>4</sup> Bernard Wheatcroft Ltd v Secretary of State for the Environment [1982] JPL 37

39. The appellant's witnesses accepted that the ground (a) 'as built' scheme was inferior to the s73 scheme and I agree. The materials, in particular the cladding and the white UPVC fenestration, are inappropriate for the prominent location and exacerbate the scale and massing of the building causing harm to the character and appearance of the area. The 'as built' structure is not well-designed, as has been accepted by all the main parties, and is therefore in conflict with the development plan policies. The appellant's position is that they do not wish to retain the as built scheme but seek planning permission to protect the present position and to allow for further s73 applications. However, a grant of planning permission under the ground (a) appeal would not necessitate or secure any further applications and would legitimise the existing structure in terms of its planning status.
40. It was accepted by the Council and the appellant that the "as built" structure causes more harm to the character and appearance of the area than the proposed s73 scheme and I agree. The development is in conflict with DM Policy 30 and CS Policy 15. The other considerations, as set out in relation to the s73 scheme and including the best interests of children and the appellant's assertion that it would provide time to allow for submission of a replacement scheme, do not outweigh this conflict, and indeed the ground (a) appeal would only grant permission for the unfinished building and would not provide certainty as to the next steps.

*Conclusion on the ground (a) appeal*

41. As set out above, the development as built is in conflict with the development plan and the Framework. As there are no material considerations to outweigh this conflict the appeal on this ground does not succeed and the deemed application for planning permission is refused.

*Ground (f)*

42. The appellant's pleaded case on this ground has fallen away because it refers to elements of Option B which has been deleted.
43. An appeal under this ground is that the steps required by the notice to be taken exceed what is necessary to remedy the 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 such a breach. Caselaw holds that an Inspector has wide powers to decide whether there is any solution short of a complete remedy of the breach which is acceptable in planning and amenity terms. However, as I have set out above, the development described in Option B1 and Option C would not remedy the breach of planning control and is materially different to that under the Original Permission, and it would cause injustice to allow the notice to be varied to include them.

*Ground (g)*

44. The notice provides a compliance period of 21 months for the remaining Option A. The appellant is requesting an additional 12 months to make provision for any further applications in respect of Option A. However, 21 months is reasonable and proportionate taking into account all the circumstances including the harm being caused by the development and the public interest in the notice being complied with expeditiously as well as the best interests of the children. It will also allow sufficient time for a further application to be made,

determined and commenced should the appellant wish to pursue a different scheme. The appeal on this ground is therefore dismissed.

### **Formal decisions**

#### **Appeal A Ref: APP/C5690/W/20/3245112**

45. The appeal is dismissed.

#### **Appeal B Ref: APP/C5690/C/19/3242363**

46. It is directed that the enforcement notice be corrected by:

(i) the deletion from paragraph 5 of the words: 'to carry out either Option A or Option B below';

(ii) the deletion from paragraph 5 of the heading 'Option A';

(iii) the deletion from paragraph 5 of the words 'as shown on the following approved plans: PL\_003, PL\_004, PL\_005, PL\_006, PL\_007, PL\_104, PL\_105, PL\_106, PL\_204, PL\_301, PL\_302, PL\_401, L-110 Rev A (Planting Plan), L-111 Rev C, C100 Rev P, C101 Rev P1, Detailed Data Network Maps, Desk Study Report, Landscape Design, Ecological Appraisal and Initial Bat Inspection, Energy Strategy Statement Phase 3, Arboricultural Impact Assessment, Design & Access Statement, Acoustic Implications On Design, BREEAM2014 Education Pre-assessment report Rev A, Overheating Assessment, Bat Survey Report, Daylight Assessment Stage 2, Public Transport & Local Services Analysis Stage 2 (received 30th March 2016); PL\_501 Rev A, PL\_502 Rev A, PL\_503 (Received 20th May 2016) PL\_505 Rev A, PL\_506 Rev A (received 2nd September 2016); PL\_507, PL\_102 Rev A, PL\_103 Rev A, PL\_201 Rev B, PL\_202 Rev B, PL\_203 Rev B (received 9th September 2016); and Transport Assessment Addendum (EAS, September 2016), L-110 Rev E (Landscape External Works Plan); L-112 Rev C; PL\_508 (received 12th September 2016).';

(iv) the deletion from paragraph 5 of the entirety of Option B ;

(v) the deletion from the paragraph headed 'Time for Compliance' of the words 'Option A' and 'OR Option B – Nine (9) months after the date this notice takes effect'; and

(vi) the deletion of Appendices EN2 - EN22 inclusive.

47. Subject to these corrections the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

*Zoë Franks*

INSPECTOR



## **APPEARANCES**

FOR THE APPELLANT: G Jones QC

He called	
R Matthews, RIBA	Director, IID Architects
Dr S Hughes	Director of Education and Diocesan Schools Commissioner of the Roman Catholic Archdiocese of Southwark
M Ringham	Headteacher, OLSPN
S McGrath, BA, MSci, MRTPI	Director, WSP UK Limited

FOR THE LOCAL PLANNING AUTHORITY: S Blackmore

She called	
N Hayhurst, BA, AADipl, ARB, RIBA, FHEA	Architect, Hayhurst and Co Architects
G McBirney, BA(Hons),MA, Licentiate Member RTPI	Planning Officer, Lewisham Council
J Hughes, BA(Hons), MPlan, MRTPI	Team Leader, Planning Service, Lewisham Council

FOR THE RULE 6 PARTY: J Webb

INTERESTED PERSONS:

R Ronan  
MA Barlow  
M Dwyer  
E Debenham  
R Dodsworth  
A Doel  
N Boateng  
T Williams  
N Giacomelli  
G Sears  
Cllr C Best  
Dr S Hayman  
Cllr A Hall  
L Macmillan-Watson

DOCUMENTS:

1. Opening submissions for the Appellant
2. Opening submission for the Council
3. Legal authorities submitted by the Appellants
4. Legal authorities submitted by the Council
5. Comments on conditions submitted by the Appellants
6. Comments on conditions submitted by the Council
7. Comments on conditions submitted by the Rule 6 Party
8. Letter from Council enclosing; costs statement from the Council, speaking note of N Hayhurst and email correspondence with Cllr Copley.
9. Closing submissions and Legal Annex for the Council
10. Closing Submissions for the Rule 6 Party
11. Closing Submissions and legal authorities for the Appellant
12. Costs application made by the Appellant
13. Response to costs application made by the Council
14. Final response regarding costs application made by the Appellant