
Appeal Decisions

Site visit made on 6 December 2016

by **D H Brier BA MA MRTPI**

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

Decision date: 6 January 2017

Appeal A Ref: APP/X5210/C/16/3150172 and

Appeal B Ref: APP/X5210/C/16/3150173

21 Aberdare Gardens, London NW6 3AJ

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Ms D Macit (Appeal A) & Mr M von Bock und Polach (Appeal B) against an enforcement notice issued by the Council of the London Borough of Camden.
- The enforcement notice was issued on 31 March 2016.
- The breach of planning control as alleged in the notice is the creation of a roof terrace with the installation of metal railings and decking on the rear ground floor extension.
- The requirements of the notice are:
 1. Cease the use of the extension roof as a terrace.
 2. Remove the metal rails and decking.
 3. Make good any damage to the building as a result of the works.
- The period for compliance with the requirements is 3 months.
- **Appeal A** is proceeding on the grounds set out in section 174(2) (a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
Appeal B is proceeding on the grounds set out in section 174(2) (c), (d), (f) and (g). Since the prescribed fees have not been paid within the specified period for this appeal, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered.

Summary of Decisions: Appeal A is allowed the enforcement notice is quashed and planning permission is granted on the deemed application. Appeal B is dismissed.

Background

1. The appeals site lies in the South Hampstead Conservation Area. No.21 Aberdare Gardens is a 3 storey building subdivided into 3 flats. The matters in contention relate to a single storey flat roofed rear extension for which planning permission (along with an adjoining conservatory) was granted in October 2000. No condition restricting the use of the roof of the extension was attached to this permission.
 2. The works referred to in the notice have 2 components, firstly, timber decking which has been installed on top of the flat roof of the extension just below the parapet of the roof. And, secondly, metal railings about 1.15m high which are positioned around the outer edges of the decking. Access to the decking is gained from the first floor flat via a door in the rear elevation of the main building. The notice contains no reference to this door and the Council's statement includes a photograph from August 2011 which shows it in place
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then. Judging by the Council's comments, there appears to be an acceptance that the door is probably immune from enforcement action.

Appeals on Ground (c)

Preliminary Matters

3. In order for the appeals to succeed on this ground it has to be shown that the matters alleged in the notice do not constitute a breach of planning control. As is also the case with ground (d), ground (c) is a legal ground of appeal, distinct from planning merits. The courts have held that the onus on proving these grounds lies with the appellant(s).
4. The appellants' contention that "*the enforcement notice is against the use of the roof*"¹ is correct insofar as requirement 1 is concerned. However, ground (c) is concerned with the matters alleged in the notice. In particular, the term "use" does not appear in the allegation; it refers instead to operational development, namely the physical creation of a roof terrace by the installation of the decking and railings. Accordingly, therefore, my consideration of the appeals on this ground will focus upon these works. The submissions regarding the use of the roof offer no assistance in this respect and so carry little weight in the context of the ground (c) appeals.
5. Under the ground (c) heading in the initial grounds of appeal, issue is taken with requirement 1 of the notice. As I see it, the submissions in this respect do not have a bearing on the ground (c) appeals, and are a matter for ground (f) instead. As the same argument is raised under the latter ground in any event, it is more appropriate for this matter to be considered there.

Appeals

6. The appellants note that the position regarding the metal railings is not disputed. Their submissions focus upon the timber decking
7. Despite the extensive nature of the submissions, including the reference to *Burroughs Day v Bristol City Council [1996] 1 P.L.R. 78 [1996] 1 E.G.L.R.167*, my view is that in this instance the appellants' approach is somewhat misguided. To my mind the roof terrace constitutes a single physical entity. In particular, the installation of both the railings and the decking were integral components of the works carried out in order to create the roof terrace. In the light of this, the question of whether there has been a breach of planning control applies to the scheme as a whole. Even if the appellants' argument that one element of the scheme does not constitute development in its own right is correct, it is not appropriate to consider one of its constituent parts in isolation.
8. Given the appellants' stance regarding the railings – and I see no reason why their installation should not be regarded as an act of development – my conclusion is that roof terrace constitutes development for which planning permission is required. In the apparent absence of such an approval, I find there has been a breach of planning control.
9. The appeals on ground (c) therefore fail.

¹ Appeal statement paragraph 5.1

Appeals on Ground (d)

10. In order for the appeals to succeed on this ground it has to be shown that at the time the notice was issued it was too late for enforcement action to be taken.
11. The appeals on this ground are also prefaced by the submission that the notice is against the *use* of the roof of the extension as a terrace². However, as I note in paragraph 4 above, the allegation does not refer to a use, it is directed at operational development instead. Consequently, mindful that the reasons for issuing the notice indicate that the alleged breach "*occurred within the last 4 years*" the issue in the ground (d) appeals is whether the operational development is immune from enforcement action by virtue of the 4 year 'rule'. The appellants' evidence regarding the use of the roof of the extension in the past offers little assistance in this respect.
12. No evidence that shows that the operational development described in the allegation had been substantially completed more than 4 years before the notice was issued has been put forward. Indeed, the appellants' acceptance that the decking and the railings "*may not benefit from the four year time limit set by section 171B*"³ strongly suggests to me that the operational development in question probably was not immune.
13. The absence of relevant supporting evidence concerning the operational development in question means that the burden of proof that lies with the appellants has not been discharged. It leads me to the almost inescapable conclusion that it has not been shown that, on the balance of probability, it was too late for enforcement action to be taken when the notice was issued.
14. The appeal on ground (d) therefore fails.

Appeal A - Ground (a) and the Deemed Application

15. The main issues are the firstly, whether the character and appearance of the host building and the South Hampstead Conservation Area would be adversely affected. And, secondly, whether the living conditions of the occupiers of the neighbouring dwellings would be adversely affected. In so saying, I am mindful that section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that special attention be paid to the desirability of preserving or enhancing the character or appearance of a conservation area.
16. Planning policies for the area are contained in the Council's Local Development Framework Core Strategy (CS) and Development Policies (DP). The statutory requirement above is reflected in both CS Policy CS14 which requires development to be of the highest standard that respects local context and character – something that DP Policy DP24 seeks to achieve too – and in DP Policy DP24, headed 'Conserving Camden's Heritage'. CS Policy CS5 indicates that the amenity of local residents will be protected, a matter that is elaborated upon in DP Policy DP26, headed 'Managing the Impact of Development on Occupiers and Neighbours'. My attention has also been drawn to a number of the Council's Planning Guidance documents (CPG). Having read the CPGs were approved following consultation I attach weight to them commensurate with their status.

² Grounds of appeal paragraph 6.2.

³ Appeal form – submissions on ground (d).

17. On the first issue, the South Hampstead Conservation Area covers a predominantly residential area. As I perceived it, its special quality derives in no small measure from the well-proportioned and detailed front elevations of the properties, together with their relatively spacious layout where much greenery is in evidence.
18. As the works in question are at the rear of No.21, they do not impinge on the local street scene. The rear of No.21 though can be seen from a number of the neighbouring properties within the conservation area. However, compared with the attractive frontages of the buildings, the rear elevations of properties here are more mundane and tend to lack the distinctiveness apparent on the road frontages. In particular, the rear elevation of No.21 has a variety of window openings of different shapes and sizes as well as the glazed door that opens onto the single storey rear extension. In addition, a large modern conservatory protrudes outwards beyond one side of the extension. The end result is that the rear of No.21 has a somewhat bland and eclectic appearance, a trait that is echoed in most of the rear elevations of the other properties in the locality.
19. Large expanses of timber decking are not external materials characteristic of this area, but whereas the extension upon which the decking stands, together with the attached conservatory, have a marked effect on the external appearance of No.21 as whole, my impression was that this is not so insofar as the decking is concerned. Its effect is much more limited and localised; visibility of it is confined, primarily, to the upper floors of a limited number of the neighbouring properties in Aberdare Gardens. The rear walls of some of the properties opposite in Greencroft Gardens face towards the back of No.21, but as they are some distance away, I very much doubt whether the decking is particularly noticeable from there. In terms of the visual impact on the appeal property and its surrounds, I see little difference between the decking and the mineral felt roof it has been placed above.
20. As to the railings, the basis for the Council's apparent aversion to them is somewhat difficult to comprehend. Not only are railings in evidence in the area as the appellant's photographs indicate, but also the Character Appraisal for the conservation area states that "*Ironwork features extensively all over the CA*"⁴ and goes on to note that some ironmongery survives on high level balconies. In these circumstances, I am not inclined to regard the disputed railings as an alien or inappropriate feature here, albeit the area of roof they flank is larger than that of a typical balcony.
21. Like the decking, the railings do not impinge upon the well-proportioned front elevation of No.21 or the local street scene. As the railings extend above No.21's extension, their elevated position makes them more noticeable than the decking. Be that as it may, even though the railings can be seen from ground floor level as they are not set back into the terrace, their height is relatively modest, and their visual impact is somewhat localised also. Given the eclectic nature of the rear of the appeal property, the railings do not look particularly incongruous or appear unduly strident here.
22. In the light of the foregoing, contrary to the Council's concern as expressed in the reasons for issuing the enforcement notice, I do not consider the works have adversely affected either the character or appearance of the host building, or the South Hampstead Conservation Area. While I would not go so far as to

⁴ South Hampstead Conservation Area Character Appraisal and Management Strategy paragraph 5.20

- say that the works have enhanced the conservation area, I find their effect has been essentially neutral, in which case its character and appearance has been preserved.
23. Turning to the second issue, in my experience, roof terraces are capable of giving rise to the type of problems the Council allude to. However, mindful that the evidence regarding the length of time the roof is said to have been used has not been challenged, there is nothing that indicates that such problems have occurred in this particular instance. It may be that the works in question have made using the roof a more attractive (and safer) proposition, as the Council contend. However, the expressions of support for the development from the residents at both sides of No.21 – the neighbours most likely to be affected by the development – strongly suggest that the Council’s concerns are not well-founded. Indeed, I am inclined to regard the level of support as weighty consideration in this case.
24. Given the elevated nature of the terrace, some overlooking of the neighbouring gardens would be likely to occur, but as this would be possible from the upper floors of the properties in any event, this is not a matter to which I attach much weight. And, the presence of rear extensions at Nos 19 and 23 reduces the scope for overlooking at ground floor level. The terrace does, though, facilitate views towards the first floor windows of the neighbouring properties, especially No.19, which could impinge upon the neighbours’ privacy. But, my impression was that the planting (in pots) on the outer edge of the terrace provides an effective means of ameliorating this, as well as augmenting the greenery in the area. Further planting, something the appellant is willing to carry out, would assist more. This, together with retention of the existing planting, is a matter that could be covered by condition.
25. A further consideration in this case is that as the notice does not require the removal of the first floor level rear door, it seems likely that access could still be gained to the roof above the extension come what may. Notwithstanding the Council’s submissions regarding the Building Regulations in this respect, I regard this as another weighty consideration. This, together with the other factors referred to above, leads me to conclude that in this particular instance the development in question would not have an unacceptably adverse effect upon the living conditions of the occupiers of the neighbouring dwellings.
26. The circumstances of this case are such that I see no conflict with the relevant planning policies that apply here. The appeal on ground (a) therefore succeeds and planning permission will be granted on the deemed application subject to a condition as discussed in paragraph 24 above. In the light of this, there is no need for the appeals on grounds (f) and (g) to be considered.
27. I have taken into account all the other matters raised. None, however, are sufficient to outweigh the considerations which have led me to my conclusions.

Formal Decisions

Appeal A Ref: APP/X5210/C/16/3150172

I allow the appeal and direct that the enforcement notice be quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the creation of a roof terrace with the installation of metal

railings and decking on the rear ground floor extension on land at 21 Aberdare Gardens, London NW6 3AJ, referred to in the notice, subject to the following condition:

The building operations hereby permitted shall be removed and all materials resulting from this shall be removed within 90 days of the date of failure to meet any one of the requirements set out in i) to iv) below:

- i) Within 2 months of the date of this decision a scheme for planting, on the east and west sides of the roof terrace, including the retention of the existing planting, shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
- ii) If within 4 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
- iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
- iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

28. The purpose of the condition is to require the appellant to comply with a strict timetable for dealing with the additional planting which needs to be addressed in order to make the development acceptable. The condition is drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matter because the development has already taken place. The condition therefore provides for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority ("LPA") or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable then the planning permission falls away.

Appeal B Ref: APP/X5210/C/16/3150173

29. I dismiss the appeal.

D H Brier Inspector