
Appeal Decisions

Hearing held on 20 September 2016

Site visit made on 20 September 2016

by Chris Preston BA (Hons) BPI MRTPI

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

Decision date: 10 October 2016

**Appeal A: Appeal Ref: APP/K5600/C/16/3150682
77 Stanhope Mews East, London SW7 5QT**

**Appeal B: Appeal Ref: APP/K5600/C/16/3152123
77 Stanhope Mews East, London SW7 5QT**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - Appeal A is made by Mr Russell Garner and Appeal B is made by Mr Chris Garner against an enforcement notice issued by The Council of The Royal Borough of Kensington & Chelsea.
 - The Council's reference is E/15/00679.
 - The notice was issued on 20 April 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission: (1) the erection of slatted fencing on the perimeter of the roof terrace; and (2) the installation of a four pillared roof structure on the roof terrace.
 - The requirements of the notice are: (1) Remove the unauthorised slatted fencing located on the front, side and rear elevations of the roof terrace from the land; (2) Restore the roof terrace front elevation boundary to its former condition as shown on Photo A; (3) Remove the four pillared roof structure, located on the terrace, from the Land, as outlined in yellow in Photo B; and (4) On completion of steps 1-3 above, remove all resultant materials and debris from the Land.
 - The period for compliance with the requirements is one calendar month from the date the notice takes effect.
 - Appeal A is proceeding on the grounds set out in section 174(2) (a), (c), (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), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decisions

Appeal A (APP/K5600/C/16/3150682):

1. The enforcement notice is corrected by the deletion of sub-paragraph 2) of section 3 containing the words "the installation of a four pillared roof structure on the roof terrace". Subject to this correction the appeal is allowed and the enforcement notice is 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 erection of slatted fencing on the perimeter of the roof terrace.

Appeal B (APP/K5600/C/16/3152123):

2. The enforcement notice is corrected by the deletion of sub-paragraph 2) of section 3 containing the words "the installation of a four pillared roof structure
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on the roof terrace". Subject to this correction the appeal on ground (c) is dismissed but because the notice is quashed I shall take no further action in respect of this appeal.

Application for costs

3. At the Hearing an application for costs was made by Mr Russell Garner and Mr Chris Garner against The Council of The Royal Borough of Kensington & Chelsea. This application is the subject of a separate Decision.

Preliminary Matters

4. At the Hearing it was brought to my attention that there was a discrepancy between the version of the enforcement notice submitted by the Council in relation to the appeal and the version that was served on the appellants. That discrepancy related to the plan attached to the notice. On the version served by the Council, the hatched area denoting the land affected covered 77 Stanhope Mews alone. However, on the version submitted with the appeal the hatched area also extended over the adjacent property at 77 Queens Gate. It is not entirely clear how the discrepancy occurred but the Council put it down to an administrative error. However, both the appellant and the Council confirmed that the plan attached to the notice that was actually served correctly covered 77 Stanhope Mews East and not the adjacent property at Queens Gate. I received a copy of the enforcement notice, as served, following the Hearing and have based my decision on that notice, including the correct plan.

The Appeals on Ground (c)

5. The appeals on ground (c) are made on the basis that there has not been a breach of planning control. The appellants' submissions on ground (c) relate to the hot tub roof mechanism and the perimeter fencing. I shall address each in turn.

The Four Pillared Hot Tub Roof Cover

6. Section 55(1) of the Town and Country Planning Act 1990 (the Act) defines development as: The carrying out of building, engineering, mining or other operations in, on, over, or under land or the making of a material change in the use of any buildings or other land. A building is defined by s336 of the Act as: any structure or erection and any part of a building, as so defined, but does not include plant or machinery comprised in a building. Established case law has identified three primary factors that should be considered in determining what constitutes a building; its size; the degree of permanence; and whether the proposal would be physically attached to the ground¹. No one factor is decisive and any judgement will be a matter of fact and degree based upon the specific circumstances of the case.
7. The information provided by the Council indicates that, at the time the notice was served, they considered that the hot tub roof cover amounted to development that would require planning permission because it was physically attached to the roof such that it could not be moved². The reports do not state

¹ Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd [1949 1QB 385 & Skerits of Nottingham Ltd v SSETR (No.2) [2000] 2 PLR 102

² Paragraphs 3.7 & 4.14 of the Delegated Report by the Executive Director of Planning and Borough Development, as repeated at paragraph 3.7 of the Council's appeal statement

how the Council came to that conclusion; I understand that the enforcement officer who undertook the site visit no longer works for the Council and he was not at the Hearing.

8. Essentially, the roof mechanism consists of a lightweight plastic cover, roughly square in shape, which is attached to four metal pillars or legs; one in each corner. Those pillars have the ability to expand and retract in order to raise or lower the height of the roof. When fully retracted, the roof sits just above the hot tub and when fully expanded, has a height of approximately 2.5 metres. The cover is not physically attached to the hot tub but rests over the top of it. The 'feet' of each pillar have pre-drilled holes, as if designed to facilitate fixing to the surface. However, the appellants maintain that the feet have never been fixed to the roof on account of the fact that drilling holes would undermine the water tightness of the roof terrace. Given that living accommodation is directly below I can see a persuasive logic in that argument.
9. Photographs taken by the former enforcement officer were produced by the Council at the Hearing³. Those photographs show that the two front feet were not 'screwed in' to the roof below but were free-standing. However, the rear pillars were enclosed by a wooden casing which surrounded the space between the perimeter of the hot tub and walls to rear and side of the terrace. The feet of the rear pillars were not visible as a result. Presumably that casing was installed to enable drinks or other items to be supported whilst the tub is in use and to prevent items falling down the small gap between the tub and the perimeter walls. The photographs show that rear pillars projected upwards through pre-drilled holes in the wooden casing. At the time of my visit, the casing had been removed such that I was able to inspect all four of the feet. They were not physically attached to the roof and there was no evidence, such as marks on the roof surface, to indicate that they had ever been attached to the roof.
10. Consequently, given the lack of evidence to the contrary and the practicality of maintaining a water tight seal, I have no reason to doubt the appellants' submissions that the cover has never been physically attached to the roof. That said, whilst the cover mechanism does not appear to have been physically attached to either the roof or the hot tub, the way in which the support pillars were enclosed by the timber casing would have made the prospect of moving the cover more difficult. In effect, the casing would either need to be removed, as it had been at the time of my visit, or the pillars would have to be lifted out through the holes in the casing.
11. However, to my mind, the presence of the casing did not result in the cover being physically attached to the roof. As explained by Mr Garner at the Hearing, the process of erecting or dismantling the cover is relatively straightforward. He estimated it could be done within 45 minutes to an hour. It has four pillars, each tied to the other by metal bracing strips running across the base. The roof cover is connected to each pillar through a metal bracket in each corner. Having viewed the item I consider that the process of dismantling it would not be overly complex and have no reason to doubt the evidence given by Mr Garner in that respect. It is likely that the operation could be carried out by most people using basic tools and a moderate degree of competence and

³ Hearing document 3

fitness, as opposed to an operation that would require a builder or skilled tradesman.

12. In that sense, the cover is comparable to common garden furniture such as a child's trampoline or swing, or a garden parasol. Akin to those items it can be erected and dismantled relatively easily by a process of bolting together various sections. Moreover, the size of the mechanism does not preclude its portability. It is not unduly large, being open sided with four legs and a top. The cover is made from a lightweight hardened plastic. Consequently, in my view, the roof mechanism is an item designed to be brought to a site, ready made, with a view to being easily assembled and disassembled as and when required. It is not physically attached to the ground and is modest in size. In the case of *James v. Brecon County Council* [1963] [15P. & C.R.] it was held that a battery of six fairground swing boats did not amount to development. In that case, the boats were capable of being lifted and taken away by six men, or being dismantled in about an hour. Whilst I am mindful that each case must be considered on its merits, and of the difficulty in drawing direct comparisons with other cases, it seems to me that there are similarities between that judgement and the matter before me. The cover is small, relatively lightweight and could be moved either by being carried – by less than six men in this instance - or by the quick process of dismantling.
13. In terms of the degree of permanence, the cover has been on the site for a number of months and, setting aside the outcome of these enforcement proceedings, there is no indication that the appellants intend to remove the item or alter its position at any point in the near future. In effect, its useful life is likely to mirror that of the hot tub to which it is associated. The Council has confirmed its view that the hot tub does not constitute development for the purposes of the Act, a view presumably taken having regard to the likely degree of permanence of that item. Logically, the cover mechanism is likely to be no more or less permanent than the associated tub. Given the likely expense of the item and the durability of the materials, it is probable that the roof cover would have a life span of a number of years. It could remain in its present position but also, given the ease with which it could be moved, it could be moved to a different part of the roof terrace or moved from the site altogether if the appellants moved house or decided they no longer needed the facility for any reason.
14. Therefore, whilst it is possible that the cover could remain on site for a lengthy period, I do not find that point decisive in the question of whether it amounts to development for the purpose of the Act. The same could be said of other common items of garden furniture such as sun canopies, trampolines or outdoor dining tables. Such items often remain in a particular spot within a garden simply because that is the most logical spot for them in the eyes of the householder. To my mind, the fact that such items may remain in situ does not, of itself, dictate that they should be considered as buildings or structures for the purpose of the Act.
15. In this case, the roof cover is not attached to the land and is easily capable of being moved by virtue of the lack of physical attachment and its modest size. In other words, it is not a fixture that has permanently altered the character of the land. The fact that it *may* remain in situ for a period of time is not, of itself, sufficient to dictate that it amounts to a building for the purposes of section 55 of the Act. On the contrary, having regard to established case law,

and taking account of the modest size and the lack of physical attachment to the land, I conclude that the canopy does not amount to development for the purposes of section 55 of the Act. Therefore, the appeals under ground (c) succeed insofar as they relate to the hot tub cover and I shall correct the notice to remove reference to the 'four pillared roof structure' as that element does not amount to development for which planning permission is required.

The Slatted Fencing

16. The balcony has been enclosed using slatted timber fencing on each of its four sides. Photographic evidence demonstrates that a green painted timber fence was in situ on the side and rear boundaries prior to the erection of the current fence. To the front, the fence replaced railings, as depicted in 'Photo A' attached to the enforcement notice. The appellants accept that the new enclosure across the front boundary has materially altered the appearance of the building as a result of the substitution of the more open metal railings with the more substantial and less transparent timber fence. There was no dispute that the front section of the fence amounts to development for which planning permission is required and I concur with that position.
17. The appellants contend that the fencing to the side and rear boundaries does not materially affect the external appearance of the building such that it is excluded from the definition of development by the terms of sub-section 2(a)(ii) of Section 55 of the Act. In making an assessment of whether the external appearance of the building has been altered it is necessary to consider what the 'building' is. In other words, whether the fence should be considered as a building in its own right, or whether it forms part of a larger building, including the house below.
18. In most domestic gardens it appears to me that garden boundary fencing would be a separate entity to the adjacent house, with a specific function of enclosing the associated amenity space. In other words, for the purposes of the Act, the fencing would amount to a building of itself. In this case, the appellants contended at the Hearing that the fencing should be considered as part of the wider building and, therefore, that the assessment of whether there has been a material change in the appearance of the building should be considered taking account of the building as a whole. To my mind, there is some merit in that argument due to the fact that the amenity space is at terrace level. In that sense, the means of enclosure sits on top of the building itself and is integral to the safe functioning of the terrace, unlike a ground floor garden where any wall or fence would be off-set to the front, side or rear of the house.
19. However, I do not find it necessary to form a definitive conclusion on that point; whether the fence is considered as an entity of itself, or as part of the wider building, it seems to me that it has had a material effect on the outward appearance of the building. Although the materials are the same, the type of timber is different and the design of the fence is also different. The depth of the horizontal slats was much deeper on the former fence. Although the fence is the same height, the photographs demonstrate that more than twice as many horizontal slats have been used on the current fence than were utilised on the previous fence. The use of pre-treated timber, as opposed to painted slats, also adds to the change in appearance. In my view, the difference in design and finish has resulted in a marked change in external appearance. The

new fence has a much greater horizontal emphasis due to the use of the larger number of slats and the overall impression is of a more modern or contemporary design.

20. The fencing to the side and rear is visible from a number of vantage points, including other residential properties which overlook the terrace. Those aspects may not be visible from the street but, in a heavily populated urban environment, I consider it reasonable to take account of the number of private views from neighbouring windows. Whether the starting point is the building as a whole, including the house and fence, or the fence of itself, I conclude that the alterations have had a material affect on the outward appearance of the building. As such, planning permission would be required for the new fence in its entirety. In the absence of any planning permission it is clear that a breach has occurred and the appeals on ground (c) fail in respect of the fencing.

Appeal A on Ground (a)

21. For clarity, I confirm that the lawful use of the terrace is not a matter that is under consideration in my decision. The Council have previously granted planning permission for the enlarged stair access to the terrace⁴ and do not dispute that the terrace can be used for purposes associated with the dwelling at No. 77. Furthermore, given my conclusions in relation to ground (c) the four pillared hot tub cover does not amount to development and does not fall to be considered in relation to the appeal on ground (a).
22. In view of the above, the main issue in relation to the ground (a) appeal is the effect of the slatted fencing on the character and appearance of the Queen's Gate Conservation Area.
23. Stanhope Mews East is described as a 'mild mannered post war development' within the Council's Queen's Gate Conservation Area Proposals Statement (the Proposals Statement). It is one of a number of mews streets within the Conservation Area and, as is common of such streets, sits to the rear of a substantial terrace of properties at Queen's Gate. The adjacent terrace at Queen's Gate is Grade II listed. The wider Conservation Area takes its character from those grand, stucco rendered, terraces, associated mews streets and public buildings, including museums.
24. The Proposals Statement does not reserve particularly high praise for the development at Stanhope Mews East noting that the redevelopment into a residential street has been carried out 'fairly convincingly'. The adjacent garage court at Stanhope Mews East fares less well, with the Proposals Statement noting that it is 'excessively dull in appearance' and that 'it is not apparent how this particular part of the Area could ever 'soften in time' as have the mews'.
25. Having regard to the descriptions within the Proposals Statement as being 'mild mannered' and 'fairly convincing', it is clear that the post-war development Stanhope Mews East is not one that is considered to have enhanced the Conservation Area to any significant degree. Rather, the Mews sits comfortably within the Conservation Area and respects the prevailing pattern of development without having a significantly positive impact of itself.

⁴ LPA reference PP/15/03056

26. In terms of the design of the terrace, each dwelling has a degree of symmetry and vertical emphasis provided by three bays, including a central bay with a feature doorway and further bays set at either side. At ground floor level a number of dwellings retain a garage door set to one side of the front entrance door but that garage has been converted into living accommodation at No. 77. It is clear that use of roof terraces is an established part of the character of the immediate area. Judging by what can be viewed from street level and from on the terrace at the appeal site the majority of flats or houses with access to a roof space appear to make use of that space. That is understandable, given the dense nature of development and paucity of ground floor amenity space.
27. There is very little consistency in terms of the design of boundary treatments within the area. Some properties retain relatively transparent fencing or railings whilst others have utilised more solid timber fencing. I note the Council's comments regarding the lack of any record of planning permission being granted for other fences, including the fence at the neighbouring property at No. 78. However, having witnessed the range of fencing in the immediately surrounding area, it is clear that the use of terraces is long established, and that a large number of fences and other boundary treatments have been in situ for a considerable period of time.
28. Thus, the variety of boundary enclosures used on terraces is part of the established character of the immediate part of the Conservation Area. Moreover, given the enclosed nature of the Mews and the elevated position of the fencing, the variety in boundary treatments has not caused any notable harm to the character and appearance of the Conservation Area in my view, particularly taking account of the relatively modern design of the Mews and adjacent garage court.
29. In that context, I am satisfied that the appearance of the fencing at No. 77 does not appear incongruous or out of kilter with the prevailing pattern of development. The replacement of the railings with a more solid fence has altered the appearance of the front aspect but the fence is set back at the rear of the parapet, thereby lessening the visual impact from the street, and plant boxes have been set to the front of the fence, providing greenery to the site frontage. The overall effect does not harm the simple symmetry of the dwelling or that of the row and is not out of keeping with the character and appearance of the immediately surrounding area. In that respect, I am satisfied that the fencing complies with advice regarding alterations to mews streets within the Proposals Statement which notes, amongst other things, that external alterations must respect the character of the mews. Whilst the fencing does project above the parapet, its visual impact is limited for the reasons given.
30. The internal fencing has no visual impact from street level and, when viewed from neighbouring dwellings, is consistent with the established pattern of development. Whilst it is of a different design to the fence which it replaced I find that the change in appearance has not caused harm to the character and appearance of the area, given the established variety of fencing.
31. In view of the above, I conclude that the design and appearance of the fencing is sympathetic to the character and appearance of the post-war mews development and that it has not caused any harm to the character and appearance of the wider Conservation Area. In that regard, the development

preserves the character and appearance of the Conservation Area in compliance with the requirements of policy CL3(a) of the Royal Borough of Kensington and Chelsea Consolidated Local Plan (2015) (the Local Plan).

32. For the same reasons, the design and appearance of the fencing is acceptable in relation to policies CL1 (a and h), CL2 (a and b), CL6 (a, b and C), CL8 and CL9 of the Local Plan. The fencing is also consistent with the aims of the National Planning Policy Framework (the Framework), with regard to conserving the historic environment.

Other Matters

33. I have taken account of the impact of the fencing, particularly that on the rear elevation, on the outlook and levels of light reaching the rear aspect of adjacent flats within the terrace at Queen's Gate. I was able to observe the fence from the rear of flat 4 at No. 77 Queen's Gate at my accompanied site visit. A more transparent fence would allow marginally more light into adjacent windows but I am satisfied that the fence, as constructed, maintains a reasonable balance between the need to maintain privacy and the need to prevent undue loss of light or outlook for neighbouring residents. I note that it is no higher than the solid fence that it replaced and that the rear boundary of the terrace at No. 76 is enclosed by a solid timber panelled fence of the same height. Even if the fence at the appeal site were removed, any benefit in terms of light to the rear of Queen's Gate would be limited, taking account of the height of the fence and the fact that the neighbouring fence would remain.
34. Therefore, whilst I appreciate that the rear of Queen's Gate sits closely adjacent to the rear of Stanhope Mews East I consider that the rear fence does not have an undue impact on the living conditions of neighbouring residents by virtue of its height, scale and proximity.
35. The adjacent terrace at Queen's Gate is grade II listed. In reaching my decision I have had special regard to the need to preserve the setting of that building, as required by the Act. The Council is satisfied that the development has preserved the setting of the building and no evidence has been presented that would lead me to take a contrary view. As noted, the fencing is situated to the rear of Queen's Gate, set amongst a number of roof terraces both on Stanhope Mews East and on the listed building itself. The fencing is consistent with the general theme and preserves the setting of the building as a result.

Conclusions on Ground (a)

36. For the reasons given, I conclude that the fencing has preserved the character and appearance of the dwelling and that of the Queen's Gate Conservation Area. No other material considerations have been raised that would warrant planning permission being withheld and, as such, I shall allow Appeal A on ground (a) and grant planning permission in accordance with the application deemed to have been made under section 177(5) of the Act for the allegation, as corrected, that being the erection of slatted fencing around the perimeter of the roof terrace.

The appeals on grounds (f) and (g)

37. It is unnecessary for me to consider these grounds because the enforcement notice will be quashed as a consequence of my decision to allow Appeal A on ground (a).

Overall Conclusions

38. For the reasons given, Appeal A succeeds, in part, on ground (c) and I shall correct the enforcement notice and remove reference to the hot tub roof cover from the alleged breach of planning control. Subject to that correction, the appeal on ground (a) succeeds, planning permission will be granted for the breach of planning control described in the notice, and the enforcement notice will be quashed. In those circumstances it is unnecessary for me to consider the appeal on grounds (f) and (g) and I shall take no further action on these grounds of appeal.
39. Appeal B also succeeds, in part, on ground (c) and I shall correct the enforcement notice and remove reference to the hot tub roof cover from the alleged breach of planning control. Whilst the appeal on ground (c) fails in respect of the perimeter fencing it is unnecessary for me to take any further action in respect of the fencing, or to consider the appeal on grounds (f) and (g) on account of the fact that the notice will be quashed as a result of my decision in relation to Appeal A.

Chris Preston

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr John Littman Dip TP MRTPI	JCL Partnership Ltd
Mr Christian Zwart	Of Counsel
Mr Russell Garner	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Ms Megan Rowe	Senior Planning Enforcement Officer
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INTERESTED PERSONS:

Ms Caryl Harris	Chair, South Kensington and Queen's Gate Residents' Association
Ms Friederike Maeda	Local resident
Mr David Campbell	Local resident
Ms Sara Jane Hoare	Local resident

List of Documents Submitted at the Hearing

- 1) Drawing number PA.1 – suggested alternative front elevation
- 2) Decision notice pertaining to planning permission PP/15/03056
- 3) Site photographs (undated) taken by the Council as part of their enforcement investigation