

Appeal Decision

Site visit made on 9 November 2016

by John Whalley

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

Decision date: 15 November 2016

Appeal ref: APP/X5990/C/16/3147963
34 Cato Street, London W1H 5HS

- The appeal was made by Mr Christopher Michael Attey under Section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the City of Westminster Council.
- The notice was issued on 7 March 2016.
- The breach of planning control alleged in the notice was: Without the requisite planning permission and within the last 4 years the installation of large timber planters and timber trellis fence panels on the flat roof of the property.
- The requirement of the notice is to: Remove the timber planters and timber trellis panels from the flat roof (partially shown outlined by red lines on Photograph A attached to the notice).
- The period for compliance with the requirement is two months.
- The appeal was made on grounds (a) and (c).

Summary of Decision: The enforcement notice is quashed

Appeal property

1. The appeal property, No. 34 Cato Street, is a 4 storey terrace house with a flat roof. The house is divided into flats. Flat 3 on the top floor has a hatch to gain access onto the roof.
2. The Council issued the enforcement notice in respect of timber box planters and timber trellis panels that have been placed upon the roof. Each of the 3 planters is about 1.5m long by 450mm x 450mm. The 3 trellises fitted loosely into the planters to a height of about 1.5m.

The appeal on ground (c)

3. The appeal on ground (c) asserts that there has not been a breach of planning control. The burden of proof in an enforcement appeal on a legal ground such as this lies with the Appellant. The case of *Nelsovil v MHLG [1962] 1 WLR 404* is authority for that position.
4. For the Appellant, Mr Attey, it was said that the installation of the trellises and planters had not resulted in anything that could be described as a building, structure or erection as set out in s.336(1) of the Act. Mr Attey said he brought ready-made trellises and planters from a DiY store to the house in his car. He

placed the planters on the roof, filled them with soil and loosely fixed the trellises to the planters himself. That did not require the services of a builder or other professional.

5. The Council said the installation of the planters and trellis panels constituted operational development in the form of a building operation. The structures were clearly visible from the upper floors of surrounding properties. It was accepted that the Appellant had been brought the planters and trellis panels to the site complete. But they would need to be disassembled in order to be moved. It was clear they were intended to be retained permanently.
6. Section 55(1) sets out the meaning of development and new development. It says: *Subject to the following provisions of this section, in this Act, ..., "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land,* Section 55(1A) says:
For the purposes of this Act "building operations" includes –
 - (a) *demolition of buildings;*
 - (b) *rebuilding;*
 - (c) *structural alterations of or additions to buildings; and*
 - (d) *other operations normally undertaken by a person carrying on business as a builder.*
7. S.55(2)(a)(ii) says operations involving the improvement or alteration of any building which do not materially affect the external appearance of the building shall not be taken for the purposes of the Act to involve development of the land.
8. Where there is a dispute on the question of whether or not building operations requiring planning permission have been carried out, it is necessary to make a fact and degree assessment in each case. There are established tests for a building operation, (derived from the decided case of *Cardiff Rating Authority v Guest Keens [1949] 1 KB 385* - endorsed by the Court of Appeal in *Skerritts of Nottingham Ltd v SSETR (No.2) [2000] 2 PLR 102*). All 3 factors below need to be applied and considered. It may be appropriate to give greater weight to one over another:
 - (a) size: are the items of a size that would normally be constructed as opposed to being brought ready made to the site?
 - (b) permanence: a physical change of some permanence.
 - (c) physical attachment.
9. In the present case, (a), it was accepted that the planters and the trellises were ready made, purchased complete and not assembled or erected as structures on site.
10. With regard to permanence, (b), without soil, the planters could be carried by one, or perhaps 2 persons and moved or slid into another spot by one person. The trellises were lightweight and could be picked up in one hand. In the *Skerritts*, case it was held that a marquee erected on site for 8 months of every year had sufficient permanence for its erection to amount to operational development. But that involved a large structure, which erection required the work of several skilled persons. Here, the scale is small, the placing of the planters along just one of the edges of the flat roof to No. 34 which are fairly easily moved about not amounting, in my view, to operational development.

11. Finally, with regard to the question of physical attachment, (c), neither the planters nor the trellises were fixed to the roof. They were merely placed on the surface. The planters had not been fixed together as might have been the case if they, and other planters, had for example, been set out as a secure edging or walling to a roof amenity area. On that point, I note that a certificate of lawfulness was issued by the Council on 6 January 2015 for the use of the roof for residential purposes including for use as a roof terrace in association with the top floor flat. At the same time, a certificate of lawfulness was refused for security railings that had been installed around the edge of the roof. The railings had been removed by the time of the appeal visit. Any question of the use of the flat roof for sitting out or whether the placing of the planters and trellises helps to facilitate such a use is not a matter before me.
12. The combination of all the above considerations leads me to the conclusion that planning permission was not required for the placing of the planters and the trellises on the roof of No. 34 Cato Street on the scale as carried out.
13. The appeal on ground (c) succeeds. The enforcement notice is quashed. The appeal on ground (a) is therefore not considered.

FORMAL DECISION

14. The enforcement notice is quashed.

John Whalley

INSPECTOR