

Appeal Decision

Site Inspection on 21 November 2016

by Graham Self MA MSc FRTPI

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

Decision date: 23 November 2016

Appeal Reference: APP/H5390/C/16/3148669

Site at: Flat 4, 16 Bramber Road, London W14 9PB

- The appeal is made by Mr Philipp Zingerle 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 London Borough of Hammersmith and Fulham Council.
- The notice is dated 24 March 2016.
- The breach of planning control alleged in the notice is: "Without planning permission the installation of a balustrade around the perimeter of the main roof, and the installation of a staircase leading onto the main roof in connection with its use as a roof terrace".
- The requirements of the notice are:
 - a. Cease the use of the roof at third floor level as a roof terrace.
 - b. Remove from the land the metal railings surrounding the main roof and the metal stair case leading onto the main roof.
- The period for compliance is six months.
- The appeal was made on grounds (b) and (c) as set out in Section 174(2) of the 1990 Act. Ground (a) was later added and the fee was paid for the application for planning permission deemed to have been made under Section 177(5).

Summary of Decision: The appeal does not succeed.

The Enforcement Notice - Allegation and Requirements

1. The enforcement notice is flawed. I shall explain why below, bearing in mind that the appellant is not professionally advised.
2. For the purposes of planning law there are two main types of "development" as defined in Section 55 of the Town and Country Planning Act. One is *operational development* - which covers a building, engineering or other operation. The other type of development is *making a material change of use* of a building or other land. An enforcement notice directed at a material change of use can validly require operational development which has facilitated and is integral to the unauthorised change of use to be undone.¹ However, the reverse does not apply - thus a notice directed at operational development cannot validly require an unauthorised use to cease. The inclusion in the allegation of this notice of the phrase "in connection with its use as a roof terrace" does not affect the fact that this is an "operations" notice.

¹ The standard court judgments confirming this point are *Murfitt v SSE & East Cambridgeshire DC* [1980] and *Somak Travel v SSE* [1987].

3. The notice is not fatally flawed, because I can use the powers available to me under Section 176 of the 1990 Act to vary it. It is sensible for me to do so bearing in mind that if the notice were to be quashed for the reason just explained, the council would simply issue another one and there would be another appeal, causing further cost, delay and inconvenience for all involved.
4. I shall therefore make a suitable variation by deleting the requirement relating to the use of the roof. However, I stress that this step is for legal reasons and I am not condoning or permitting "the use of the roof as a roof terrace".

Ground (b)

5. This ground of appeal is a claim that the development enforced against as described in the enforcement notice has not occurred, as a matter of fact. Although "balustrade" may not be quite the correct term to describe the railings which have been erected around the roof, it is a reasonably apt description, and it is clear that as a matter of fact, the railings and the staircase have been installed. Thus the operation described in the allegation has occurred, and there is no basis for the appeal to succeed on ground (b).

Ground (c)

6. Under ground (c) it is claimed that the matters stated in the enforcement notice's allegation did not constitute a breach of planning control. The installation of the railings and staircase was an operation of the type defined as development in Section 55 of the 1990 Act. No application for planning permission was made. The works carried out did not fall within any of the categories of permitted development under the Town and Country Planning (General Permitted Development) Order, and planning permission was not granted by any other means. Therefore what is alleged in the enforcement notice constituted a breach of planning control and the appeal on ground (c) fails.

Appellant's Alternative Claims

7. I am inserting here an explanation of some points which I hope will help Mr Zingerle to understand why his case on both grounds (b) and (c) is unsuccessful. He has put forward some arguments which do not relate to these grounds of appeal.
8. Mr Zingerle has contended in essence that during the process of dealing with the Borough Council, he has done everything the council required him to do in order to comply with building regulations. Part of his case is that throughout the entire correspondence he had with the council, he was never informed of the potential need for planning permission. He argues that all guidelines, requirements and deadlines given by the borough council have been respected in every detail.
9. Unfortunately for Mr Zingerle, he has apparently not realised that building regulations and planning law cover completely different areas of legislation. An approval under building regulations does not grant planning permission. It seems that Mr Zingerle noted the comment by a building control officer (made in an email) that "a balcony will need planning permission" but took the view that he was not creating a balcony.
10. The council's building control officers might perhaps have done more to alert Mr Zingerle to the need for planning permission for the staircase and railing structures, but it would be unreasonable to expect more than a standard warning - and such a warning was appended to the receipt for the building notice application, which stated:

"Please note that any written approval given, or inspections carried out, by Building Control are for the purposes of the requirements of the Building Regulations 2000 (as amended) only and do not confer any approval under the Town and Country Planning Acts, nor under any other legislation that may be applicable."

11. In his appeal statement Mr Zingerle writes: I have written confirmation by the council that....a planning permission is not needed". That claim conflicts with the warning note which I have quoted above.
12. I also note Mr Zingerle's statement that he employed "a professional (and expensive) architect". I have sympathy for the situation which Mr Zingerle now finds himself in, perhaps caused by lack of suitable advice. It appears from the submitted drawings that the designer employed by Mr Zingerle is not based in the UK (the drawings are labelled with the name of an architectural firm based in Bolzano, northern Italy). I do not know whether the designer is entitled to use the title "architect" in the UK², or whether this person told Mr Zingerle anything about the requirements of UK planning law. Be that as it may, although the various reasons why Mr Zingerle did not obtain planning permission are understandable, they do not amount to a case on either grounds (b) or (c) of Section 174(2).

Ground (a) and Deemed Application

13. The main issues raised by this part of the appeal are the effect of the development on the appearance of the appeal property and the possible impact on the residential amenity of neighbouring occupiers. As in all such cases, these issues have to be considered in the light of applicable planning policies.
14. The railings and staircase are fairly easily visible from the street, for example from the pavement on the opposite side of Bramber Road. Many users of the street would probably not often look up towards roof level, but that is not a major point in favour of granting planning permission. There is considerable variation of roof shapes in this terrace, but seen from the front in particular, the railings and staircase are noticeable as the only such structure projecting at roof level in the terrace containing the appeal property. The structure is incongruous and visually out of keeping with the rest of the building and its neighbours.
15. Mr Zingerle points out that the materials and design of the railings, including details such as the spearhead finials, are the same as is found in the surrounding area. That is so only when comparing the railings to others which are not at roof level and visible from the street. I also note Mr Zingerle's comment that the specifications of the railings were agreed with the council. As I have previously explained, any agreement for the purposes of building regulations is not a substitute for planning permission.
16. During my inspection I saw that several areas of flat roof behind the buildings in both Bramber Road and Chesson Road are bordered by enclosing structures of various types, including frosted glass panels, which do not reflect the frontage design of these terraces; but these features are at the rear, not visible from public viewpoints in the street, and so do not have as much effect on the appearance or character of the terraces as the structures enforced against.

² Those practising architecture in the UK are subject to legal restrictions on the use of the term "architect". Most UK-qualified architects can be expected to have some basic knowledge of UK planning law even though not professionally qualified as planners.

17. The council's case is supported by relevant planning policies. Under Policy BE1 of the development plan for the Borough, development should "respect local context and character". Development Management Policy G3 provides that alterations to buildings should be successfully integrated into the architectural design of the existing building. In my judgment this development does not meet those criteria.
18. As regards the amenities of nearby residents, the dwelling at Flat 4 is a small unit currently occupied by a member of Mr Zingerle's family, and evidently the flat is not occupied all of the time. Mr Zingerle states that he does not intend to use the roof area in such a way as would cause loss of privacy to neighbouring residents.
19. According to his appeal statement Mr Zingerle's main reason for installing the railings and staircase was to provide easy access to the flat roof and for safety purposes when the roof window needs to be cleaned. The reference to cleaning the roof window is qualified in the statement by the phrase "among other things", and the window cleaning does not seem to have been mentioned as a priority in the correspondence with the council officers dealing with building regulations. The railings enclose a larger area than would appear to be necessary merely for cleaning the roof window, and I note that on the drawings submitted in evidence the enclosed area is labelled as "rooftop terrace", though this may perhaps be a misunderstanding by the designer.
20. Unfortunately for the appellant, even setting aside the points of doubt just mentioned, his intentions have little weight since ownership and occupation of the flat could change at any time. Future occupiers might well have a different lifestyle to the current occupier. The staircase and railings, possibly combined with some temporary roof protection which could be difficult for the planning authority to control, could result in the roof area being more frequently used for leisure purposes unrelated to window cleaning. In these circumstances the occupiers of numerous dwellings in Chesson Road which have rear-facing windows and small outside areas would be likely to suffer reduced privacy, to an extent causing either perceived or actual loss of amenity. The extent of such harm might not be very great, bearing in mind that mutual overlooking already occurs between flats in these two terraces; nevertheless I judge this to be a supplementary objection to the development.
21. In reaching my decision I have considered the possibility of imposing conditions, for example requiring the railings and staircase to be painted black. I judge that the objections to the development would not be overcome by this means. I conclude that the council had sound reasons for issuing the enforcement notice and that planning permission should not be granted, so the appeal on ground (a) fails.

Formal Decision

22. I direct that the enforcement notice be varied by deleting sub-paragraph (a) from the text of the requirements (headed "What You Are Required To Do", and by deleting the bracketed letter "(b)" where it introduces the second sub-paragraph of the requirements, so as to leave this paragraph (beginning "Remove from the land...") as the only requirement. I dismiss the appeal, refuse to grant planning permission on the application deemed to have been made under Section 177(5) of the 1990 Act, and uphold the enforcement notice as varied.

G F Self

Inspector