

Appeal Decision

Site Inspection on 25 November 2016

by Graham Self MA MSc FRTPi

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

Decision date: 14 December 2016

Appeal Reference: APP/A5270/C/16/3149780

Site at: Flat 2, 13 Wimborne Gardens London W13 8BY

- The appeal is made by Mr Marc Hickey 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 Ealing Council.
- The council's reference is COM/2015/00242.
- The notice is dated 6 April 2016.
- The breach of planning control alleged in the notice is: 'without planning permission, the installation of a balustrade (marked with an X on the attached plan and hereinafter referred to as the "Unauthorised Development" facilitating the use of the rear extension as a balcony'.¹
- The requirements of the notice are:
 - a. Remove the balustrade in its entirety.
 - b. Remove all resultant debris.
- The period for compliance is one month.
- The appeal was made on grounds (a), (c) and (d) as set out in Section 174(2) of the 1990 Act.

Summary of Decision: The appeal succeeds for legal reasons. The enforcement notice is quashed.

Procedural Matters

Site Inspection

1. Neither the appellant nor anybody representing him arrived at the arranged time for the site inspection, or for some time afterwards. As far as I could tell after ringing doorbells, nobody was at home in the appeal property. I spoke to the appellant's agent on the telephone in the presence of the council's representative. The agent told me he was not aware of the inspection arrangements. With permission from staff at the nearby school, I was able to see the rear of the appeal property while standing on a stepladder to look over the boundary fence.
2. I have pursued within the Planning Inspectorate the matter of the site inspection arrangements. The relevant administrator (who is not the case officer) has confirmed to me that notification of the arrangements was sent to the appellant's agent at 11.48am on 7 November 2016. The message was sent to the email

¹ The absence of a closing bracket after the phrase "marked with an X on the attached plan" is because I am quoting directly from the enforcement notice here.

address stated on the appeal form. I have also been assured that the Inspectorate uses a system which notifies the sender of any undelivered messages, and that the message to the appellant's agent was not returned as undelivered. I therefore believe that the appellant's agent was notified of the arrangements.

Correspondence and Comments after Site Inspection

3. As both main parties and a third party will be aware, I sent a written message (through the case officer in the Planning Inspectorate) to all three parties after my inspection, raising questions and inviting comments on a number of points about the validity of the appeal, the ownership of the part of the appeal property involved in this dispute, and aspects of the property's planning history. The "third party" referred to here are Mr and Mrs Cohu, who evidently own and occupy the ground floor flat (Flat 1). They (and a neighbour) had submitted written representations about the appeal and they have an interest in the case for various legal and planning reasons.
4. The points I raised in my message are a matter of record and I do not propose to reproduce them here, but I refer below to the main matters arising.

Right of Appeal and Validity of Enforcement Notice

5. The evidence which was originally available to me suggested that Mr Hickey might not have had a right of appeal. From the information about shared ownership submitted in response to my queries, I am now satisfied that Mr Hickey had a right of appeal. My finding on this matter is based on Mr Hickey's evident part-share in the freehold of the site at 13 Wimborne Gardens since March 2015 (well before the enforcement notice was issued). The ownership and usage rights of the balcony at the rear of the appeal property are disputed, and I am not entering into that dispute. Whether Mr Hickey has gained "adverse possession" rights to use or occupy the balcony which projects above part of the roof of the rear ground floor extension and whether any such rights could extend to tenants of Flat 2 are not matters for me to determine and I make no finding on them.
6. I have also decided that the notice can be treated as valid, even though it may have inaccurately regarded the disputed development as being part of Flat 2 and so may have incorrectly defined "the land affected". All potentially relevant parties were aware of the notice and have had the opportunity to appeal or comment on the appeal, so no injustice would be caused in my taking this approach even if the address in the notice is flawed. According to the annex to the enforcement notice, the notice was served on Mr and Mrs Cohu, and they could have appealed against it. Instead, they stated that they intended to comply with it.²

Ground (c) and Related Legal Issues

7. I consider ground (c) before the other grounds as it is logical to do so. Under this ground of appeal, it is claimed what occurred, as alleged in the enforcement notice, did not constitute a breach of planning control.
8. The appellant's case is mainly based on the premise that the railing balustrade was erected as the re-installation of a pre-existing balustrade, which had been in place for well over four years and was removed for a few months as part of maintenance or improvement work which did not materially affect the external appearance of the building. The supporting evidence includes a drawing dated

² I also understand that a legal undertaking relating to court proceedings has prevented them from doing so.

August 2010 showing a railing balustrade as existing. I am leaving this argument to one side because it is really a claim that the balustrade had gained immunity from enforcement by having been erected more than four years before the enforcement notice was issued, and such a claim is more applicable to ground (d) than ground (c).

9. The property's recent planning history raises different considerations relating to ground (c). The evidence originally supplied about recent planning permissions was incomplete (as I comment further in "Other Matters" below). In my message to the parties, I referred to planning permissions which I discovered had been granted. These include a permission issued in 2011, subject to various conditions, for a rear ground floor extension to Flat 1. The elevation drawings in the application plans (labelled drawing 10/22/10) show a balcony surrounded by railings at rear first floor level. Condition 5 of this permission provides that: "The development hereby approved shall be carried out in accordance with drawing title 10/22/10 unless otherwise agreed in writing by the local planning authority". There is no evidence that the council have agreed any variation from drawing number 10/22/10.
10. As far as I can tell from what I have seen and read, the timing of events here is this: the planning permission just mentioned was granted on 3 October 2011; the works to the balcony, when existing railings were removed, were carried out in approximately the summer of 2014; the enforcement notice was issued in April 2016. Photographs indicate that the rear ground floor extension was not there in 2014. It was in place when I saw the site. In their comments submitted in December 2016 Mr and Mrs Cohu have referred to "our extension build this year" (ie 2016), but have also written: "This Spring, when we notified the appellant that we would....resume our extension build". This evidence taken together is unclear, but the word "resume" suggests that a start was made on the rear extension before the Spring of 2016 (on a date not revealed in any submitted evidence) and that work later stopped. However, Mr and Mrs Cohu's appeal statement - which was evidently submitted in June 2016 and is headed "*Complete Relevant Background*" - does not mention the construction of the rear ground floor extension.
11. There appears to be a discrepancy between the drawings of the extension and what now exists on the ground, in that the balcony and railings ended up in a higher position than previously because of alterations to the flat-roofed area. As I have not been able to gain access to make measurements I do not know the precise difference in height: the photographic evidence suggests that this difference may be about 16-20 centimetres. However, the council have not taken enforcement action against the balcony on the ground that it is at the "wrong" height, or that a part of a structure which was merely a flat roof has been reconstructed to form a balcony, only against the balustrade.
12. I have given the council the opportunity of submitting that what has been built is materially different from what was permitted under the 2011 permission, or that the rear ground floor extension including the balcony, or the balcony itself, is unauthorised because the 2011 permission had lapsed. No such alternative submissions have been made; so the council appear to be satisfied - or to have been satisfied up to now - that the ground floor extension, complete with the balcony and surrounding railings, has been built in accordance with the approved plans and with Condition 5 of the 2011 permission.

13. In response to my questions and invitation to comment, the council have contended:
- "A planning application for the installation of a balustrade to facilitate the formation of a balcony was never submitted to, nor approved by the LPA. Whilst it may have been shown on existing and proposed plans of previous applications it did not form part of the development description of any related planning application and was not consequently assessed by a Planning Officer on its merits."
14. That contention misses the point. The grant of planning permission for the rear extension, with drawings clearly showing the balcony surrounded by railings at roof level of the extension, permitted what was shown on the drawings - especially since the permission was subject to a condition that the development shall be carried out in accordance with the approved drawings. If what has been built is materially not in accordance with the drawings, the ground floor extension would be unauthorised. As I have noted above, that has not been argued - at least, not yet - and I can only take account of the arguments put before me.
15. Part of the council's case is that during the time when the railings were removed (for a period which the council say was 5 months), "the council would have been precluded from taking enforcement action because the breach of planning control had ceased....as such, a break in the continuous existence of the development had occurred, thereby breaking any immunity that may previously have been granted". At first sight, this argument seems to have force. But because of the 2011 planning permission (assuming it was implemented), the point about the breach of planning control having ceased for a period does not apply.
16. In summary, the enforcement notice was directed at a railing balustrade which appears from the available evidence to be part of a development which had been granted planning permission. A planning permission overrides an enforcement notice, so on that basis the development enforced against ("the installation of a balustrade") would have been permitted; the matters alleged in the notice would not have constituted a breach of planning control, so the appeal would succeed on ground (c).
17. There is an alternative possibility. Looking at all of the evidence, including an apparent refusal of an application to discharge Condition 1 of the 2011 permission, it is possible that building work on the ground floor extension was not started until after the 2011 permission lapsed.³ If so, the balcony and railings shown in drawing 10/22/10 would not have been authorised by the 2011 permission, irrespective of any balcony height discrepancy. If those circumstances were to apply I would still have quashed the enforcement notice, on the grounds that it would have been directed at the wrong breach, and should have been directed either at the whole of the ground floor extension including the balcony with its balustrade, or at the balcony at its present height together with the balustrade.⁴ Either way, the outcome of this case would have been the same, though the reason for quashing the notice would be different.

³ An application for discharge of Condition 1 of the 2011 permission (the three year time limit on the permission) was evidently refused in October 2015. (Source: Council website). This makes me doubt that the permission was kept alive by some initial work (such as digging a foundation trench) before then, and later stopped.

⁴ Several court judgments (including *Sage v SSETR* [2003] and the much older *Copeland v SSE* [1976]) have established the principle that where operational development such as the erection of a structure is not carried out wholly in accordance with a permission, the whole structure is unauthorised, not just the part of it which does not accord with the permission.

18. Having regard to all the points discussed above, I have decided to quash the enforcement notice, either because the appeal on ground (c) succeeds or because the notice was directed at the wrong breach.

Grounds (d) and (a)

19. In view of the conclusion I have reached on ground (c) and related legal points, the other grounds pleaded become superfluous. I do not get as far as considering the deemed application for planning permission, and the fee for it should be returned in due course.

Other Matters

20. Parts of the written statements submitted in relation to this case deal with a planning permission granted in February 2016 for the retention of pvc-framed doors and a window at the first floor rear of the appeal property. The approved drawings for this permission did not show the railings, apparently at the request of the council before permission was granted. This is a secondary issue which does not affect the appeal decision, as there is no reason why the 2016 permission for the doors and window should override or negate the permission for the ground floor extension which included the railings.
21. It is not for me to comment on issues relating to building regulations or the related references in submitted statements to the possible installation of "Juliet-type" railings next to outward-opening French doors.⁵ Planning permissions can sometimes be issued for development which would not comply with building regulations. The fact that the council granted planning permission for outward-opening doors next to an area of flat roof does not mean that planning permission was granted in 2016 for the balcony and railings.
22. There is disputed evidence on several other matters. One example is whether the railings which were removed as part of the work carried out in 2014 were replaced later, or whether new railings were bought. Mr and Mrs Cohu state that the appellant bought new railings. The appellant states that the railings previously in place were temporarily removed, stored in the property, and then replaced. The appellant's case is supported by a sworn statutory declaration by a builder (Mr Tracey). However, his statement that he "replaced the metal balustrade *in the same position* [my italics] on the balcony" fails to mention the increased height of the flat roofed area (and therefore of the railings). The difference in height is apparent in photographs, including those showing visible marks where the railings previously joined the brick wall.
23. Because I cannot test witnesses by oral questioning, I cannot tell which evidence about the source of the railings is correct. In any event, this is an issue of possible relevance to ground (d) rather than ground (c), and as already noted ground (d) does not fall to be considered.
24. Mr and Mrs Cohu say they have "credible witnesses should you wish to have further evidence" and also state: "Please contact us on the telephone numbers below if you would like more information". I cannot take up either of those suggestions. The written appeals procedure requires all submissions and evidence to be in writing, and although I have had to raise questions and invited comments on specific points, it is not for me or the Planning Inspectorate to construct cases for any party.

⁵ Although I use the term "doors" these opening glazed units evidently do not extend right down to internal floor level - a 2016 photograph shows an internal raised lip or step which was not present in 2014. This difference presumably resulted from a reduction in the vertical dimension of the opening, caused by the increased external height of the flat roofed area.

25. It is unusual, and not normally appropriate, for an inspector to have to probe the planning history of an appeal site by searching the local authority's website. I considered it necessary in this instance because when I looked at the rear of the site I was surprised to see the ground floor extension, when there was no reference to any planning permission for it in the appeal statements.
26. Statements for written appeals should be concise, but they should also contain enough relevant facts for a properly informed decision to be made. This applies to all involved, but particularly the two main parties. My written messages have made the appellant, the planning authority and Mr and Mrs Cohu aware that I consider recent planning permissions to be relevant, and they have all had the opportunity to comment. I have tried to get gaps in the evidence filled, but I am fairly sure that I have not been told everything I should have been told about the planning history of this property; that is why I have had to consider alternative possibilities.
27. My decision does not rule out further enforcement proceedings. Whether enforcement action against the rear extension as a whole (including the balcony and balustrade) or the balcony as a whole (with the balustrade) would now be appropriate is a matter for the council, depending on facts which are not all known to me.⁶ Alternatively, the outcome of court proceedings in due course may enable Mr and Mrs Cohu to remove or alter the balcony and/or the railings irrespective of the existence or absence of any extant enforcement notice.

Formal Decision

28. I allow the appeal and direct that the enforcement notice be quashed. The application deemed to have been made under Section 177(5) of the 1990 Act does not fall to be considered.

G F Self
Inspector

⁶ To avoid possible misunderstanding, I point out here that an enforcement notice directed at an unauthorised structure does not necessarily have to require complete removal; it could "under-enforce" by requiring an alteration to the structure.