



Appeal Decision

Site visit made on 18 January 2017

by Susan Wraith Dip URP MRTPI

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

Decision date: 16 February 2017

Appeal Ref: APP/A5840/C/16/3157076

Land at 158 Camberwell Road, London SE5 0EE

- The appeal is made under s174 of the Town and Country Planning Act 1990 [hereafter "the Act"] as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Rubina Usman against an enforcement notice issued by the Council of the London Borough of Southwark.
 - The notice was issued on 6 June 2016.
 - The breach of planning control as alleged in the notice is: Without planning permission, the construction of a conservatory extension to the front of the Property at first floor level and shown in the approximate position edged blue on the enforcement notice plan.
 - The requirements of the notice are:
 - 5.1 Remove the conservatory extension (including for the avoidance of doubt its roof, windows and wooden supports) along with fixtures and fittings;
 - 5.2 Replace the door providing access to the conservatory extension with a window matching the windows on the floor above in terms of size, design and material; Return the ground floor roof of the Property to its condition before the breach
 - 5.3 occurred; and
 - 5.4 Remove from the Property any material and debris arising from compliance with the requirements of 5.1. to 5.3 above.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in s174(2)(a), (b), (c), (f) and (g) of the Act. Since an appeal has been brought on ground (a) an application for planning permission is deemed to have been made under s177(5) of the Act.
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Decision

1. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under s177(5) of the Act for the development already carried out, namely the erection of a conservatory extension to the front of the property at first floor level and shown in the approximate position edged blue on the enforcement notice plan on land at 158 Camberwell Road, London SE5 0EE referred to in the notice.

Preliminary matters

2. The deemed application and all of the grounds of appeal flow from the wording of the allegation. It is argued by the appellant that the allegation should be described as the infilling of the sides of the structure with window frames and glazing as the structure, in the main, was erected more than four years ago. The appellant considers the notice to be confusing in this regard and, thus, a nullity. However, the question of whether or not enforcement action was
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taken in time is one for the grounds of appeal. On the face of it there is a structure to the front of the property at first floor level which can reasonably be described as a conservatory extension. I do not find the notice to be a nullity or that any correction to the allegation is called for.

3. There is no appeal made expressly on ground (d).¹ However, the appellant has brought evidence to support her claim that the structure, in the main, was constructed more than four years before the notice was issued. I shall consider this evidence under the heading "The implied appeal on ground (d)".
4. Grounds (b), (c) and (d) are amongst those known as the "legal grounds". In a legal ground of appeal the burden of proof is upon the appellant. The test of the evidence is one of balance of probability.²
5. There is an unresolved issue between the appellant and the Council concerning whether or not the conservatory can be used for the holding of functions. However, the notice that is before me in this appeal concerns only operational development. There is no material change of use alleged. Thus, this issue remains one for the appellant and the Council in the first instance.
6. Notwithstanding the above, I do not rule out that some use of the conservatory might occur as a part of the existing use of the premises as a hotel.

The appeal on ground (b)

7. An appeal on ground (b) is that the matter alleged has not occurred as a matter of fact. The matter alleged is the construction of a conservatory extension. As a matter of fact, there is a conservatory extension at the premises in the position described in the notice. The appeal on ground (b) fails.

The appeal on ground (c)

8. An appeal on ground (c) is that the matter alleged (if it occurred as a matter of fact) does not amount to a breach of planning control, for example because it is not development or is permitted development.
9. I know of no permitted development rights that would allow the construction of a conservatory in such a position upon a hotel. Neither has such a case been argued. The works materially affect the external appearance of the building and amount to development as it is defined by s55 of the Act.³
10. Apart from the matters to be considered under ground (d), there are no arguments put for why the construction of the conservatory would not amount to a breach of planning control. The appeal on ground (c) fails.

¹ An appeal on ground (d) of s174(2) of the Act is that, at the date when the notice was issued, no enforcement action could be taken in respect of the matter(s) alleged.

² Balance of probability concerns "likelihood". In other words, it means that the assertion being made is more likely than not to be true.

³ S55 of the Act sets out the meaning of "development". It states that development means (amongst other things) the carrying out of building operations. The carrying out of maintenance, improvement or other alterations which affect only the interior of a building, or do not materially affect its external appearance, do not involve "development". However, the appeal development does not fall within these preclusions.

The implied appeal on ground (d)

11. Under s171B(1) of the Act the relevant time period for taking enforcement action, in the case of a breach involving building operations, is four years. The four year time period begins to run from the date of substantial completion. The relevant date before which substantial completion must be demonstrated is the date four years before the issuing of the enforcement notice, in the appeal case 6 June 2012.
12. The Council argues that the conservatory was not substantially completed until the glazing and frames were installed, which was less than four years before the issuing of the notice.⁴ The appellant, on the other hand, argues that much of the structure was completed, and the area was in use, more than four years before the issuing of the notice.
13. Having regard to the cases put by both parties, I consider that the determinate matter is whether the conservatory was constructed as a single building operation (and thus substantially completed after the relevant date) or whether it evolved as a result of a series of different building operations each one having a separate date for its substantial completion.
14. It is said that the previous owner used the area as a roof terrace from 2006. The earliest photographic evidence dates from 2009⁵ and shows parasols and planting behind the deep fascia sign indicating that the area was, indeed, in use as a terrace by that date.
15. At my site visit I saw that a plinth surrounded the area which was behind the fascia sign at its front part, the fascia appearing the same as is shown in the 2009 photographs. The plinth is constructed in the same material as the decked surface, both the plinth and the decking giving the appearance of having been installed together as part of a coherent scheme.
16. Whilst the decked surface cannot be seen in the 2009 photographs, I am inclined to agree with the appellant that a surface would probably have been laid to the flat roof area at the time it was first brought into use as a terrace, in order to protect the roof and to provide a suitable floor for the terrace. It is more likely than not that this would have been the decked surface (which is raised a little above roof level) installed together with the plinth, and that the plinth was behind the fascia sign and to the sides of the area in 2009 as indicated by the photographs.
17. It is also likely the doorway opening (referred to in the requirements of the notice) would have been formed at around that time as, without it, there would have been no means of access to the terrace.
18. I do not consider, on balance, that the installation of the decked surface and plinth, together with the formation of a doorway opening, would have been part of an ongoing building operation. That is because the area was brought into use as an open terrace with parasols and planting and because it appears

⁴ There is no precise evidence of when the glazing and frames were installed. However, it must have been after October 2012 as these works do not appear in the Facebook photograph of that date. Therefore the works must have been carried out after the relevant date and, thus, within the four year period prior to the issuing of the notice.

⁵ Both the Council and the appellant have produced photographs taken from Google Street View dated 2009.

there was an interval during which the area was in use without any further works being undertaken. I consider, as a matter of fact and degree, that the works involving the installation of the plinth and decking, together with the formation of the doorway, amounted to a discrete building operation that was complete and in use by the time of the 2009 photograph and, thus, substantially complete more than four years prior to the issuing of the enforcement notice on balance of probability.

19. By April 2012 a timber framed canopy had been erected over the terrace. This is evidenced in a Google Street View photograph of that date. The canopy is also seen in the Facebook photographs dated July, August and October 2012.⁶ The evidence is unclear as to whether the roof was glazed or covered in plastic sheeting and later changed to glazing.⁷ However, this is of little consequence to the issues in the appeal.
20. I am mindful of the relevant date (6 June 2012) before which substantial completion must be proved. The Facebook photograph in July 2012 shows the timber framed canopy in situ and the area in use. The canopy is also seen in the April 2012 photographs albeit the area does not appear to be in active use at that particular snapshot in time. However, it is possible to see that lighting had been installed upon the structure, indicating that it was in its finished form at that date.
21. There is no evidence of any further ongoing development at that time. The area was brought into use and a period of (at least) six months elapsed without any further works being undertaken.⁸ As a matter of fact and degree, the erection of the canopy amounted to a separate building operation and, thus, a separate breach of planning control. The works to construct the timber framed canopy were complete by the time of the April 2012 photographs and, thus, substantially complete more than four years prior to the issuing of the enforcement notice on balance of probability.
22. The appellant acquired the property in July 2014 by which time frames and glazing had been installed to the sides and front of the canopy (above the plinth) and to the roof. These alterations are shown in the Google Street View photographs of June 2014. These works to alter the structure amounted to a further act of development. However, the timber frame of the canopy (as had been in situ in April 2012) remained in situ.
23. I agree that the Council would not have been able to enforce against a "conservatory" on the relevant date (four years prior to the issuing of the enforcement notice) as at that time there was a timber framed canopy over the decked area and the structure could not have been described as a conservatory. However, that is not the determinate issue. A four year period has passed within which enforcement action could have been taken at any time against the decking, plinth and doorway; and another four year period has passed within which action could have been taken at any time against the timber framed canopy (albeit a further breach involving the installation of

⁶ Both the Council and the appellant have produced photographs taken from Google Street View of 2012. The appellant's photograph is dated April 2012. Facebook photographs, dated, are within the appellant's evidence and show the area beneath the canopy in use in July, August and October.

⁷ The appellant refers to the roof being glazed whereas the Council says it was covered in plastic sheeting.

⁸ The October 2012 Facebook photograph shows the canopy. No further works had been undertaken from the date of the April 2012 photographs.

frames and glazing may have occurred over that period). In respect of both of these separate operational developments, the enforcement notice was issued too late on balance of probability.

24. Insofar as the enforcement notice relates to the insertion of frames and glazing, however, the enforcement notice was issued in time. The implied appeal on ground (d) succeeds only in part.⁹ I shall, therefore, proceed to consider the appeal on ground (a) and the deemed application focussing particularly upon the insertion of the frames and glazing.

The appeal on ground (a) and the deemed application

Planning policies and statutory requirement

25. The development plan comprises the London Plan 2016¹⁰ [hereafter "LP"], Southwark Core Strategy 2011 [hereafter "SCS"] and the saved policies of the Southwark Plan 2007 [hereafter "SP"]. LP policies 7.4 and 7.6, SCS policies 12 and 13 and SP policies 3.12 and 3.13, taken together, seek to ensure development is of the highest possible standard of design which contributes positively to the character of the area and is of high environmental quality. LP policy 7.6 and SP policy 3.2 seek to ensure that development does not cause a loss of amenity, including in terms of noise, privacy and overshadowing.
26. Planning law requires that planning decisions are made in accordance with the development plan unless material considerations indicate otherwise.¹¹
27. Reference has been made to the National Planning Policy Framework [hereafter "the Framework"] which sets out the Government's planning policies for England and how it expects these to be applied at local level. Section 7 is concerned with requiring good design. The Framework is a material consideration in this appeal.
28. The SP and SCS policies referred to above, whilst pre-dating the Framework, are in general conformity with it. The LP policies post-date and conform with the Framework.

Main issue

29. Having regard to the planning policies and submissions made by the parties, and the limited extent to which enforcement action may be taken against the structure, I consider the main issues in the appeal on ground (a) and deemed application to be the effect of the window frames and glazing upon the character and appearance of the area; and upon the living conditions of neighbours with particular regard to outlook, lighting, privacy and noise.

⁹ As the implied appeal on ground (d) succeeds in part this may lead to variations in the requirements of the notice under ground (f). However, first of all it is appropriate that the development is considered on its planning merits under ground (a) and the deemed application. If permission is granted no need arises to consider ground (f).

¹⁰ The London Plan 2015 is referred to in the enforcement notice. However, this earlier version was replaced by the London Plan 2016. There is no material difference insofar as the policies relevant to the consideration of this appeal are concerned.

¹¹ S38(1) and (6) of the Planning and Compulsory Purchase Act 2004 and s70(2) of the Town and Country Planning Act 1990.

Effect upon the character and appearance of the area

30. The appeal building fronts a busy main road within an area of mixed commercial and residential uses. The building is characteristic of many in the area, with its main façade set well back and its ground floor projecting forward to the back edge of the footpath. The appeal structure sits upon the flat roof of the ground floor projection.
31. There is little evidence of other usage of the projecting flat roof areas. None of the other properties within the parade, or on the opposite side of the road, have any such structures. To that extent, the appeal structure does not conform to the prevailing character and appearance of the area.
32. However, it is necessary to take into account that the terrace, plinth and wooden framed canopy to which the glazing is affixed cannot be enforced against and that the structure could revert to its previous appearance. This is an important material consideration to which I attach substantial weight.
33. The frames and glazing have altered the structure but, to my mind, not in a detrimental way. The glazing serves to enclose the area and helps to mask the clutter and paraphernalia arising from the use which would have been far more visible beneath the open sided canopy. The structure now has a more understated and simple appearance, being seen as receding behind the deep fascia. It does not draw the eye to the same extent as did the timber framing of the canopy.

Effect upon living conditions of neighbours – outlook, lighting, privacy and noise

34. The accommodation to either side of the conservatory is in residential use. Number 160 is positioned to the south and, therefore, enjoys a good level of daylight/sunlight. I cannot see that its outlook has been affected in any way by the installation of the glazing. Number 156 has a window in close proximity to the conservatory at a slightly lower level. Positioned to the north, it is likely to be overshadowed to an extent by the structure but the installation of the glazing will have made little discernible difference. Neither is there any difference in terms of effects from lighting as the area already had lighting. Nor is there any change to the level of privacy at these properties bearing in mind that there was an open sided terrace previously.
35. In terms of noise, the glazing would not have made matters worse. In fact noise emanating from the area may have been reduced a little by the enclosure of the sides of the structure.

Conclusions on ground (a) and the deemed application.

36. On ground (a) I conclude that, when comparing the altered structure to the pre-existing terrace and wooden framed canopy, the effect upon the character and appearance of the area is, on balance, positive. Additionally, there is no added harm to neighbouring residents in terms of privacy, outlook and noise. I find no conflict with the policies of the development plan insofar as the installation of the frames and glazing is concerned. There are no planning conditions suggested by the Council and I do not consider any to be necessary.

Conclusion

37. For all the reasons given above I conclude that the appeal should succeed on ground (a) and planning permission will be granted. Grounds (f) and (g) of the appeal do not, therefore, need to be considered.

Susan Wraith

Inspector