
Appeal Decisions

Site visit made on 20 March 2017

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 30 March 2017

Appeals A and B - Refs: APP/X5210/C/16/3155324 and 3155325

40b Rosslyn Hill, London NW3 1NH

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (the Act) as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Ethan Sassower and Mrs Tracey Sassower against an enforcement notice (EN) issued by the London Borough of Camden.
 - The enforcement notice, numbered EN15/0364 was issued on 21 June 2016.
 - The breach of planning control as alleged in the notice is: the erection of three (3) wooden structures dividing the rear roof terrace located on the flat roof of the rear extension at first floor level.
 - The requirements of the notice is to permanently remove the three (3) wooden structures dividing the rear roof terrace located on the flat roof of the rear extension at first floor level from the site.
 - The period for compliance with the requirements is one (1) month.
 - The appeal is proceeding on grounds (a) and (c) as set out in section 174(2) of the Town and Country Planning Act 1990 as amended.
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Appeal C Ref: APP/X5210/F/16/3155328

40b Rosslyn Hill, London NW3 1NH

- The appeal is made under section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr and Mrs Ethan Sassower against a listed building enforcement notice (LBEN) issued by the London Borough of Camden.
 - The notice, numbered EN15/0364 was issued on 21 June 2016.
 - The contravention of listed building control alleged in the notice is: the erection of three (3) wooden structures dividing the rear roof terrace located on the flat roof of the rear extension at first floor level.
 - The requirement of the notice is to permanently remove the three (3) wooden structures dividing the rear roof terrace located on the flat roof of the rear extension at first floor level from the site.
 - The period for compliance with the requirements is one (1) month.
 - The appeal is made on grounds (a), (b) and (e) as set out in section 39(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended (PLBCAA).
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Decisions

1. Appeals A and B are dismissed. In Appeal C the LBEN is quashed. See formal decisions below.

Background information

2. The appeals site comprises a self-contained flat (at No 40b) which forms part of a redeveloped Grade II* listed bank and two terraced houses which date back to around 1895-6. They are located within the Hampstead Conservation Area (HCA). The three wooden structures (which have the appearance of planters with fencing attached) have wheels and can be interlinked, or used separately to form a screen,

fence, partition or enclosure between the two parts of the flat roof. They have been positioned on the terrace, on the flat roof of the rear extension, at first floor level, where the property at No 40b abuts the rear boundary of No 3 Pilgrim Lane. They separate the roof terrace of the former property from that of the latter with the two properties sharing the terrace. There is a hinged timber gate attached to the easternmost unit.

3. Thus, the sub-divided rear roof terrace is used by the occupiers of both 40b Rosslyn Hill and No 3 Pilgrim Lane and a fire escape staircase allows the occupants of 3 Pilgrim Lane to access the roof terrace. The Lane lies to the south east of No 40b and the two buildings form an 'L-shape' linking Rosslyn Hill to the Lane with the former bank in between, which wraps around the corner junction of the two roads. The wooden appeal structures are located where the two properties meet at their rear extremities.

4. Other works relating to the single storey extension to No 40b and its roof terraces have been authorised by the Council. These include planning permission (PP) and Listed Building Consent (LBC) for the extension at rear first floor level (December 2011); the installation of a metal balustrade, timber screen, alterations and access to the second floor roof terrace (July 2014) and railings and 'oiled vertical iroko plank screening' to the second floor terrace (October 2014).

Appeals A and B on ground (c)

5. Under this ground it is initially argued that the EN is flawed because the Council has failed to specify whether the EN relates to: (a) carrying out development, or (b) failing to comply with any condition or limitation subject to which planning permission has been granted. However, it is clear from a full reading of the EN what the alleged breach comprises and that the Council clearly considers that that the breach falls under s171A (a) whereby it is alleged that the Appellant has carried out development without the required planning permission.

6. In any case the EN does refer to Section 171 A (1) (a) in part 1 and, even if a LPA omits a reference, such an error can be corrected under s176, as long as no injustice has been caused which, in my view, would be the situation in this case. I now turn, therefore to the essence of the appeal under ground (c).

7. To be successful on this ground it must be shown that either there is a planning permission in place for the works carried out, or that one is not required because, for example, the works do not amount to 'development' or constitute permitted development. The merits of the case do not fall to be considered under this ground. Clearly, although there are other PPs and LBCs for works to the rear roof terraces, the appeal structures are not included. Nor can they constitute permitted development due to the fact that the property is listed.

8. This just leaves the question as to whether or not the appeal structures constitute 'development' as defined by section 55 of the Act. On behalf of the Appellant it is argued that the structures do not fall within the meaning of 'development' in this section. It is indicated that the use of the terrace for residential purposes is authorised and that the EN does not allege any material change of use of the property.

9. It is noted that the 3 slatted 'timber cabinets' are mounted on castors with vertical timber back panels above the structures. It is stated that they are garden structures created by a cabinet-maker and contended that they do not comprise a building, engineering works or operational works normally undertaken by a builder. Furthermore it is indicated that the reason for issuing the EN relates to the visual

appearance of the sub-division of the roof terrace and that there is no alleged intensification of the lawful residential use.

10. In support of the Appellant's case it is stressed that the positioning of free-standing objects or structures (seats, tables, parasols and barbeque equipment) on an authorised amenity space does not constitute development. It is indicated that the appeal structures (a combination of timber seating, screening and garden/barbeque storage) are not physically attached to the building; that they are mounted on castors; that they are capable of being easily moved around the terrace and that their mobility allows for variations in the relative provision of amenity space for both dwellings.

11. The courts have held that operational development comprises activities which result in some physical alteration to the land which has some degree of permanence (*Parkes v SoS for the Environment* 1978). Other cases, (including *Skerritts of Nottingham Ltd v SoS for the Environment Transport and the Regions* 2009), have identified three primary factors, or tests, as being relevant to whether or not operations required planning permission. The three factors are size, permanence and physical attachment. In the Act a 'building' is defined so as to 'include any structure or erection and any part of a building as so defined, but does not include plant or other machinery comprised in a building'. The courts have also held that any object may be a 'building' in planning law without being incorporated into the land as part of the realty.

12. Applying these factors or tests to the situation at the appeals property, I acknowledge that the appeal structures are relatively small in themselves and that they have been designed to be multi-purpose. However when used together they are clearly of a size to perform what seems to me to be their primary function: that is to provide a physical sub-division of this first floor rear roof terrace. If that had not been the case then they might have been positioned in such a way to allow open movement across the terrace. Despite their other garden functions they have clearly been designed and constructed to span across the terrace in order to provide what is, in effect, a *wall, fence or enclosure* with a gate at one end.

13. It is evident that because of the castor wheels they can be moved relatively easily in order to open up a gap between the two areas of terrace. Although the structures also provide storage for garden items and barbeque equipment, as indicated above, it is evident from my inspection that their primary function is as a separating structure (or erection) of the roof terrace space.

14. Having seen the structures and how they can be moved, I accept that they are not physically fixed by any bolt, fixing or similar mechanism to the roof. However, they are clearly able to remain in place due to their weight only and are 'erections' or 'structures' which separate the two sections of the terrace. They have also been designed to provide such a barrier for a period of time and have been in place since April 2015. When designed and placed in position it was clearly the Appellant's intention for the separating structures to remain in place. My view in this respect is reinforced by the design and careful detailing and carrying out of the works.

15. Thus, with regard to the question of 'permanence', I consider that the structures were specifically designed as a '*wall, fence or enclosure*' and the reason for the works being carried out was to create a physical '*wall*' across the roof terrace so that the two parts could be used separately from one another. There is no evidence to suggest that the situation is to be temporary and it is not unreasonable to assume that the appellant wished the terrace to remain separated

in the future. It seems to me that the situation is one of '*permanence*' and that the likely timescale would be of material consequence in the planning context.

16. Having applied the relevant tests I conclude that the wooden structures are indeed '*buildings*', '*erections*' or '*structures*' and that they constitute development as defined in section 55 of the Act. With no planning permission in place (either express or permitted) it follows that Appeals A and B must fail on ground (c).

Appeals A and B on ground (a)

17. The main issues in both appeals are as follows: firstly, the effects of the unauthorised work on the character, integrity, setting and special historic and architectural features of the listed building and, secondly, the effect on the character and appearance of the Hampstead Conservation Area (HCA). There is also an issue raised by neighbours relating to the noise and disturbance caused by the separation and use of the terrace. However, the Council has not raised this as an issue or a reason for issuing the EN and the use of the terrace is, in any case, authorised. Any unacceptable levels of noise and disturbance would have to be dealt with by other legislation.

18. The relevant development plan policies are CS14 (Promoting high quality places and conserving our heritage); DP24 (Securing high quality design) and DP25 (Conserving Camden's heritage) of the LDF Core Strategy and Development Policies 2010. The decisions must be made in accordance with the policies unless material considerations indicate otherwise.

19. The policies are up-to-date with the National Planning Policy Framework (NPPF) which is a major material consideration. In reaching my decisions I have had regard to the NPPF and in particular to sections 7 (Requiring good design) and 12 (Conserving and enhancing the historic environment). I have also had regard to relevant sections of Planning Practice Guidance (PPG). Because the appeal property is listed in Grade II* and within the HCA, I have had regard and paid special attention to the duties set out in sections 66 (1) and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (PLBCAA).

20. Having seen the structures in place and having seen their physical relationship to the listed building(s), I share the Council's concerns about their effect on the character and setting of the buildings. At the time of my visit they were slightly staggered, as opposed to being in a straight line. Even so, due to their height, bulk and construction they are perceived as bulky, incongruous and visually harmful erections or structures. When looking down from the upper floor of No 40b they are seen as a separating timber wall. And when viewed from the terrace itself they are noticeably close to the rear wall of No 40b which affects the character and setting of the property as well as the character and setting of the main bank building.

21. Whilst accepting that they have been designed to also store garden furniture and barbeque equipment, their overall appearance is harmful to the listed building and its setting. The effect of this 'timber wall' also detracts markedly from the other special and architectural and historic features and layout of the buildings. It is clear that the Council would not have granted planning permission in the first instance and, having had regard to section 66 (1), I do not consider that the building, its setting and its features of architectural and historic interest have been preserved by this inappropriate and ungainly wall of 'timber cabinets'. There can be no justification, therefore, to grant planning permission for the retention of such a barrier at this appeal stage. Appeals A and B therefore fail on ground (a).

Appeal C – The Listed Building Enforcement Notice

22. I have concluded above in Appeals A and B that the timber structures constitute development and that, as *erections or structures*, they are '*buildings*' for purposes of the Act. However, they are free-standing buildings within the curtilage of the listed building. Listed building consent is not required for such a building if the works carried out are not physically affixed (for instance by bolts, other fixings or materials) to a part of the listed building or if they were constructed after 1 July 1948. The appeal structures are not connected physically to any part of the listed building, albeit they are held in place by their own weight. Thus, although they form the equivalent of a *fence, wall or other enclosure*, they do not, in my view, require listed building consent.

23. The operations carried out do, however, require planning permission and I have dealt with that above. There is still a statutory duty under section 66 (1) of the PLBCAA to have special regard to the desirability of preserving the building or its setting or any feature of special architectural or historic interest which it possesses. I have dealt with the planning application above and I have discharged the required duty under section 66 (1). This statutory duty is the same as that set out at section 16 (2), when considering whether or not to grant LBC.

24. However in these particular circumstances I do not consider that LBC is required and, therefore, there cannot have been a contravention of listed building control. I intend, therefore to quash the LBEN and Appeal C on grounds (a), (b) and (e) does not fall to be considered.

Other Matters

25. In reaching my conclusions in all three appeals I have taken into account all other matters raised by the Appellants, the Council and other interested persons. These include the full planning history; the grounds of appeal in each case, the Appellants' final comments dated 25 November 2016; the third party/interested persons' submissions and the photographic evidence.

26. However, none of these carries sufficient weight to alter my conclusions on Appeals A and B and that the LBEN (Appeal C) should be quashed.

Formal Decisions

27. Appeals A and B are dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the Act.

28. In Appeal C, the listed building enforcement notice is quashed.

Anthony J Wharton

Inspector