

Appeal Decision

Inquiry held on 28 February 2017

Site visit made on 1 March 2017

by Graham Dudley BA (Hons) Arch Dip Cons AA RIBA FRICS

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

Decision date: 7 April 2017

Appeal Ref: APP/X5990/X/16/3159960
61C Edbrooke Road, London W9 2DE

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Karen Atkinson against the decision of City of Westminster Council.
 - The application Ref 16/01375/CLEUD was refused by notice dated 12 April 2016.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is of a second floor roof as a terrace.
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Procedural Matters

1. At the Inquiry applications for costs were made by Karen Atkinson against the City of Westminster Council and by the City of Westminster Council against Karen Atkinson. These applications are the subject of separate decisions.
2. An application for planning permission for an extension (ref 04/06486/FULL) was permitted on 8 October 2004, subject to conditions. Condition 2 notes 'you must not use the roof of the extension for sitting out or for any other purpose, unless we have given you our written approval beforehand. You can however use the roof to escape in an emergency'. The reason was to protect the privacy and environment of people in neighbouring properties, identifying relevant policies. The roof over which this extension was constructed had been used as a terrace.
3. The LDC application was received and validated by the Council on 16 February 2016. The description of 'use of a second floor roof as a terrace' is used in the refusal notice and by the appellant in the appeal form, and I have used it also.

Decision

4. The appeal is dismissed.

Reasons

Main issues

5. The main issues are:

- The effect of the previous lawful development certificate (ref 12/03949/CLEUD).
- Whether the period to gain lawfulness by the passage of time should be considered as being 4 or 10 years.
- Whether there has been continuous use throughout the appropriate period (taking into consideration the type of use occurring).
- If the development is found to be lawful, whether there has been deliberate concealment or deception materially affecting enforcement action.

Lawful Development Certificate (ref 12/03949/CLEUD)

6. An application was submitted by the appellant for a LDC. There was some confusion about what was being applied for. Box 7 indicated that it was for 'building works only', with neither an 'existing use' nor 'an existing use, building work or activity in breach of a condition' section being ticked. However, Box 8 indicated allowing access... to create a roof terrace.
7. The Council saw the potential contradiction and wrote a letter asking for clarification of what was being applied for. The Council's concern was identification of physical works and/or use. The response was also very clear 'I confirm that I'm applying for a certificate of lawful development to prove the physical structures have been in place for a period of over 4 years'. The appellant acknowledged in cross-examination that she understood the LDC related only to operational development and hence the reason for not using the terrace at that time.
8. It is clear on the facts that the certificate application was only for physical works and not use and that is how the Council considered the application. The certificate is written in those terms and is clear on its face that it is for 'Lowering of window cill and insertion of new door to rear third floor elevation and erection of railings around the second floor flat roof'. The appellant identified at the inquiry that the reference to 'third' floor was an error and should be 'second'. However, it is clear from all correspondence that all understood the effect of the certificate.
9. I accept that when the notification letter went out to neighbours that indicated the application was seeking determination of the lawful use of the building. However, while the neighbours were misinformed of this, that does not affect the LDC issued, which was clearly based on the appellant's confirmation of what was being applied for and the certificate in itself is clear that it was for operational development only and not use.
10. I acknowledge that the information added to the certificate is confusing and wrong in terms of its advice. However, as pointed out by the appellant's counsel, that does not form part of the formal certificate. I accept that the LDC does confirm that the works described in it are lawful and that it would not be possible to take enforcement action against them, even if the use of the terrace is subsequently found to be unlawful in breach of the condition attached to the planning permission.
11. If the Council had any concern that it was not lawful, because it considered that the works were an integral part of the unauthorised use, then the

certificate should have been refused. It would have been up to the applicant to demonstrate that what was applied for was, on the balance of probability, lawful, including if necessary to demonstrate that they were not integral to the use or to prove the use lawful at the time. Had the Council now been trying to enforce against the works described in the LDC it would gain little benefit from the informative.

12. The appellant argued that in cases where lawful physical development had been undertaken in association with an unlawful use and which were integral to that use the lawful operational development could be required to be removed. In this case it is argued that the use is integral to the operational development and is therefore part and parcel of it. In similar terms it is also put that because the building regulation detail drawings showed what is suggested as stronger joists for the deck, and railing details at the edge of the roof, that these are integral to the use of the roof as a terrace, so that use was effectively before the Council and approved.
13. Railings and decking can be provided where a terrace is not being formed. It is not uncommon for flat roof buildings to have some form of railing as a safety feature, albeit often of a more utilitarian nature. The planning officer also noted that where there are small flat roofs such as these, it is not uncommon for them to be considered as a means of escape in case of fire or a refuge if downward escape through the building is blocked. The planning condition imposed at the time of the permission anticipated such use being possible and excluded it from what was being precluded by condition 2. The appellant confirmed this potential use in her email of 5 July 2012 noting, access only for means of escape in an emergency.
14. It is also relevant that the appellant used the flat roof as a terrace (albeit, as she noted, unsafely) from about August 2005 until about August 2006 when the railings were erected. This indicates that the appellant did not see the use of the roof as a terrace as being integral or part and parcel of the provision of railings or these were necessary to facilitate the use as a terrace, albeit accepting that safety is an important matter for consideration by any user. So while these features may be provided as an integral part of such use, they clearly were not in this case. Roof joist size can vary and to my mind a small difference cannot be taken as having a use integral to them.
15. I acknowledge that there is no specific escape route from the roof, but it could still be a refuge and, while land locked at the rear, ladders could be provided to aid rescue from the flat roof, or by dropping down onto the neighbour's terrace below and the presence of the railings would not be a significant hindrance to this. I reject that it must be assumed that the provision of/presence of the railings and joists means that there is an associated use as a terrace.
16. Whether the building regulation drawings mean that the railings and enlarged joists were permitted at the time is not relevant to the issues in this appeal as, whether that is the case or not, these have been subsequently agreed as being lawful in the LDC issued and the current LDC does not relate to them. In addition, in the *R v Basildon District Council, Ex p Martin Grant Homes Ltd* the planning permission was granted after the building regulation approval, which has not been shown to have been the case here.

17. I conclude on the first main issue that the use of the roof as a terrace is not covered by the previous LDC granted for operational development or by the previous planning permission/building regulation approval.

4 or 10 year time period

18. Section 171A(1) identifies two categories of breach of planning control: (a) carrying out development without the required planning permission or (b) failing to comply with a condition or limitation subject to which planning permission has been granted. Section 171B provides different time bars for enforcement action for breach of planning control. (1) where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed; (2) where there has been a breach of planning control consisting of the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of four years beginning with the date of the breach and (3) in the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
19. The case of *First Secretary of State v Arun DC* looked at breach of condition in relation to a change of use to use as a single dwelling house. It concluded that change of use of any building to use as a single dwelling house comes under section 171B(2), even where it is as a result of failure to comply with a condition attached to a planning permission. The wording in the judgement follows the wording of section 171B(2) being change of use as a single dwelling house. The reason for this is made clear in the decision where it is noted that the background history and legislation has as its outcome, unlike other changes of use, householders who change the use of a building to that of a single dwelling house should only be vulnerable to enforcement action if it is instituted within four years from the change.
20. The roof is already part of the dwelling house and cannot be used in the way proposed because of the condition attached to the planning permission of the extension. In this case any change of use is not to use as a single dwelling house as the unit of 61C is already a single dwelling house.
21. The appellant identifies that the Council, through officers, has in the past referred to the period for consideration of the passage of time as being 4 years. This is particularly referred to in a 1998 letter from the Director of Environment and Planning to the previous owner and a hand written note on a letter inquiring whether the previous lower roof terrace required planning permission. It is difficult to judge the basis of that advice as there may not have been a condition preventing the incidental residential use of the lower roof, in which case the relevant period may only relate to operational development. However, in any case, whether or not it was a similar situation, I do not accept that this is the correct advice for the current situation. Just because some wrong advice may have been given does not mean an incorrect decision should be made now.
22. I conclude on the second main issue there has not been a breach of planning control consisting in the change of use of any building to use as a single dwelling house. Therefore, section 171B(3) is the relevant part and

enforcement action is not prevented during a period of 10 years beginning with the date of the breach.

Whether the use has been continuous use

23. Generally there is no significant argument over the use of the area as described by the appellant before July 2012 and after April 2015. The main point of contention relates to the use that occurred from about July 2012 until around April 2015. I have found that the period to demonstrate lawfulness through the passage of time should be 10 years, so the appellant would not have achieved lawfulness from the first use in 2005 up to July 2012. The Council says that the cessation of use as described by the appellant in her email of 5 July 2013 demonstrates that from 2012 there was a clear break in the continuity of the use.
24. Following the issuing of the LDC for the railings etc. the Council wrote to the appellant accepting the lawfulness of the railings etc., but noting that the use of the flat roof as a roof terrace remains unauthorised, because of condition 2 of the planning permission. The Council asked that the appellant confirm the use of the roof and that if there was no confirmation, enforcement action may still be taken. The appellant replied by email 'I confirm that the flat roof isn't being used as a roof terrace (and window has remained locked for a year now). Access only for means of escape in an emergency'. So the appellant's own assessment was that the use was not that of a terrace for that period.
25. Planning Practice Guidance notes in the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. In this case the applicant's evidence was clear and precise that the roof had not been used as a roof terrace for a significant period.
26. In her statement the appellant says she did not abandon the use of the terrace, she just stopped actually more actively using it, except for storage of items. She had cleared the terrace of the table and some chairs and living plants between July 2012 and April 2015, noting the planters, two blue chairs and brush remaining.
27. In cross-examination the appellant confirmed that the area was not then used apart from this until 2015 other than for maintenance purposes. She did not want to be prosecuted and wanted to make the use lawful to regularise the situation. To this effect a planning application for the use was submitted and subsequently refused and then the application was made for the LDC that is the subject of this appeal. To my mind this makes it clear the appellant was aiming to comply with the condition until the use was lawful, but clearly there could be no assumption that it would be possible to continue the use, given the condition preventing such use.
28. The condition does not prevent use as terrace per se, but states 'sitting out' or 'for any other purpose'. Therefore, it is possible that one aspect could be breached such as sitting out, while other aspects might not and vice versa. Use as a terrace might encompass many things, including access, sitting out,

storage and use of equipment such as the chairs and barbecues and positioning of plants and planters.

29. The written evidence is quite clear in that the appellant did not gain access to the roof for any purpose for a year from about July 2012 and there was no access for 'sitting out' from about July 2012 to about April 2015. The only access was related to maintenance in the period. The use sought was not occurring and the Council could not have taken enforcement action against it. The fact that there were two folded chairs on the roof would not have justified enforcement action and their presence was, in my opinion, de minimis and would not have been a material breach of the condition. It would not have been expedient to take enforcement action against them.
30. There are four planters with artificial sphere topiary which were placed on the roof from about January 2011. They are not fixed down and given their size I do not consider them to be operational development. These would have to be in place for 10 years to become lawful and that clearly is not the case. To my mind use as a terrace ceased in late July 2012 and no material use continued. Even if the presence of the chairs, broom and planters was considered material in themselves they would be a storage use which it would not itself have become lawful.
31. I have also taken into consideration that the Council indicated low key use would be acceptable. However, this is vague and does not explain what would or would not be acceptable. In any case, officers' advice is not binding and the only way to confirm the lawfulness of a use is through an LDC application.
32. Even if you consider the use as a whole with the sitting out and storage being considered as use of the terrace, the amount of storage that continued through the period of August 2012 to April 2015 was still de minimis and not a material breach of the condition, and it would not have been expedient to take enforcement action against the use, particularly where the reason for the condition was to protect the privacy and environment of people in neighbouring properties. A neighbour had noted that disturbance from the terrace had reduced during the period.
33. The appellant has suggested the period of non-use could be considered as a period of dormancy similar to that identified in the case of Panton and Farmer. However, this was more on the understanding of the relevant period being 4 years not 10 years. If the period had been 4 years the appellant would have a good argument and then abandonment may have become relevant. However, in this case the use had not gained lawfulness and the concept of dormancy from the Panton and Farmer case is not relevant. I accept that the appellant always wanted to use the terrace in the future and there was no intention to 'abandon' it, but only if future use became lawful by application of one kind or another. That does not mean that the use should be considered as continuing in the relevant period. It is in fact clear that the use was intentionally stopped, the door locked and table and some chairs removed and this was confirmed to the Council to have occurred for around a year.
34. There was also discussion as to whether the use should be considered as a seasonal type of use where it was by character an intermittent use, so enforcement action might be expected to need to be taken, and could have been taken, even at times the use was not actually occurring, or whether it should be considered as a use that would be expected to normally be

continuous, so enforcement action would not normally be expected to be taken when the use had permanently ceased.

35. In this regard it was put that the terrace would be unlikely to be in use say during the night or even in winter months. I acknowledge that would clearly be the case as there is every expectation that a terrace would not be used continually. But that is of little relevance to this case where the cessation of use was for over 2 years and this cannot be considered as being intermittent in the same way that perhaps a holiday occupancy condition might operate, summer and winter. With the cessation of use that occurred it was reasonable of the Council to consider that the use was unlikely to recur, it having already being notified that the use had ceased for about a year, and it would not have been expedient to take enforcement action.
36. I conclude on the third main issue that the use has not gained lawfulness through the passage of time and that the Council could not have taken enforcement action during the period of about August 2012 until April 2015, a substantial interruption to continuous use.

Other Matters

37. While not now relevant to the case, there was some suggestion of a deliberate intention to conceal use. Simply I reject that. The appellant has set out her clear use and intentions throughout the period. Her aim was to properly avoid enforcement action, and at each stage she had done what she had said, which was a reasonable approach. Her view was that the lawfulness had been gained with the 4 years use. I do not believe that building the railings, having enlarged roof joists or leaving some stored items without mentioning them or the email relating to use was any form of deliberate concealment to avoid enforcement action, but it was put as an argument that the use had continued, and was not some form of planned deception.
38. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of a second floor roof as a terrace was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Graham Dudley

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Christiaan Zwart	Of Counsel
He called	
Karen Atkinson	Appellant
John Littman Dip TP	The JCL Partnership
MRTPI	

FOR THE LOCAL PLANNING AUTHORITY:

Mr Charles Street	
He called	Area Planning Officer, Westminster City Council
Kimberley Davies BA	
Hons MA Town Planning	
MRTPI	

DOCUMENTS

Document	1	Notification letter
	2	Appellant's opening submissions
	3	Bundle of Case Law from the appellant
	4	Bloomfield v Secretary of State for the Environment, Transport and Regions and Another submitted by the Council
	5	Closing submissions of City of Westminster
	6	Appellant's submissions
	7	Council's costs application