



Appeal Decision

Site visit made on 27 June 2017

by Jonathan Tudor BA (Hons), Solicitor (non-practising)

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

Decision date: 31 July 2017

Appeal Ref: APP/X5990/W/17/3171297
67-69 Beak Street, London W1F 9SW

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by LaSalle Investment Management against the decision of City of Westminster Council.
 - The application Ref 16/09126/FULL, dated 22 September 2016, was refused by notice dated 2 February 2017.
 - The development proposed is erection of raised deck enclosed by timber balustrade to third floor flat roof for use as a roof terrace in association with the use of the building as office (Class B1) floorspace.
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Decision

1. The appeal is allowed and planning permission is granted for erection of raised deck enclosed by timber balustrade to third floor flat roof for use as a roof terrace in association with the use of the building as office (Class B1) floorspace at 67-69 Beak Street, London W1F 9SW in accordance with the terms of the application, Ref 16/09126/FULL, dated 22 September 2016, subject to the following conditions:
 - 1) The roof terrace hereby approved shall not be used for any purpose (other than to escape during an emergency) except between 0900 and 1900 Mondays to Fridays and not at any time on weekends or on Bank or Public holidays.
 - 2) No music shall be played on the roof terrace hereby approved at any time.

Procedural Matters

2. The appeal form refers to the site address as 67-71 Beak Street but the original planning application form and decision notice refer to 67-69 Beak Street. The location of the development is identified and fully apparent from the submitted plans. Therefore, I do not see cause to change the address in the banner heading or decision from that used in the original application.
3. The description of development used in the banner heading and decision above has been taken from the appeal form and the Council's decision notice, as it more clearly and accurately describes the development than the wording used in the original planning application.
4. As indicated in the submitted documentation, and as I saw on my site visit, the development has already taken place and the application and appeal are, therefore, retrospective.

Main Issue

5. The main issue is the effect of the development on the living conditions of the occupiers of neighbouring properties, with particular regard to privacy and noise.

Reasons

6. The appeal site comprises a four storey building fronting on to Beak Street, a three storey warehouse building along its northern boundary and a two storey building connecting them. All the buildings are in office use (Class B1). The site lies within the Soho Conservation Area.
7. It is accepted in the Council Officer's Report that until recently, the third floor flat roof was enclosed by a safety rail fitted to the top of the parapet wall and was readily accessible via a staircase. It considered that the access and the presence of planters, tables and chairs clearly indicated that the flat roof terrace had *'long been used as an informal terrace for occupants of the building'*.
8. The opinion of counsel was sought by the appellant and is provided with the appeal submission. Counsel refers to that part of the Council Officer's report and a planning permission, granted 2 June 2015¹, which shows *'existing upper roof terrace to be retained'* in one of the approved plans, Ref 804_PL_3.1 Rev. PL3. Although not specifically referred to in the description of the proposal in that permission, the appellant advises that the application form also referred to *'use of flat roofs as terraces'*. There were two subsequent applications in 2016 to make minor material amendments to that permission which were approved², with the same plan listed in the decision letters as part of the original permission. Counsel refers to relevant case law³ which confirms that plans and drawings are as much a part of the description of what has been permitted as the permission notice itself. Therefore, counsel's opinion is that there is an existing lawful use of the *'existing upper roof terrace to be retained'*, as illustrated on the relevant plan.
9. In its appeal statement the Council also appears to accept that there is an existing lawful use as a roof terrace. Therefore, I see no reason to disagree with the views of both main parties, as supported by Counsel's opinion, that there is an existing lawful use. Although the Council then concentrates on the likelihood of intensified use and its effects, it is important that the principal of lawful use has been accepted because it means that the relevant judgement is then to compare the effect of that unrestricted use with any different or greater effect resulting from approving the appeal proposal.
10. The proposal would legitimise use of a slightly larger area of the third floor roof terrace, about 2.8m longer according to the Council, and 18m² according to the appellant. It would also approve the raised deck and timber balustrade, already in place.
11. Previously the combined height of the parapet walls and safety rails enclosing the terrace was 1m. The balustrade put in place is 1.1m high. The Council expresses the view that the compliance with building regulations, achieved by

¹ Ref 14/05685/FULL

² Refs 16/02629/FULL and 16/07596/FULL

³ Barnett v Secretary of State for Communities and Local Government [2009] EWCA Civ.476

the 10cm increase in height, and the larger size of the terrace would lead to a significant intensification of use and it is this additional use that would cause harm. Whilst I appreciate those points, I am not persuaded that the increase in height and size of the terrace, described as making it '*slightly larger*' in the original Council Officer's report, would lead to such a level of additional use that it would significantly increase noise or potential overlooking.

12. Stirling Court, a 10 storey tower block to the north of the appeal site, is in residential use from its fifth floor and above. The appellant advises that the fifth floor of that building is approximately two storeys above the height of the third floor upper roof terrace, which is in accord with what I saw on my site visit. There is a reasonable distance between Stirling Court and the appeal site and views towards those residential flats would be at an oblique upward angle.
13. Building work was in progress at Stirling Court during my site visit. The Council Officer's report advises that two new flats are proposed on its fourth floor but that they would be unaffected, as their windows would not directly face the roof terrace.
14. Residential flats in the upper storeys of properties along Beak Street to the south, including Nos 61-63 and No 65, would be subject to some overlooking but they are also a reasonable distance away and some are not at the same level as the roof terrace. The wooden balustrade, set in slightly from the parapet, would also partially restrict views downwards towards surrounding buildings. There is a penthouse flat to the west of the appeal site on Marshall Street which is also a reasonable distance away and partially screened by the existing plant enclosure.
15. There would be sound generated by users of the roof terrace. However, it is a reasonable distance from other properties and use is likely to be limited by weather conditions. Furthermore, the appellant has proposed a condition restricting use to between 0900 and 1900 Mondays to Fridays. That would prevent any use during the more sensitive evening and weekend periods. A further condition is proposed to prevent the playing of music on the terrace at any time. I do not share the Council's interpretation of those suggested conditions as an acknowledgement of intensified use but rather as a reasonable attempt to mitigate any potential adverse effects, especially during unsocial hours.
16. In light of the above and having fully considered the objections of some neighbouring residential occupiers, I consider that any potential adverse effects would be limited. It is also necessary to acknowledge that the accepted lawful use of the terrace, albeit not fully compliant with Building Regulations, would also generate some noise and overlooking. That use would be free of any restrictions with regard to times of use or the playing of music and could, therefore, potentially have a more harmful effect. Evidence indicates that use has occurred in the past and it has not been suggested that such use could not resume. It is, therefore, a potential 'fallback' position.
17. Whilst it is perfectly legitimate for Councils not to follow Officer recommendations, I note that the original Council Officer's Report considered that, subject to conditions, there would be no unacceptable effect on the living conditions of neighbouring residents. It recommended that permission should be granted. For the reasons already given, I do not find the rationale presented in the appeal statement for the decision to refuse convincing.

18. Overall therefore, taking account of the reasonable distance from other properties and the 'fallback' position, I find that the development would not harm the living conditions of the occupiers of neighbouring properties, with particular regard to noise or privacy. It follows that it would not conflict with policies S29 or S32 of Westminster's City Plan⁴ or saved policies ENV 6 and ENV 13 of the Unitary Development Plan⁵, which, amongst other things, seek to avoid an unacceptable material loss of residential amenity, prevent a significant increase in overlooking and reduce noise pollution and its impacts on noise sensitive receptors, such as residential properties.

Other Matters

19. The appeal site is located within the Soho Conservation Area (CA). The development does not involve significant additions to the existing built form and its location is concealed from public view. Therefore, it would not have an adverse effect on the character or appearance of the CA.
20. In addition to the issues already discussed, potential cooking smells from the roof terrace have been referred to. The Council did not include that aspect in their reasons for refusal. Although I have considered it, given the elevated position of the roof terrace and the reasonable distance from neighbouring properties, it does not lead me to alter my decision.
21. Another refused planning application for a roof terrace at the site has been referred to. However, the Council Officer's Report advises that the relevant application concerned the creation of a first floor terrace where there would have been close and direct overlooking, which differentiates it for the appeal proposal. Therefore, I do not consider that it is comparable.
22. The retrospective nature of the application has been objected to. However, as stated in the Council Officer's report, that is not of itself a reason for refusal. Planning law requires that prospective and retrospective applications must be determined in accordance with the development plan unless material considerations indicate otherwise.⁶

Conditions

23. The Council has suggested conditions which I have considered, making minor amendments if necessary to ensure compliance with the tests contained in the Planning Practice Guidance. Conditions limiting the hours of use of the roof terrace and prohibiting the playing of music are necessary to safeguard the living conditions of neighbouring residents. I have modified the hours of use condition slightly for clarity.

Conclusion

24. For the reasons given above, and having regard to all other matters raised, I conclude that the appeal should be allowed.

Jonathan Tudor

INSPECTOR

⁴ November 2016

⁵ Adopted January 2007

⁶ s38(6) Planning and Compulsory Purchase Act 2004 and s70(2) Town and Country Planning Act 1990