
Appeal Decisions

Site visit made on 3 July 2017

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 31 July 2017

Appeal A - Ref: APP/N5660/C/16/3164304

Appeals B – Refs: APP/N5660/C/16/3164306, 3164308 and 3164309 3 Bankton Road, London, SW2 1BP

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by Mr Kelvin Donald, Mrs Gemma Donald, Mr Angus Donald and Mr Neil Donald against an enforcement notice issued by the Council of the London Borough of Lambeth.
 - The enforcement notice was issued on 25 October 2016.
 - The breach of planning control as alleged in the notice is the removal of the original mono-pitched roof from the three storey rear addition, and its replacement with a roof terrace consisting of the construction of a raised platform with a tiled balustrade to the perimeter ("the unauthorised roof terrace").
 - The requirements of the notice are:
 - a) Remove the unauthorised roof terrace and reinstate the original mono-pitched roof as existed prior to the breach of planning control;
 - b) Remove all associated waste and debris from the premises resulting from compliance with above steps.
 - The period for compliance with the requirements is four months after this notice takes effect.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a) and (f) of the 1990 Act. Appeals B are proceeding on the ground set out in section 174(2)(f) of the 1990 Act. Since the prescribed fees have not been paid within the specified period for Appeals B, the appeals on ground (a) and the applications for planning permission deemed to have been made under section 177(5) of the Act as amended in relation to those appeals have lapsed.
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Appeal C - Ref: APP/N5660/W/16/3164301

3 Bankton Road, London, SW2 1BP

- 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 Mr Kelvin Donald against the decision of the Council of the London Borough of Lambeth.
 - The application Ref 16/05092/FUL, dated 25 August 2016, was refused by notice dated 21 October 2016.
 - The development proposed is described as retention of a third floor roof terrace and associated boundary screening.
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Summary of Decisions

1. The appeals are all dismissed. See formal decisions below.
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Appeal A on ground (a) and Appeal C

Background and preliminary matters

2. The appeals all relate to the same roof terrace that has been created on the third floor of the rear projection, the outrigger of the appeal property, together with boundary screening consisting of a tiled balustrade. Retention of a building is not an act of development but s73A of the 1990 Act allows “retrospective” applications. The s78 appeal is essentially for the development already carried out, although there are slight variations proposed to what has been built, which I deal with below. I have dealt with the s78 appeal on the basis of the submitted plans and what I have seen from my site visit.
3. The appeal on ground (a) is that in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. The deemed planning application is therefore for the development as it existed on the date the notice was issued. By virtue of s177(1)(a) it is possible to grant permission for the whole or any part of the development but not for some alternative form of development that differs from the alleged breach. Permission may only be granted for what is stated in the notice as constituting a breach of planning control. There is no power to go beyond the notice by considering alternative proposals outside its scope if they differ materially from what is alleged and has been built.
4. A Certificate of Lawful Development (LDC) is relevant to the appeals, Ref 15/02175/LDCP issued by the Council on 12 June 2015, for a proposed loft conversion involving the erection of a rear dormer and two front roof lights. By s192(4) of the Act the lawfulness of these building operations is only conclusively presumed where there has been no material change before the operations are begun. The LDC can only apply to the operations specified in the application and supporting plan (the approved plan).
5. Intentional unauthorised development (IUD) is capable of being a material consideration in the determination of planning applications and appeals. Although the Council asserts that erection of the terrace is a clear example of such development, it brings no robust evidence to bear on the issue, asserting only its belief that the appellant was aware that it did not accord with approved plans or permitted development legislation. For the avoidance of doubt IUD is not therefore a material consideration in these appeals.

Main issues

6. The main issues are the effects of the development on: firstly, the character and appearance of the area; and secondly, on living conditions of occupiers of neighbouring properties.

Character and appearance

7. No 3 is a three-storey dwelling on the north side of Bankton Road in a residential area. The existing three-storey rear projection is probably an original feature, considering the adjacent properties in the same terrace. Several pairs of three-storey back projections belonging to properties on Bankton Road and Mervan Road surround the appeal property and have retained their original sloping roof form. In my view the compositional

- harmony of these pairs of roofs makes them locally distinctive. They make a positive contribution to the character and appearance of the area.
8. The Lambeth Local Plan 2015 (LP) Policy Q11 (o) sets out, insofar as is relevant that roof terraces and roof level balconies will normally be resisted on locally distinct building types where they are not characteristic of the host building/group. Generally Policy Q11 requires additional accommodation to respond positively to the original architecture and roof form, whilst not supporting development that unacceptably dominates or overwhelms its host.
 9. The roof terrace extends across virtually the full width of the outrigger roof and to the back of the rear projection by some 6.1m. The enclosing wall is about 0.9m high and faced with grey tiles. Whilst the majority of the development is within the envelope of the LDC approved plan, it rises above the ridge of the three-storey outrigger and appears as an unduly prominent feature, visible against the rear elevations of the host and surrounding dwellings. Its height and scale make it appear as an additional storey and its bulky design makes it an insubordinate and unsympathetic addition to the main building. The tile-clad, solid perimeter wall adds to its incongruous and dominant appearance.
 10. A small storage area on the flat roof is also proposed in the s78 appeal. This would sit within the perimeter wall and would have a neutral effect on the appearance of the area.
 11. The submitted plans also show frosted glass panels up to a further 0.90m on top of the perimeter wall. The wall is already higher than the roof of the rear projection and consequently, despite the lightweight design of the proposed screening, it would do nothing to alleviate the harm to the character and appearance of the area caused by the development in situ.
 12. Other approvals for roof terraces in the Council's area have been considered. Those in the immediate vicinity of the appeal site are generally designed with set-backs from the roof eaves, use visually permeable materials, or are constructed on an already existing flat roof. In these respects the examples differ materially from the appealed development. The prevailing undeveloped roof forms of the rear projections at Bankton Road and Morven Road are especially relevant to consider as they provide the immediate visual context for the development. They can be clearly seen in the 2011 aerial photographs.
 13. Thus, whilst the approvals for 15 Bankton Road, and 36 and 44 Mervan Road are more recent, they are few in number and it seems to me that the Council has in any event taken a considered approach to them, in order to reduce the impacts on the roofscape. The Brixton Society points out, which appears not to be in dispute that the approved extension at 44 Mervan Road departed from the approved design and was subject to enforcement action.
 14. The appeal decision for 46D Kellett Road¹ is not comparable to the present appeals, as it was concerned with a more modest addition in the existing roof slope, set well back from the end of the rear wing and found by the Inspector not to be a conspicuous structure. Nor is the appeal decision for 7 Streatham Common South² comparable: it dealt with a small addition on a roof that was

¹ 5 January 2009. Ref APP/N5660/A/08/2080138

² 22 August 2016, Ref: APP/N5660/W/16/3150175

- not locally distinctive, and where no public views obtained but private views were also very limited.
15. Although the development may not be open to public views it is visible from private views from several rear gardens of the terrace at Bankton Road and the rear of properties fronting onto Morven Road. Overall, the uniformity of the terrace, including its front and rear elevations, and its mainly unaltered form contribute positively to local character. As built the roof terrace disrupts the rhythm of the roofscape and introduces an incongruous addition that detracts from the character and appearance of the terrace.
 16. So, I am not persuaded that the examples I have referred to, or the others submitted provide a compelling reason to allow the appeals which I have determined on their individual merits. Reference is made to the judgment of *Islington Borough Council v First Secretary of State [2004] EWHC 430 (Admin)*. Whilst I agree that account may be taken of other similar developments in the vicinity, they will only be material to these appeals if so closely related to the issues that regard should be had to them. I have considered other nearby developments insofar as I can see that they involve similar issues, but the examples provided are very many and some appear somewhat indiscriminately chosen. Several are not supported by any detailed information. At the end of the day they do not, as the court observed was the case in *Islington*, displace consideration of the particular proposal in its own particular surroundings.³
 17. The Appellant seeks to agree a mutually acceptable reduction in the area of the roof terrace whilst retaining the use of screening. Therefore a copy of the roof plan is submitted showing, by a single dotted line across it, a "potential reduction in terrace area". The appellant would accept a condition requiring the terrace to comply with this plan but it is indicative only as to the actual reduction in area and is in my view insufficiently precise to enable it to be the subject of an enforceable condition. Moreover it does not specify the design and height of the boundary treatment that would retain "the use of screening" at the truncated section of the terrace.
 18. I have no reason to doubt that a differently designed development might not find favour with the Council but it is not for me to judge what would be acceptable in this regard. If I were to impose a condition leaving it to the appellant to agree matters with the Council, this may alter the nature of the development because it is impossible to tell what might be acceptable. It could prejudice interested persons who would not have been consulted and the Council, who had not suggested the condition but who would be left to determine something they refused on grounds of character and appearance.
 19. To conclude on this issue the roof terrace including its balustrade, by reason of its design including its location, size and materials unacceptably detracts from the architectural integrity of the host property and the character and appearance of the surrounding area.
 20. The development is contrary to the aims of LP Policies Q5 and Q11. These include that development should sustain and reinforce local distinctiveness, and respond positively to the built form of roofscapes whilst not unacceptably dominating its host. It would also conflict with the policies in Section 7 of the

³ Paragraph 10 of the judgment

National Planning Policy Framework which seek to secure a high quality design in all development.

Living Conditions

21. As I observed when standing in the terrace, there are clear views therefrom into rear garden areas and into several windows of neighbouring dwellings, in particular 1 Bankton Road and 38 to 48 (even) Mervan Road. The appeal property is at the greatest separation distance between the rear elevations of properties on Bankton Road and Mervan Road. Other windows overlook rear amenity areas and this is inevitable where rear elevations face each other. However the unauthorised terrace is a purpose-built amenity space at an elevated level. Having regard to its size, its projection into the rear of the plot and overall height, I consider that the extent of loss of privacy liable to be experienced by nearby residents is excessive and unneighbourly.
22. The appeal site is in an inner London borough where background noise levels may be higher than in some other places. However I also take into account that LP Policy Q2 supports development where the adverse impact of noise is reduced to an acceptable level and, as Paragraph 10.3 of the supporting text to this policy states, quality of life issues are exceptionally important. The extent of the terraced area could in my view result in increased noise and disturbance from its use, the hours of which would not be practicable to control by condition. There is no technical assessment of how effective noise barriers might be at this location. This adds to my concerns.
23. The proposed opaque glass screening would reduce overlooking to an extent, but would still allow views over the reduced 0.45m screen at the end of the roof terrace back into 1 Bankton Road. I also have concerns that a sense of loss of privacy would still be experienced by other adjoining occupiers.
24. I therefore find on this issue that the design, size and location of the development unacceptably harms the living conditions of occupants of adjacent properties by reason of increased adverse impacts on privacy including a sense of loss of privacy, and increased noise from use of the terrace, which it has not been demonstrated would be satisfactorily mitigated. The harm is significant and conflicts with the aims of LP Policy Q2 in that it fails to provide acceptable standards of privacy and is likely to result in adverse impacts that cannot be effectively reduced through screening.

Other matters

25. I do not agree that permitted development rights or the LDC establishes the principle of the main built form of the roof terrace, for the following reasons.
26. Firstly, whilst the Town and Country Planning (General Permitted Development) (England) Order 2015 (the Order) permits certain forms of enlargement of a dwellinghouse, including additions or alterations to its roof, it excludes development if it would consist of or include the construction or provision of a balcony or raised platform.⁴ This would apply to the roof terrace.
27. Secondly, the approved plan did not specify a roof terrace within the description of development that the LDC regarded as lawful, nor did it approve

⁴ Class B.1(e)(i) of Part 1, Schedule 2 to the Order

the increase in height above the ridge line of the roof of the rear projection. The top of the perimeter wall appears horizontal whereas the approved plan shows a shallow-pitched roof, and furthermore the tile-clad wall conflicts with the approved use of brickwork to match the rear elevations.

28. These are material changes to the approved plan and indeed a radical departure in my view, from that approval. It is therefore misleading to suggest that the "actual physical form" of the terrace already benefits from consent, or to say that it is only the use of the roof area which requires planning permission. Such matters would be the subject of an appeal on ground (c) to the effect that the matters specified in the notice do not constitute a breach of planning control but, perhaps unsurprisingly no appeal is made on this ground.
29. Insofar as the LDC may be said to represent a fall-back position, the certificate is conclusive unless there is a material change in any of the matters relevant to determining lawfulness which occurs before the development begins. It is unlikely that, as appears to be suggested, the roof terrace was created after the dormer was completed in accordance with the LDC. The Council noted the roof terrace was in place by about 14 August 2015 and the appeal statement explains that "the use of the flat roof as a roof terrace was suggested during the construction of the dormer extension". This would imply that the structure had already been built with a flat roof and not with a slightly shallow pitch as approved. It is also worth noting that the LCD also relates to a main roof dormer element but it too, is not built to the approved plan since double doors, not shown in the plan, have been installed instead of the approved window, with no evidence of a prior installation of that window.
30. In my view the evidence points to the whole structure having been carried out as a single continuous operation. As a result any lawfulness certified by the LDC could no longer be relied on having regard to s192(4) of the Act. From that perspective there is no reasonable or realistic prospect of the fall-back dormer addition being lawfully implemented in the present circumstances.
31. The appellant may of course apply for planning permission, or a further certificate of lawfulness based on permitted development rights. However by Article 3(5) of the Order such rights do not apply if the building operations in the construction of that building, which include any part of that building, are unlawful. Once planning permission had been granted, or the notice has been complied with, permitted development rights would again apply.

Conclusion on ground (a)

32. The development clearly conflicts with development plan policies that require development to respect local distinctiveness and to safeguard living conditions of nearby residents. The harm caused is not overcome by other factors.
33. For these reasons, and taking into account all other matters raised, the s174 appeal fails on ground (a) and the s78 appeal will be dismissed.

Appeal A and Appeals B on Ground (f)

34. The issue under this ground is whether the steps required by the notice exceed what is necessary to remedy the breach of planning control, or, as the case may be, to remedy any injury to amenity due to the development. The notice

indicates that by requiring the complete removal of the terrace its purpose is to remedy the breach of control in accordance with s173(4)(a) of the Act.

35. The appellants' case under Ground (f) is that it is only the use of the flat roof area that constitutes a breach of planning control and so it would be appropriate to require the lesser step of removing the means of access to it. As described above, whether the development alleged in the notice constitutes a breach of control is not relevant to an appeal on this ground but would have been a matter for an appeal under ground (c) which has not been made.
36. Furthermore I do not agree with the suggestion that the LDC somehow permits the removal of the pre-existing mono-pitch roof as a stand-alone operation or that to require its reinstatement is excessive. With a notice intended to achieve a complete remedy to the breach of planning control it is not appropriate in an appeal on ground (f) to explore whether lesser steps would achieve the alternative purpose of remedying injury to amenity. As the notice requires the recipient to restore the land to its condition before the breach took place, it cannot by reliance on s176(1)(b) of the Act, be turned into a notice which requires something less.
37. Consequently it is necessary and not excessive to require reinstatement of the original mono-pitched roof as it existed prior to the breach of planning control. The appeals on ground (f) therefore fail.

Overall Conclusion

38. For the reasons given above I conclude that the appeals do not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the deemed application.

Formal Decisions

Appeal A and Appeals B

39. The appeals 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.

Appeal C

40. The appeal is dismissed.

Grahame Kean

INSPECTOR