



Appeal Decision

Site visit made on 16 September 2019

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 13 November 2019

Appeal Ref: APP/G1250/C/18/3217171

Land at 40 Wordsworth Avenue, Bournemouth BH8 9NS

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mrs Cathy Cheng against an enforcement notice issued by Bournemouth Borough Council.
 - The enforcement notice was issued on 8 November 2018.
 - The breach of planning control as alleged in the notice is: Without planning permission, the installation of clear and obscure glass balustrade and composite decking to form a terrace.
 - The requirements of the notice are: Dismantle the clear and obscure glass balustrade and composite decking board and remove all resultant materials from the site.
 - The period for compliance with the requirements is 2 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a) (c) and (f) of the Town and Country Planning Act 1990 as amended. Since an appeal is brought on ground (a), an application for planning permission is deemed to have been made under s177(5) of the Town and Country Planning Act 1990.
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Formal Decision

1. The appeal is 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 1990 Act as amended.

Preliminary Matters

2. On 19 October 2018, the Council refused planning permission for 'the erection of clear and obscure glass balustrade and composite decking board to existing accessible flat roof'. A planning appeal made under s78 of the Town and Country Planning Act 1990 (the 1990 Act) against that refusal was dismissed, and so I shall refer to the '2018 application' and 'previous appeal'¹.
3. The enforcement notice subject to this appeal was issued after the 2018 application was refused. Another appeal was made against the notice by Mr Lee Cheng, but he made the appeal on ground (a) alone and then did not pay the required fee within the stipulated period. His appeal lapsed².
4. Mrs Cheng, the appellant, initially appealed on ground (a) alone, but later added grounds (c) and (f). The Council has had an opportunity to respond to all the late grounds and I have taken account of all representations made.

¹ Appeal ref: APP/G1250/D/18/3216632

² No fee was payable on Mrs Cheng's appeal since the 2018 application had been made in her name and a fee had been paid for that application.

5. The appellant states that the cover letter sent with the enforcement notice recited an incorrect address. This claim is capable of amounting to an appeal on ground (e), which is that copies of the notice were not properly served. However, the notice was in fact sent to the correct address in time for the appellant to make a valid appeal. Thus it appears that the notice itself was properly served and the appellant has suffered no prejudice from the error in the cover letter.

The Development Subject to the Enforcement Notice

6. The alleged balustrade and decking are installed upon the flat roof of a single storey extension that is attached to the rear elevation of a two storey detached house. The Inspector who determined the previous appeal recorded differences between the balustrade and decking that existed on the ground – and those that were ‘proposed’ as shown on the plans before him:
 - The existing balustrade comprised 1m high side panels formed of etched glass and supported by stainless steel tubular posts; the proposed balustrade would have the same design but be 1.1m high to the side and back adjacent to 38 Wordsworth Avenue, and 1.75m high to the side and back adjacent to no. 42.
 - The existing decking covered the entire surface of the surface of the flat roof but was proposed to be ‘shrunk back’ from the sides of the roof.
7. For the avoidance of doubt, the previous Inspector dismissed the appeal for the proposed development. The enforcement notice relates to what was existing then, and I saw that the balustrade and decking remain as existing then.
8. The notice alleges that the balustrade and decking were installed to ‘form a terrace’. However the notice does not attack an existing door in the appeal house which provides access from a bedroom to the flat roof of the extension, and nor does it attack the use of the flat roof as a terrace. This appeal, therefore, is strictly concerned with the alleged balustrade and decking.

The Appeal on Ground (c)

9. The appeal on this ground is that the matters alleged in the notice do not constitute a breach of planning control. The onus of proof is on the appellant to demonstrate this on the balance of probabilities. It is submitted that the appeal development is permitted development (PD) under Article 3 and Schedule 2, Part 1, Class C of the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended (GPDO).
10. Under Article 3, Schedule 2, Part 1 of the GPDO, planning permission is granted for “the enlargement of a dwellinghouse consisting of an addition or alteration to its roof” (Class B) and “any other alteration to the roof of a dwellinghouse” (Class C). Both classes of PD are subject to conditions and limitations.
11. Paragraph C.1(b) states that development is not permitted under Class C if it would “protrude more than 0.15 metres beyond the plane of the slope of the original roof when measured from the perpendicular with the external surface of the original roof”. The alleged balustrade protrudes more than 0.15m above

- the extension roof that it stands upon, but not above the original roof of the house. It does not, therefore, conflict with paragraph C.1(b)³.
12. However, development is not permitted under Class C if it would 'enlarge' a dwellinghouse and thus fall to be considered under Class B. Accordingly, whether a means of enclosure around the flat roof of an existing extension falls to be considered under Class B or Class C depends on whether it would cause the house to appear larger to those looking outside of it as a matter of fact and degree, with regard to its position, height, materials and design.
 13. The height of the balustrade at approximately 1m high is not an insignificant enlargement, particularly relative to the height of the single storey rear extension upon which it is positioned. The balustrade is also designed with no significant gaps in the enclosing panels, giving it a solid appearance. The glass panels and metal poles materials used in the balustrade appear as of relatively robust construction, similar to those used in a conservatory.
 14. Thus, the balustrade is sufficiently significant in size and substantial in form as to make the house look larger to those outside looking at it. Whilst the decking is of limited height, it lends some additional solidity to the balustrade that it is related to. As a matter of fact and degree, the alleged development represents an enlargement of the dwellinghouse consisting of an addition or alteration to its roof, and so it falls to be assessed under Class B not Class C.
 15. Class B indicates that development is not permitted under this class if it would consist of or include the construction or provision of a 'verandah, balcony or raised platform'. The appeal decking comprises a raised platform and so the development as a whole is not PD under Class B. For the same reasons, it is not permitted by Class A which allows the enlargement, improvement or other alteration of a dwelling house but not where this would include the construction or provision of a verandah, balcony or raised platform.
 16. The appellant's submission that the development falls within Class C is based upon an appeal decision which is referred to on the 'diynot' website. No reference number is given for that appeal and I do not have full details of the particular circumstances leading to that decision.
 17. I conclude then that the appellant has not shown on the balance of probability that the appeal development is PD under Schedule 2, Part 1 of the GPDO. The matters alleged in the notice constitute a breach of planning control and the appeal on ground (c) fails.

The Appeal on Ground (a) and Deemed Planning Application

18. The main issues on the ground (a) appeal and in respect of the deemed planning application are the effect on the living conditions of the occupants of 38 and 42 Wordsworth Avenue, with particular regard to privacy, and on the character and appearance of the appeal property and surrounding area.

Living conditions

19. As outlined above, the notice does not enforce against the bedroom door giving access to the roof, nor against the use of the flat roof as a terrace. As such, I

³ The Permitted development rights for householders Technical Guidance (2019) (Technical Guidance) states on p40 that "...in the case of Class C, measurement of height is made against the original roof and not as in Class B where it is the existing roof".

- can only consider whether to permit the balustrade and decking. However, while the appellant could use the flat roof as a terrace regardless of the presence of the balustrade and decking, she would be more likely to do so more often if permission is granted for these.
20. Properties along Wordsworth Avenue, although detached, are spaced relatively closely together. Mutual oblique overlooking of rear garden areas is common between neighbouring properties in the area. This is though generally limited to transient glances from upper floor rear windows, rather than any sustained opportunity for overlooking.
 21. The Inspector in the previous appeal found that the existing development allowed 'sight over a fairly significant portion of the neighbouring garden' and that even raising the height of the panels would not overcome the 'unsettling and intrusive' effects on neighbours. I see no reason to disagree with that assessment, which accords with my observations on site.
 22. Concern was also raised by the previous appeal Inspector in relation to occupants of No 42 using their bathroom being audible to people on the roof terrace. Again, I concur with the previous appeal Inspector's assessment on this based upon my findings at the site visit. Seeking to overcome this issue, the appellant proposes that the privacy screen adjacent to No 42 be conditioned to be of an acoustic design.
 23. However, no detailed evidence is provided as to how effective such a screen would be in reducing the audibility of people using the bathroom in No 42. As such, I cannot be confident that the uncomfortable proximity of the terrace relative to the bathroom window would be resolved.
 24. Almost the entirety of No 42's rear garden is visible when standing on the roof terrace. There is therefore the potential for overlooking of this area for more sustained periods than would be usual from a rear first floor window, such as to impede the reasonable enjoyment of the garden by the occupants of No 42. The elevated position of the decking heightens the sense of invasive overlooking and so differs from mutual visibility over a boundary fence.
 25. Access to the terrace is via a pre-existing door from a bedroom and the appellant does not intend to use the area for socialising and dining out. However, use by any member(s) of the appellant's family would be enough to cause an unacceptable loss of privacy.
 26. The decking and balustrade would not enable overlooking of any of No 42's habitable rooms but this does not redress the harm caused by overlooking of the garden. No 38 has no affected flank windows and so does not suffer the same issues as No 42 related to the audibility of users of the bathroom.
 27. As such, whilst the development does not result in any material harm to the living conditions of the occupants of No 38, it has a significantly harmful effect on the living conditions of the occupants No 42, with particular regard to loss of privacy. It conflicts in this way with the requirements of Policy CS41 of the Bournemouth Local Plan: Core Strategy (2012) (CS) and Policy 4.19 of the Bournemouth District Wide Local Plan (2002) (LP) regarding the protection of residential amenity.

Character and appearance

28. In the previous appeal, the Inspector found that the increased height to part of the balustrade then proposed would appear unbalanced and contrived. He concluded that on this basis harm would result to the character and appearance of the host property and area.
29. My determination is in respect of the decking and balustrade as existing. The present balustrade does not feature any partial increase in height, as per the previous appeal balustrade proposed. As such, and given the fairly typical design and materials used, the balustrade and decking harmonise reasonably well with the host property and area.
30. The development does not therefore have any harmful effect on the character and appearance of the appeal property and surrounding area. It accords in this way with Policy CS41 of the CS and Policy 4.19 of the LP which seek high quality design appropriate to the site and its surroundings.

Other Matters

31. The appellant has provided evidence in relation to other roof terraces in the wider area. These were not though in the immediate locality and I do not in any event have details of the particular planning circumstances leading to those terraces in order to form a detailed comparison with the appeal development which I have assessed on its merits. I note comments in relation to the number of objections made but the number of objections has not influenced my decision.
32. I acknowledge that the balustrade and decking were constructed in the belief that it was permitted development, following consultation with neighbouring residents, and at a stressful time for the appellant's family and I have some sympathy in this regard. I also note that the development is intended to make use of the roof terrace safer but none of these points in my view could justify the harm caused to the living conditions of the occupants of No 42, and to the character and appearance of the house and area.
33. As regards the request for roof strengthening apparently installed to be removed, there is no evidence to suggest that any such works would have required planning permission.

Conclusion

34. I conclude that the appeal balustrade and decking cause unacceptable harm to the living conditions of the adjoining occupiers, in conflict with Policy CS41 of the CS and LP Policy 4.19. The development does not have any adverse effect on the character and appearance of the surrounding area. This is though only a neutral effect and so does not compensate for the living conditions harm identified. Further, there are no positive considerations to justify a grant of planning permission.
35. Article 8 of the Human Rights Act 1998 provides that everyone has a right to respect for their private and family life, home and correspondence. Article 1 of the First Protocol affords a right to peaceful enjoyment of possessions. These are qualified rights, whereby interference may be justified if in accordance with the law and legitimate aims. Article 14 prohibits discrimination in the enjoyment of rights but does not confer any free-standing rights.

36. A refusal of planning permission would interfere with the appellant's rights under Articles 1 and 8 but be proportionate and necessary given the legitimate and well-established planning policy aim to protect the living conditions of nearby occupiers. It would not violate the appellant's rights under Articles 1, 8 or 14. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

37. For these reasons and with regard to all other matters raised, the appeal on ground (a) fails and planning permission is refused pursuant to the deemed application.

The Appeal on Ground (f)

38. The appeal on this ground seeks to show that the steps required to be taken by the notice exceed what is necessary to remedy any breach of planning control identified or, as the case may be, to remedy any injury to amenity.
39. Since the notice alleges the installation of structures and requires that they are removed, it follows that the purpose of the notice is to remedy the breach of planning control. The appellant's proposal to retain the works with the provision of an acoustic privacy screen was properly considered under ground (a) and I still found that planning permission should be refused.
40. No other lesser steps have been put forward by the appellant and requiring the removal of the balustrade and decking is not excessive as a means of remedying the breach. The appeal on ground (f) therefore fails.

Conclusion

41. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

V Bond

INSPECTOR