



Appeal Decision

Site visit made on 22 June 2021

by Stephen Hawkins MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13th July 2021

Appeal Ref: APP/C1760/C/21/3270682

Land at 15 Bracken Hall, Bracken Place, Chilworth, Southampton, Hampshire SO16 3ET

- 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 Mr Lee Smith against an enforcement notice issued by Test Valley Borough Council.
- The enforcement notice was issued on 5 February 2021.
- The breach of planning control as alleged in the notice is without planning permission the construction of a second floor balcony, shown hatched in blue on an attached plan.
- The requirements of the notice are: (a) Remove the safety railing enclosure; (b) Remove the decking material and supporting joists; (c) Reinstate the safety railing between the dormer window of apartment No 16 and the external spiral staircase; (d) Remove from the land all the materials resulting from compliance with steps (a)–(c) above.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174 (2) (a) and (c) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld in the terms set out below in the Formal Decision.

Application for Costs

1. An application for costs was made by Mr Lee Smith against Test Valley Borough Council. This application is the subject of a separate Decision.

Ground (c) appeal

2. The ground of appeal is that the matters alleged in the enforcement notice do not constitute a breach of planning control. It is for the appellant to show that their appeal should succeed on this ground, the relevant test of the evidence being on the balance of probability.
3. Bracken Hall is a substantial building originating in the early 20th Century, later extended and subdivided into several apartments. The appeal property (No 15) is on part of the first and second floors of the building. The notice attacks a balcony at second floor level on a flat roof adjacent to a metal external fire escape. The balcony is accessed directly from a pedestrian door in No 15 which also accesses the fire escape.
4. There are two strands to the ground (c) appeal. Firstly, I shall deal with the appellant's argument that installing the balcony did not amount to development. The definition of development set out in s55(1) of the Act includes the carrying out of building, engineering, mining or other operations

in, on, over or under land. 'Building operations' includes, at s55(1A)(c) and (d) respectively, structural alterations of or additions to buildings and other operations normally undertaken by a person carrying on business as a builder. In s336(1) the Act defines a building as including any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building.

5. The Courts have identified three primary factors decisive of what is a building: that it is of a size to be constructed on site, as opposed to being brought to the site; its permanence and; the extent of any physical attachment to the land¹. Where what has been done has resulted in erection of a building, the Courts have held that a great deal of persuasion is required to show that the erection of it did not amount to a building or other operation².
6. The balcony consists of a timber frame about 0.2 m deep over which decking boards have been laid. A UPVC fascia board surrounds the outer edges of the frame, to which a metal railing is attached at about six points. Installing the balcony is likely to have involved laying and fixing together the timber joists and the surrounding frame once cut to size, laying the decking boards, fitting the fascia boards and erecting and fixing the railing. The appellant estimated that the total surface area of the balcony is at or about 9 m²; I was given no reason to question the accuracy of this figure. I understand that it took the appellant working alone around ten days in total to complete the above works.
7. Whilst the balcony might be of modest proportions in relation to those of the building, its size is nevertheless significant and far exceeds that which might reasonably be regarded as *de minimis*. The scale of the works described above is much greater than, for example, attaching a few modular components together over a day or two. It is highly probable that the balcony would have been brought to the property as separate construction materials, rather than in a prefabricated form arriving wholly or partly assembled. This means that being on the second floor is unlikely to have affected the relative complexity of the works or significantly lengthened the time it took for those works to be carried out. As a result, in my view the balcony is of a size that required it to be assembled in situ, whilst the works to install the balcony all fall within the statutory definition of building operations. Such operations are not defined exclusively by whether they are actually undertaken by someone who is primarily employed as a builder.
8. Given how it was probably assembled, it is unlikely that the balcony is capable of being moved without being dismantled. Having regard to the greater wind speeds that are likely at this height above the ground and the potential for movement, it is hard to understand why the balcony would not be fixed to the flat roof of the building by some means such as screws, bolts or clamps, unless the weight alone meant that it is secured in one place. Therefore, the balcony has a considerable degree of permanence as well as physical attachment to the land. These are characteristics which clearly distinguish the balcony from a floor covering.
9. Drawing the above together, as a matter of fact and degree I find that the balcony is a building and that the works to install it amounted to a building operation. The balcony has had a material effect on the external appearance of

¹ *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd* [1949] 1QB 385.

² *Barvis v SSE* [1971] 22 P & CR 710.

the building; it is clearly visible from other parts of the building and from ground level. Therefore, erecting the balcony has involved development as defined by s55(1). Planning permission is required for the development of land, having regard to s57(1) of the Act.

10. It was also argued that in the event installation of the balcony amounted to development, it nevertheless benefitted from the 1999 planning permission for converting the building to apartments, having regard to the amended drawings approved in 2000³. In this respect, I acknowledge that on copies of the approved drawings supplied, the entirety of the flat roof over which the balcony now sits is annotated by the word 'balcony', the outer edges of which are surrounded by a railing.
11. The approved drawings show the overall height of the area of flat roof where the balcony sits as being approximately level with an eaves line on the building's main roof, as well as at a similar level to a nearby flat roof associated with the adjoining apartment (No 16). The drawings do not show any form of structure raising the surface above the flat roof level. The railings are shown as being in line with the external walls of this part of the building. The balcony structure built however is on top of the flat roof, its raised surface being around 0.2 m in excess of the level of the flat roof shown on the approved elevations, well above the main roof eaves line and the level of the nearby flat roof. Also, the balcony protrudes outwards appreciably from the building's external walls. Given the raised level of the balcony surface, the railing is highly likely to considerably exceed the height of the railing shown on the approved drawings and it projects further outwards from the external walls. Therefore, as a matter of fact and degree, what has been built departs significantly from the balcony shown on the approved drawings.
12. In addition, the approved drawings show access to the balcony from a door leading into No 16's larger bedroom. However, as built there is an obscure glazed casement window, the cill level of which is slightly above that of the balcony surface, in lieu of the door. Although I am given to understand that the window can afford a means of escape from No 16 in the event of a fire, access to the balcony from that apartment is otherwise restricted. Accordingly, the relationship between what has been built and No 16 is also substantially different to that shown on the approved drawings.
13. The appellant argued that No 16's window had been built as part of the 1999 planning permission. However, the opening in question is depicted on the approved floor plans in a manner which is conventionally relevant to a door. Other doors in the building are shown in a similar fashion on the floor plans, whilst no windows are represented in that way. For example, the floor plans show a second floor door in No 15, annotated by the words 'fire exit', leading to the external fire escape, in a similar way to the opening concerned. I am not convinced that the approved elevations clearly depict a window either. Although the opening in question is shown slightly differently compared to external doors leading onto other balconies elsewhere on the building this could be due to a number of factors, including the type of railings and the presence of the external fire escape in front, as well as being a reflection of the relative quality of the drawing copies supplied. In any event, based on the information before me I am uncertain whether the opening concerned is in the same

³ Ref: TVS.07442/3

position as what is shown on the approved drawings. In my view, the lower internal floor level in No 16, which I am given to understand meant that it was not practically possible to construct a door, probably became apparent during conversion of the building to apartments. No firm evidence was put forward to suggest otherwise. Therefore, taken as a whole I am not persuaded that the window in No 16 was part of the permitted works associated with the residential conversion of the building.

14. Due to all the above factors, in my view there are significant differences between what is shown on the approved drawings and what has been built. I am mindful that the approved drawings do not show a balcony which is allocated to or owned by a particular property. However, I cannot say for certain whether the Council would have granted planning permission for residential conversion of the building on the basis of what has been built subsequently, having regard to the relationship with No 16. The differences from the approved drawings have had material planning consequences, which I shall consider in the context of the deemed planning application arising from the ground (a) appeal.
15. As a result, I find that the 1999 planning permission does not authorise installation of the balcony. No other permission which might have given authority for the balcony was drawn to my attention. Development carried out without the required planning permission constitutes a breach of planning control, having regard to s171A(1)(a) of the Act.
16. Therefore, the appellant has been unable to show to the required standard that the balcony is not in breach of planning control and the ground (c) appeal fails.

Ground (a) appeal

Main Issue

17. The main issue in this ground of appeal is the effect of the balcony on the living conditions of the current and future occupiers of adjoining residential property having regard to privacy, as well as noise and disturbance.

Reasons

Living conditions

18. As noted above, a window in No 16's larger bedroom immediately adjoins the balcony. Notwithstanding the window being obscure glazed, evidence supplied showed that from their bedroom the occupiers of No 16 can clearly observe the shadows of persons using the balcony at close quarters. The appellant did not dispute the above evidence, which I found persuasive. The balcony surface is much higher than the internal floor level of No 16, emphasising the visual presence of persons using the balcony to occupiers of that apartment.
19. Furthermore, the window is capable of opening outwards over the balcony. If the window were to be opened, the adjoining occupiers can see balcony users at close quarters and are left with an impression of being overlooked, even if persons on the balcony cannot physically see into No 16's bedroom. The appellant stated that the window is rarely opened and the primary light source for the bedroom is in another elevation. However, it is highly likely that the occupiers of No 16 will wish to open the window at times, for example for ventilation purposes. In addition, the balcony faces towards clear glazed

windows at first and second floor level which serve No 16's living areas. This means that balcony users are able to look directly into parts of No 16's living areas from a relatively short distance away.

20. Due to all of these factors, the balcony has resulted in the occupiers of No 16 experiencing much greater actual overlooking as well as perceived overlooking, together with an appreciable sense of intrusion, in their living and sleeping areas. This has all harmfully eroded the standard of privacy previously enjoyed by the occupiers of that apartment. Use of blinds or curtains is unlikely to assist significantly in reducing the harmful impacts set out above. In any event, it is not reasonable to expect adjoining occupiers to keep their windows covered whilst the balcony is in use.
21. Use of the balcony is also highly likely to generate a significant level of noise and disturbance from everyday human activity. This could include from persons conversing, eating and drinking together and playing music, comings and goings and the movement of furniture and other items. Given the proximity to No 16's window, activity associated with use of the balcony by only a few people is highly likely to result in the adjoining occupiers experiencing a considerable increase in the level of noise and disturbance in their bedroom. Whether the frequency with which the balcony is used would decrease following the easing of COVID-19 restrictions is uncertain and cannot therefore be relied on. In any event, the balcony is more likely to be in use during the summer months, corresponding with when adjoining occupiers will probably want to leave their windows open at times. This is likely to exacerbate the effects of noise and disturbance on the occupiers of No 16, as is use of the balcony occurring late into the evening and early morning, when background noise levels would be relatively low and it might reasonably be expected that residential occupiers would have a greater sensitivity to incidences of noise and disturbance.
22. Whilst the balcony is not overly large, the easing of COVID-19 restrictions means that there will be little to prevent its use by greater numbers of people on occasion, for example during family or social events, leading to the occupiers of No 16 experiencing incidences of even greater noise and disturbance at times. Whilst access to the balcony is through a bedroom, that is unlikely to make a significant difference to the level of use, nor necessarily is the existence of other balconies more accessible from the main living areas of the property. Although balcony users might keep away from No 16's window, this is unlikely to have any material effect on the level of noise and disturbance experienced by the occupiers of that apartment. In any event, it is questionable why this part of the balcony was provided if it is not intended to be used. Therefore, the increase in noise and disturbance experienced at No 16 harmfully erodes the level of peace and quiet previously enjoyed by its occupiers.
23. In reaching the above findings, I acknowledge that prior to installing the balcony, part of the flat roof had previously been enclosed by a railing. Although a railing in the pre-existing position was not shown on the approved drawings, the appellant did not seek to argue that this was other than the condition of the property prior to installing the balcony. The railed area was of limited width compared to the balcony. In all likelihood this was due to the railing at least in part defining an external escape route from No 16 in the event of a fire; representations from an interested local resident reinforce my

views in this respect. As the regular placing of furniture and plants on this area would in all probability have obstructed a means of escape from No 16, such activity is more likely to have been noticed and been of concern to occupiers of that apartment. Although the appellant supplied photographs, including a *Google Earth* image purporting to date from circa summer 2019, showing items including a small table, chair and plant containers on the railed area, other photographs supplied showed that area as being clear apart from perhaps a few plant pots, with no sign of any furniture. The railed area was quite restricted, being less than half the size of the balcony and it did not have any surface material on top of the flat roof covering. In the appellant's photographs, the railed area appears cramped and scarcely able to accommodate the items shown. It is probable that access to the chair would have been awkward unless the table were moved, making the railed area inconvenient to use. Whether the railed area could have accommodated more than one of the sunbeds I saw present on the balcony is uncertain. Other balconies at the property are more expansive compared to the railed area.

24. Given all the above factors, I have significant doubt as to whether the railed area was used as a balcony, other than perhaps on an infrequent basis, by one or two people at most. Accordingly, any previous use of the railed area, if indeed it did occur, does not compare with the harmful effects arising from the use of the balcony.
25. I am also mindful of what is shown on the approved drawings. Even so, for the reasons set out above the balcony has had materially different effects to what would have occurred had the approved drawings been complied with. Moreover, as it is no longer physically possible to comply with the arrangement shown on the approved drawings, building out the approved scheme does not constitute a realistic fallback position.
26. It is highly likely that the construction of most of the other balconies on the building was contemporaneous with its subdivision into apartments. Therefore, the effects of those balconies on the living conditions of the occupiers of adjoining apartments are not comparable with this balcony.
27. Consequently, the balcony has harmfully eroded the standards of privacy and peace and quiet that the existing and future occupiers of No 16 could otherwise reasonably expect to enjoy, causing significant detriment to their living conditions. The failure to provide for the privacy and amenity of occupants of neighbouring properties does not accord with criterion in Policy LHW4 of the Test Valley Borough Revised Local Plan (LP), whilst the adverse impact on human health and general amenity from pollution, which in this context includes that arising from noise emissions⁴, does not accord with LP policy E8. The failure to provide a high standard of amenity for existing and future users is inconsistent with criterion in paragraph 127 of the National Planning Policy Framework.

Other matters

28. I accept that the balcony has not harmed the character and appearance of the building or that of its surroundings and that increased access to outdoor amenity space benefits the health and wellbeing of the appellant and his family. However, I afford these matters limited weight.

⁴ LP footnote 4.

Conclusion

29. 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.

Formal Decision

30. 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.

Stephen Hawkins

INSPECTOR