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# Appeal Decision

**by Gareth Symons BSc(Hons) DipTP MRTPI**

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

**Decision date: 24 August 2021**

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**Appeal Ref: APP/D0840/C/20/3263653**  
**39 Chynance, Portreath, Cornwall TR16 4NJ**

- 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 Penny Bence against an enforcement notice issued by Cornwall Council.
  - The enforcement notice was issued on 2 November 2020.
  - The breach of planning control as alleged in the notice is: The unauthorised construction of a fenced raised platform area on the flat roof of an existing rear single storey extension to form a balcony at first floor level.
  - The requirements of the notice are: (1) Remove all timber supports, fencing, fixtures and fittings that form the fenced raised platform from the flat roof of the existing rear single storey extension as shown in the approximate position edged in green on the attached plan. (2) Permanently remove all materials and debris from the land resulting from compliance with 1 above. (3) Cease to use the existing flat roof as an amenity space.
  - The period for compliance with the requirements is: For (1) - (3) above, 3 calendar months after this notice takes effect.
  - The appeal is proceeding on the grounds set out in section 174(2)(e), (c), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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## Decision

1. It is directed that the Enforcement Notice (EN) is corrected and varied by deleting:
  - "The unauthorised construction of a fenced raised platform area on the flat roof of an existing rear single storey extension to form a balcony at first floor level" at section 3 and replacing that with "The construction of a fence on the flat roof of an existing rear single storey extension";
  - Requirement 1 at section 5 and replacing that with "Remove all timber supports, fencing, fixtures and fittings that form the fence from the flat roof of the existing rear single storey extension as shown in the approximate position edged in green on the attached plan;
  - Requirement 3 from section 5.
  - '(3)' from section 6 and replacing that with '(2)'.

2. Subject to the corrections and variations, the appeal is dismissed and the EN is upheld.

### **Preliminary Matters**

3. Since a fence was first erected around the edge of the flat roof to the single storey rear extension, it has been modified and lowered in height. The horizontal boards now also incorporate planters that sit on the roof inside the boards. When an officer from the Council visited the site on 20 August 2020, before the EN was issued, to view the revised arrangement, they concluded that fencing remained around the edges of the flat roof area. I shall consider the appeal based on this revised arrangement on which the evidence from both sides has been submitted.
4. Furthermore, in their ground (c) appeal, the appellant has stated that a raised platform area has not been constructed as alleged in the EN and there is no fencing around the roof. This is, in effect, a 'hidden' appeal under s174(2)(b) which is that the matters stated in the EN have not occurred. It would be appropriate to consider these points accordingly. I can do this without causing any injustice because the appellant's case was included in the original grounds of appeal and the Council has had the opportunity to comment upon it.
5. There is no planning application deemed to have been made under s177(5) of the 1990 Act. As such, I cannot consider any matters of planning merit such as whether the development carried out adversely affects the living conditions of neighbours or its effect on the character and appearance of the area, including the presence of similar structures in the locality. Considerations such as whether the scheme might accord with planning policies from the Cornwall Plan are therefore also irrelevant.
6. I have read all the concerns about what the Council might have said or advised verbally or in emails, but these are matters between the appellant and the Council away from this appeal.
7. In legal grounds of appeal, such as (b), (c) and (e), the onus is on the appellant to make out their case to the standard of the balance of probabilities.

### **The ground (e) appeal**

8. This ground of appeal relates to considering whether the EN was served as required by s172 of the 1990 Act. The main concern raised is a conflict of dates between those on the EN and the supporting information document. There is clearly an error and the Council has recognised and apologised for this. However, the EN is the statutory document and the dates in there when it was served and came into effect tally and are correct. The error in the information pages attached to the EN do not mean that the EN is invalid.
9. I note other concerns raised about the Council's website allegedly showing the case closed and that the Council failed to send a copy of the EN by email by a certain date. However, there is no evidence to show that those required to be served were not duly served. Also, under s176(5) of the 1990 Act I am able to disregard any failure to serve the EN as required if the appellant has not been substantially prejudiced. Despite the failings highlighted, the appellant was able to make the appeal in time and it has progressed to the point of being determined. No substantial injustice has occurred. Consequently, the ground (e) appeal fails.

### **The 'hidden' ground (b) appeal**

10. The existing flat roof has been covered in artificial grass to create an outdoor amenity space with access from new doors that replaced a first-floor window (the doors are not subject of the EN). The perimeter fencing initially erected around the edge of the roof appears to have been sited upon the artificial grass/roof without any decking or additional platform. The lowered modified fence/boards and planters also sit on top of the roof.
11. It strongly appears to me that the raised amenity space the Council is concerned about already existed in the form of the flat roof. The only development that has occurred, as a matter of fact and degree, was the initial fence, which was facilitating the use of the roof as an outside space, and now the modified arrangement. No new raised platform or balcony has as a matter of fact been built.
12. Turning to the arrangement that is now there, although the number of horizontal boards has been reduced, they still form a low fence that wraps around the edge of the flat roof and are part of the planters that sit below the height of the boards inside the enclosed space. Looking up at the structure from below there is, as a matter of fact and degree, a fence on the roof.
13. In view of the above, there is a partial success under ground (b) related to the absence of a raised platform and the alleged breach of planning control needs correcting to "The construction of a fence on the flat roof of an existing rear single storey extension".

### **The ground (c) appeal**

14. Against this background, the issue is whether the fence constitutes a breach of planning control.
15. S55 of the 1990 Act defines development as including the carrying out of any building operations. The term building is defined as including any structure or erection. The erection of a fence is taken to be a structure for the purposes of the 1990 Act and thus it comprises development.
16. In this case the fence and the attached planters may not be fixed to the roof, but the overall size of the structure and its bespoke design to fit the size of the flat roof means that it must have been constructed on the site. Furthermore, the amount of timber used means that the development carried out is very sturdy and heavy, which also holds down the loose laid artificial grass. It is therefore secured by its own weight and to my mind it is not intended to be moved around. The construction of the fence and the attached planters, which are integral to the structure, was a building operation for which planning permission is required by virtue of s57 of the 1990 Act.
17. There is no express planning permission from the Council for the development. Turning to whether the structure could be 'permitted development' under the Town and Country Planning (General Permitted Development) Order 2015 (GPDO) the appellant advises that the planters are under 3m high and they are 7m from the rear boundary. It is not clear under what part of the GPDO that the appellant may be referring to and there are no accurate dimensions given. It might be that the appellant is suggesting the works carried out are an extension to the house, but in my view the development is a fence. In any

event, the total height of what is there, including the supporting corner posts which are part of the fence, must exceed 3m given the height of the extension.

18. A fence is development that is permitted by Schedule 2, Part 2, Class A of the GPDO, but it is not permitted if it exceeds 2m above ground level. This limitation has been exceeded.
19. In the absence of any substantive case made out that the development is permitted development, I find that there has probably been a breach of planning control. Therefore, the ground (c) appeal fails.

### **The ground (f) appeal**

20. The EN attacks operational development and not a material change of use. Therefore, requirement (3) of the EN that seeks to "cease the use of the existing flat roof as an amenity space" should be deleted. Moreover, the flat roof falls within the limits of the house that has a lawful residential use. Using the roof as an amenity space incidental to the residential use of the house would not constitute a material change of use of the building or the land. I make no comment on the advisability of using the roof without any fence around the edge.
21. Given the partial success under the hidden ground (b) appeal, requirement (1) of the EN needs modifying as set out in the Decision section above. Subject to that and the corrected allegation, the requirements of the EN seek to secure the removal of the timber supports, fencing, fixtures and fittings from the flat roof and for them to be removed from the land. As such, they are seeking to achieve the purpose of an EN under s173(4)(a) of the 1990 Act to remedy the breach of planning control by restoring the land to its condition before the breach took place. As the varied requirements would do no more and no less than seek to achieve this purpose, they are not excessive. There is partial success under the ground (f) appeal.

### **The ground (g) appeal**

22. In the time taken for this appeal to be decided, restrictions on travel in England imposed during the coronavirus pandemic have significantly eased. As such, even though the appellant lives away from the appeal property, a three-month compliance period is not unreasonably short. The Council does also have the power to waive or relax any requirement of an enforcement notice under s173A of the 1990 Act which could be exercised if considered appropriate at the time, although this is a power not under my control.
23. In view of the above, the ground (g) appeal also fails.

### **Conclusion**

24. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the EN with corrections and variations.

*Gareth Symons*

INSPECTOR