



Appeal Decision

Site visit made on 11 August 2021

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 September 2021

Appeal Ref: APP/X1165/X/21/3271333

24 Rathmore Road, Cockington With Chelston, Torquay TQ2 6NY

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr David Burton against Torbay Council.
 - The application (Ref. P/2020/1063) is dated 21 October 2020.
 - The application was made under section 191(1)(a) and 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is:
 1. The establishment of rear access steps to Walnut Road.
 2. The presence of guarding around the edge of the accessible flat roof to provide protection from falling.
 3. The establishment of the flat roof area as a terrace seeing regular pedestrian use.
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Decision

1. The appeal is allowed in part and attached to this decision is a certificate of lawful use or development describing the extent of the existing use which is found to be lawful. In other respects, the appeal is dismissed.

Preliminary Matters

2. The part of the application form describing the existing use, building works or activity included, at length, the reasons for applying rather than just a description of the act or acts of development. I have therefore used the summary from that section of the form in the header above which briefly explains what is being applied for. This is consistent with the clarification as included on the appeal form.
3. The appellant is therefore seeking a LDC for operational developments in the form that can be succinctly described as steps up to Walnut Road at the rear of the premises and for the guarding around the edge of the flat-roof also within the rear garden. In addition, the application seeks confirmation that the use of the flat roof as a terrace for regular pedestrian use is lawful.
4. The appeal was made because the Council did not reach a decision within the statutory period. I will deal with the appeal on the basis that the certificate was deemed to have been refused.

Main Issue

5. Under s191(2), uses and operations are lawful at any time if: (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of an Enforcement Notice then in force. The appellant has made the application on the basis that the operations and use of the flat roof were completed longer ago than or have been taking place for more than 4 years. The significance of 4 years relates to s171B of the Act which defines the time limits within which enforcement action needs to be taken. For building, engineering, mining or other operational developments, as well as the change of use of any building to use as a single dwellinghouse, this is 4 years. For other breaches of planning control it is 10 years.
6. The main issue is whether the Council's deemed refusal was well founded. I cannot consider the planning merits of the case as this is a legal determination and the onus is on the appellant to prove their case on the balance of probabilities.

Reasons

7. The appeal site is a terraced building with a front garden and parking area that faces towards Rathmore Road. The rear garden is formed on steeply rising land between the back of the building and Walnut Road. As a consequence, within the garden there are some concrete retaining structures which at the very rear have included a landscaped area with steps. At the base of the sloping garden is a rear part of the building with a flat roof. At the time of my site visit, a substantial timber framework had been constructed over the top of the flat roof which is not shown on the submitted plans and which the appellant does not argue is lawful.

Rear access steps and guarding around the edge of the accessible flat roof

8. The undated photographs submitted by the appellant show some timber fencing around the northern side of the flat roof and returning around part of the east side. The railings of this fencing appear in the images to have a similar grooved-texture as decking planks. What seem to be the same railings appear in the subsequent photographs taken after the new flat-roof surfacing had been installed. In these photographs, some timber steps can also be seen to the west side of the flat roof. All of the timber that can be seen in these undated photographs has a grey surface tone which would indicate that the timber has weathered rather than being new.
9. The photographs also do not show a complete picture of what was in place at that time. However, what I have described above is consistent with the timber structures shown on the submitted plans including the "0.9m high guarding to roof edge" as well as the dog-legged steps that are shown running along the path and up towards Walnut Road. The letter from the roofing contractor refers to rear steps to access the site from Walnut Road. It would seem probable that these structures were in place in August 2016. However, I have to consider the lawfulness of what existed at the time of the application.
10. The Council submits that on 4 September 2020, prior to the date of the

application, a site visit was undertaken by them in relation to another planning application which was subsequently refused (ref P/2020/01730). There is no dispute from the appellant that some work was undertaken before that visit. The appellant says in their final comments that the "framework of each repaired structure was immediately replaced". Within the grounds of appeal, it is also stated that renovation work was underway at the time the planning application was being considered to replace rotten wood with sound replacements. There is no evidence to dispute that the photographs provided by the Council were taken at the Council officer's site visit. That was over a month prior to the submission of the application for the LDC that I am considering here. The appellant states on the appeal-form that the renovations were paused. From the Council's photographs, I can see that the stage that the development had reached when I visited the was similar to that shown in those photographs from 2020.

11. Section 57(1) of the Act states, subject to various exceptions, that planning permission is required for "the carrying out of any development of land". Section 55 defines the meaning of "development" which includes "the carrying out of building, engineering, mining or other operations in, on, over or under land". At s55(2) some operations and uses are defined which should not be taken for the purposes of the Act to involve development. These include, at sub-section (a)(ii) the carrying out for the maintenance, improvement or other alteration of any building of works which "do not materially affect the external appearance of the building". It is a matter of fact and degree as to whether works of maintenance, improvement or alteration affect the external appearance of the structure.
12. At my site visit I could not see any of the previous timber guarding rails or the timber steps that had probably gone up towards Walnut Road. The Council's photographs do not show any of the former structure still in place and the appellant has not provided compelling evidence that any of that structure shown in his earlier photographs was still in situ when the application was made. The length time between removing old timber and installing new timber is of less relevance in my considerations than the degree of physical changes that were made.
13. What is now in place appears to have been substantially or possibly completely changed. This incorporates some upright posts in the place where the former guard railings were but they do not appear to be the same posts. It also includes what appear to be the supports for treads for steps up to Walnut Road. As a matter of fact and degree this is a different structure and has not been in its present form for 4 years prior to the submission of the application. Furthermore, it is not a complete form of development even if individual elements were in place for longer than the evidence would indicate.
14. The appellant has not requested a determination of lawfulness of the wider framework of timber that has also been constructed over the flat-roof and rear path. However, the timber posts for the guard rails and the early stage of steps up to Walnut Road all appear to be part of that wider, incomplete structure and cannot be separated from it, without carrying out a further act of development.
15. I therefore consider, on the balance of probabilities, that the physical works that have been undertaken to form rear access steps to Walnut Road and

construct guarding around the edge of the accessible flat roof have involved part completed operational development that has reached this stage within the 4 years prior to the date of the application being submitted.

16. If the property is a dwellinghouse it would normally attract 'permitted development' (PD) rights under the provisions of Article 3 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO). I haven't been provided with representations on this. However, the applicable PD rights within Schedule 2, Part 1 of the GPDO can only relate to "development within the curtilage of a dwellinghouse". The Council casts doubt over whether the existing use of the building is as a dwellinghouse. I have little evidence about the current use and lawful status of the building. However, even if it is a dwellinghouse to which Part 1 PD rights apply, part of the structure on its northern side, overhangs the boundary and is therefore outside of the curtilage and cannot be PD.

Use of the flat roof

17. The appellant's case refers to the length of time over which the flat roof has been in use as. However, that does not appear to be the key issue with respect to whether or not it is lawful for occupiers of the building to use the roof as a terrace. This use of this area is explained as being primarily for the purpose of airing laundry.
18. There is no dispute by the Council that the flat-roofed part of the building is lawful and furthermore, they also confirm that the re-covering of the roof that took place in 2016 did not materially affect the external appearance of the building. From the evidence that has been submitted including photographs showing the former traditional felt roof in comparison with the newly installed surface which has a similar basic appearance, I agree that these works of repair did not involve development within the definition of s55(2) of the Act.
19. According to the Council, the building is either lawfully a guesthouse or alternatively a dwellinghouse. In either scenario the occupation of the building would involve some residential occupation. If the surface of the roof is used to access clothes lines to air the clothes of its occupants as well as for some pedestrian use by them, that would be ancillary to the use of the building. Such activity would not involve the making of a material change in the use of the building or land within the same planning unit. With respect to s191(2)(a), no enforcement action can be taken against use of the flat roof in this way because it would not involve development.

Other Matters

20. Guarding around the flat-roof may be a requirement of other legislation but even if that is the case, I am only dealing with a determination of lawfulness under the provisions of s191 of the Act and not the requirements of any other legislation. Furthermore, the planning merits are not before me for consideration such as the benefits of having a railing or any other part of the present structure or in terms of a comparison with other developments in the nearby area.
21. I also cannot deal with the previously refused planning application as suggested by the appellant, or require that the Council re-consider it, refund the application fee or reach a view on why a particular officer dealt with it. An

appeal procedure could have been entered into within the appropriate period following refusal of that application which would have involved a review of the merits of the development.

Conclusion

22. For the reasons given above I conclude that the Council's deemed refusal to grant a certificate of lawful use or development in respect of the construction of steps up to Walnut Road at the rear of the premises and for the guarding around the edge of the flat-roof to provide protection from falling, was well-founded and that the appeal should fail to that extent. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.
23. However also for the reasons given above I conclude, on the evidence now available, that the Council's deemed refusal to grant a certificate of lawful use or development in respect of the use of the flat roof area as a terrace and for pedestrian use was not well-founded and that the appeal should succeed to that extent. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Andy Harwood

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 21 October 2020 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Signed

Andy Harwood

Inspector

Date 8 September 2021

Reference: APP/X1165/X/21/3271333

First Schedule

The use of the flat roof as a terrace for regular pedestrian use for purposes ancillary to the lawful use of the land.

Second Schedule

Flat-roof at the rear of 24 Rathmore Road, Cockington With Chelston,
Torquay TQ2 6NY

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 8 September 2021

by Andy Harwood CMS MSc MRTPI

Land at: 24 Rathmore Road, Cockington With Chelston, Torquay TQ2 6NY

Reference: APP/X1165/X/21/3271333

Scale: Not to scale

