



Appeal Decision

Site visit made on 9 September 2021

by Richard S Jones BA (Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 October 2021

Appeal Ref: APP/H5390/C/20/3260957

Land at 19 Wallflower Street, London, W12 0TE

- 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 Sam Beldam against an enforcement notice issued by the Council of the London Borough of Hammersmith & Fulham.
 - The enforcement notice, numbered 2019/01182/TERRAC, was issued on 1 September 2020.
 - The breach of planning control as alleged in the notice is the creation of the roof terrace, by virtue of the placement of potted plants to the roof edge.
 - The requirements of the notice are:
 - a) Remove from the land the potted plants located on the roof of the single storey ground floor rear extension.
 - The period for compliance with the requirements is two months.
 - The appeal is proceeding on the grounds set out in section 174(2)(c) and (d) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

Preliminary Matters

2. I sought clarification from the Council as to whether it intended to submit evidence that was referred to in its statement but not provided with representations on the appeal. I subsequently received an enforcement report from the Council and comments on the same from the appellant, both of which I have considered in my determination of the appeal.
3. The Council and appellant make submissions on matters relating to the effect of the alleged development on the character and appearance of the area and the living conditions of neighbouring residents. However, I am unable to consider matters which relate to the planning merits as the appellant has not made an appeal on ground (a), which is that planning permission should be granted for what is alleged in the notice.

The Appeal on Ground (c) and (d)

4. An appeal on ground (c) is that the matters alleged in the enforcement notice do not constitute a breach of planning control. An appeal under ground (d) is that at the time the enforcement notice was issued, it was too late to take enforcement action. For both grounds, the onus of proof lies with the appellant. The test for such proof is on the balance of probability.

5. The appeal relates to an end of row, two storey residential property with single storey, flat roof rear extension. The alleged breach is the creation of a roof terrace [on top of the extension], by virtue of the placement of potted plants to the roof edge.
6. The appellant has submitted a Statutory Declaration (SD) from the previous owner of the property which states that planning permission for a single storey rear extension was obtained and implemented in 1992. The Council does not seek to argue otherwise and also confirms that the first floor patio doors, which provide access to the roof terrace, are immune from enforcement action [due to the passage of time¹].
7. The SD also states that the area on top of the first floor extension has been used as seating and terraced area since about 1992/1993. As the SD is signed and witnessed by a solicitor, I attach significant weight to it. No evidence is provided from the Council which contradicts the SD and, in any case, s55(2)(d) of the 1990 Act provides that the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such, shall not be taken for the purposes of the Act to involve development.
8. I therefore find, on the balance of probabilities, that the creation of the roof terrace, insofar as that comprises the extension roof, access on to it and use of it, does not constitute a breach of planning control² (and is immune from enforcement action through the passage of time).
9. The Council explains that the purpose of the enforcement notice is to remove the potted plants on top of the rear extension which are considered to increase the likelihood of the usage of the roof as a terrace. The potted plants are considered by the Council to create an enclosure of the roof at first floor level and their presence results in an intensification of use.
10. I appreciate that the property is located within the Old Oak and Wormholt Conservation Area, which is subject to an Article 4 Direction. However, the Council has not explained why it considers that placing potted plants around the perimeter of the extension falls within the meaning of development as defined by s55(1) of the 1990 Act³, thereby requiring planning permission.
11. Whilst I recognise that the plant pots may make the space more attractive, their placement has not created the roof terrace and is unlikely to be the difference between it being used or not. Indeed, the appellant has explained that the absence of the plant pots during the first three years of living at the property did not deter him from using the terrace.
12. The use of the terrace does result in overlooking and loss of privacy to the occupants of neighbouring properties, but it has not been shown that is significantly different from that which occurred previously. Moreover, I cannot agree that the effects of the potted plants on the character and appearance of the dwelling and surrounding area are material. The character of the use is not

¹ S171B of the Town and Country Planning Act 1990 (time limits)

² S171A(1)

³ S55(1) of the 1990 Act provides that 'development' means the carrying out of building, engineering, mining, or other operations in, on, over or under land, or the making of any material change of use of any buildings or other land.

therefore changed in a fundamental way, such that it is no longer incidental to the enjoyment of the dwellinghouse.

13. I do not find, as a matter of fact and degree, the placement of potted plants has resulted in a such a change in the definable character of the use of the land that it amounts to a material change of use.
14. In terms of building operations, the plant pots are rectangular in shape and taken individually are not particularly large. Taken together, they do provide a relatively low enclosure, although there are gaps between them. Whilst there is no suggestion of them being moved in the near future, I do not generally associate plant pots as permanent features. They are not fixed to the roof and are capable of being moved. Their placement would not normally be undertaken by a builder.
15. As a matter of fact and degree, the placement of potted plants on the roof edge does not amount to building operations, and does not fall within the meaning of development requiring planning permission.
16. The Council refer to a planning permission⁴ granted in respect of the appeal property in January 2016 which was subject to a condition precluding alterations to the roof of the single storey rear extension in connection with its use as a roof terrace and the erection of railings or other means of enclosure. However, the Council acknowledge that the January 2016 permission has not been implemented. Accordingly, that condition does not bite.
17. I therefore find that the creation of the roof terrace, by virtue of the placement of potted plants to the roof edge is not in breach of planning control on the balance of probabilities. The appeal on ground (c) succeeds and the enforcement notice will be quashed.

Richard S Jones

INSPECTOR

⁴ Application reference 2015/05199/FUL for the erection of a replacement aluminium-framed rear extension at first floor level over part of the existing back addition following demolition of the existing rear extension at first floor level; and replacement all existing UPVC windows and doors on front, side and rear elevations to timber-framed windows and doors