



Appeal Decision

Site visit made on 12 January 2022

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 28 January 2022

Appeal Ref: APP/K1128/C/21/3283044

Eight Bells, South Embankment, Dartmouth, TQ6 9BB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). The appeal is made by Mrs Elizabeth Helyer (nee Worledge) against an enforcement notice issued by South Hams District Council.
 - The notice was issued on 17 August 2021.
 - The breach of planning control as alleged in the notice is:
Without planning permission, operational development namely:
 - the creation of a roof terrace;
 - the erection of an external staircase affixed to an external wall of Eight Bells to access the roof terrace;
 - the erection of a balustrade affixed to one side of the roof terrace;
 - the placement of artificial grass, seating, planters and plant pots on the roof terrace.
 - The requirements of the notice are, you must:
 - i) Remove the external staircase and balustrade;
 - ii) Remove the artificial grass, seating, planters and plant pots;
 - iii) Cease the use of the roof terrace.
 - The periods for compliance with the requirement are:
 - i) Three months;
 - ii) Three months;
 - iii) One month.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. It is directed that the enforcement notice is corrected by:
 - At section 3, the deletion of the matters which constitute the breach of planning control and their replacement with: - "the erection of an external staircase and balustrade affixed to an external rear-wall and roof to enable access to the roof"
 - At section 5 (What you are required to do) the deletion of requirements 5(ii) and 5(iii).
2. Subject to the corrections, 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

3. I carried out a site visit on my own following agreement by both main parties that this would be acceptable. The appellant had left the front door of the property unlocked to enabling me to access the property.

The notice

4. I have a duty where I can, to get a notice in order where I consider it is contains any defect, error or misdescription. This power is given by reason of s176(1)(a) and I can utilise this where it would not cause injustice to the Council or the appellant. An enforcement notice is a legal document with serious consequences if upheld but not complied with. My concerns with the notice relate to the wording of the allegation and the requirements. I will deal with these matters under the appeal made on ground 'c' as there is some overlap between what is pleaded and those concerns.
5. The appeal form does not indicate that an appeal on ground 'f' has been made. However, the appeal statement submitted before the appeal was confirmed as valid, did cover ground 'f' and I will deal with the case on that basis as well.

Getting the notice in order and the Appeal on ground (c)

6. The appeal site is within a densely built-up part of Dartmouth, close to the river frontage. The appellant's dwelling is part of a terrace which includes other residential properties and which has a flat roof accessed via metal steps that have been constructed at the rear. The appeal on this ground is that what is alleged does not constitute a breach of planning control. The onus is upon the appellant to demonstrate their case.
7. The appellant's statement only sets out grounds of appeal with respect to part of what has been alleged on the notice and confirms that the balustrade and staircase constitute development requiring planning permission. The Council has not alleged that the re-roofing of the property in 2015 required planning permission. I am therefore not considering the works for the re-roofing in this appeal which was a separate operation that appears on the balance of probabilities to have been substantially completed before the developments alleged on this notice took place.
8. Reference within the allegation to "the creation of a roof terrace" implies that this is in and of itself a separate act of development which is misleading and may have repercussions for how the notice is interpreted in future, especially given the linked requirement to "cease" that "use". The flat roof exists regardless of the physical development that has been undertaken to add to it. The appellant states that the roof is used only by the occupants of the dwelling and it is not easily accessible from anywhere else. The notice is clear in stating that it is alleging operational development and not a material change of use. Section 55(2)(d) of the Act expressly states that for the purposes of the Act, the "use of any buildings or other land within the curtilage of a dwellinghouse for any purposes incidental to the enjoyment of the dwellinghouse as such" shall not be taken to involve development. Therefore, the use of the roof of the building for purposes incidental to the enjoyment of the dwellinghouse as such, would not be development requiring planning permission.
9. The appellant explains that prior to the construction of the balustrade and staircase, access to the roof had been achieved firstly by a folding staircase/ladder from inside the kitchen and then by a metal ladder in the same position as the present external staircase. I have not been provided with any details of these but there is no suggestion that the construction of the metal staircase and the balustrade were works of maintenance of what previously existed. I agree with the main parties that these clearly are building

operations under the provision of s55 of the Act and which require planning permission by reason of s57.

10. Article 3 of The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) provides some "permitted development" (PD) allowances, granting planning permission for some developments. Schedule 2, Part 1 of the GPDO sets out what is PD with respect to "development within the curtilage of a dwellinghouse". The Council has referred (amongst others) to Class A of that part which provides PD rights for the enlargement, improvement or other alteration of a dwellinghouse subject to various limitations. This is subject to the limitation that the development is not permitted by that class if, at paragraph A.1.(k), it would consist of or include "(i) the construction or provision of a verandah, balcony or raised platform".
11. In my opinion, although the use of the top-surface of the roof in the way that has occurred cannot be considered part of the breach of planning control alleged, the physical works in this instance, have included the provision of a balcony. Government advice within Technical Guidance¹ defines a balcony as "a platform with a rail, balustrade or parapet projecting outside an upper storey of a building." The balcony has been created by constructing the steps up to the roof along with the balustrade (which are not severable from one another). The development is not PD under the provisions of Class A of the GPDO. The appellant has not provided an analysis of the provisions of the GPDO and so I have reached my view on the assessment of the evidence that has been put forward and what the GPDO says. An alternative view could be that the balustrade is an alteration of the roof, which would not be permitted under Class C as it is higher than the highest part of the original roof, thereby disallowed by reason of paragraph C.1.(c).
12. The notice also alleges that the placement of artificial grass, seating, planters and plant pots have involved operational development. Three rectangular planters are positioned at the front of the flat roof in a row, close to the edge which provides a barrier at that road-end of the roof. These appear to be retained in place by reason of their weight and also some thin wires which are tied to them and secured to the building. Similarly one of the wooden benches on the roof is also tied to the building with wire. Other planters and plant-pots are much smaller.
13. It has been held that when considering whether such matters have involved operational development, 3 primary factors are decisive in reaching a fact and degree decision – their size, permanence and physical attachment. The large planters are in position in what appears to be a permanent manner although they are clearly moveable as they are not connected into the surface of the roof and it would require very little to remove the wires in order to move them. They could be easily knocked out of position. Likewise, the benches could be easily moved as could the smaller plant pots and troughs and none of these items appear to have any significant degree of permanence. In my view the placing of these items on the roof, as a matter of fact and degree, has not involved a building or other operation. Similarly, the artificial grass has been placed on the surface of the roof and does not form part of the structure.
14. In cases where there has been a material change of use, it can be legitimate for an enforcement notice to require the removal of works or items that in

¹ Permitted Development Rights for Householders – Technical Guidance

themselves did not require planning permission, if they facilitated the use. However, that is not the case here as a material change of use is not alleged, although the wording of the notice is a little confusing given how it refers to the use of the roof. I will therefore correct the notice by removing from the allegation reference to those items that clearly did not involve operational development. This can be done without causing injustice to either main party as it does not raise new issues or alter the context of any grounds of appeal.

15. I therefore agree with the appellant that apart from the metal staircase and balustrade, other elements of the allegation need to be deleted from the notice. It would be more accurate to describe the development as "the erection of an external staircase and balustrade affixed to an external rear-wall and roof to enable access to the roof". This does not change the nature of what the notice in these respects is alleging and makes the wording clearer.
16. Ground (f) which relates to whether the steps in section 5 of the notice are excessive has been pleaded. However, I also need to review the requirements here because they relate to the incorrect allegation. The only requirement of the notice that relates to the act of development is step 5(i), to remove the external staircase and balustrade. For reasons that I have already explained, the remaining step 5(ii) refers to matters that did not involve operational development. Step 5(iii) requires the cessation of a use but there has not been a material change of use. I also consider that these corrections can be made without causing injustice to either main party.

Conclusion

17. Having considered the appeal on ground (c) with respect to the notice as corrected, it succeeds to a limited extent because parts of the allegation do not involve a breach of planning control. I have also corrected the notice to remove the confusion regarding the use of the roof.

The Appeal on ground (d)

18. The main issue is whether at the date that the notice was issued, enforcement action could be taken with respect to the development enforced against.
19. The appellant argues this ground of appeal only on the basis that the use of the roof is immune from enforcement action with the artificial grass, planters and benches having been in place for more than 4 years. However, I have deleted those elements from the notice for reasons explained above. With respect to the notice as corrected, there is no dispute that the metal steps and balustrade have only been in place since 2019. As such, they were not substantially completed 4 years before the issuing of the notice and are not therefore immune from enforcement action under the provisions of s171B(1) of the Act.
20. The appeal on ground (d) fails.

The Appeal on ground (a) and the deemed planning application

21. I have to consider whether planning permission should be given for what is alleged on the enforcement notice, as corrected.

Main issue

22. The main issue is the effect of the development on the living conditions of the neighbouring flats with particular reference to privacy and noise.

Reasons

23. The appellant has explained that the flat roof has been used for the present purposes for a number of years. Access has been achieved previously by use of a ladder from the rear, lower courtyard and also a folding staircase or ladder from the kitchen. I am not given much detail of those previous ways of getting onto the roof. From the written descriptions, they appear to have been less convenient and less safe ways of accessing the space. Without the balustrade in place, the space would be far more dangerous and therefore would be a far less attractive place to sit out and use as an amenity area.
24. Although the use of the flat roof for use incidental to the use of the dwelling would not require planning permission, the greater safety and convenience provided by the development would therefore be likely to lead to greater use. Even if the present owners and occupants do not want to use that space regularly, other occupants may have a different attitude.
25. The roof is contained on both sides by neighbouring buildings. To the south, the roof gable of the adjoining property provides a high enclosure on that boundary and does not have any openings within it. However, on the northern side, there are 2 large windows within the wall of residential flats directly on the boundary. When I carried out my site visit, I could see directly into those rooms even though one of those windows had internal net-curtains in place. Use of the roof for any significant degree of domestic activity on the roof would cause direct overlooking through these windows and therefore a loss of privacy for those residents. Some use may not be subject of controls through the planning enforcement regime. However, the likelihood of more regular use could cause more frequent loss of privacy and disturbance even if that is just from people sitting, talking, laughing so close to those windows.
26. Whilst some of these impacts could occur even if the steps and balustrade are removed, the developments would enable and could therefore encourage greater use of what is an attractive area overlooking the waterfront. That could cause some additional harmful impacts for neighbouring occupiers. Policy DEV1 of the adopted Plymouth and South West Devon Joint Local Plan (LP), seeks to safeguard the health and the amenity of local communities. The development does not provide satisfactory privacy for neighbouring residents who could also be disturbed by even a small amount of additional activity.
27. In relation to the main issue, the development could have a harmful impact upon the living conditions of the neighbouring flats due to a loss of privacy and increase noise and therefore disturbance. This would not comply with LP Policy DEV1 or the advice within the National Planning Policy Framework.

Other matters

28. The development does have a harmful visual impact. As such the character and appearance of the Conservation Area would be preserved. This neutral impact does not outweigh the harm in relation to the main issue.
29. The appeal on ground (a) fails.

The Appeal on ground (f)

30. The appeal on this ground is that the steps required exceed what is necessary to achieve the purpose of the notice. The purpose appears to be to remedy the

breach by restoring the land to its condition before the breach took place. Given that ground (a) was also pleaded, I have considered the planning merits of the case and can therefore consider ground (f) in a flexible manner.

31. I have addressed some of the appellant's concerns under this ground of appeal in getting the notice in order and the appeal on ground (c). The appellant would also like to retain the development in order to maintain the building more safely. However, for reasons that I have set out above under ground (a), that could also encourage more use of the flat roof causing harm to neighbours' living conditions. I do not find that the risks from occasional maintenance of the roof and the building in general would necessitate the harm from the development to continue. It is not explained why the development is so important for maintenance and why temporary safety measures during any maintenance work would not be feasible.
32. The appeal on ground (f) therefore fails.

The Appeal on ground (g)

33. The appeal on this ground is that any period specified in the notice falls short of what should reasonably be allowed. I have corrected the notice including deletion of some of the requirements and this ground needs to be considered in relation to the notice as corrected. The remaining requirement necessitates the removal of the stairs and balustrade within 3 months.
34. Whilst the appellant states that removing these would require specialist equipment, there is no specific evidence to help demonstrate that this would be particularly difficult to organise. The restricted nature of the site is self-evident but again, I have no evidence before me indicating that the removal of the metalwork would be a specialist undertaking or that fairly standard equipment would be difficult to utilise. There is a road to the front of the property with a parking-bay and it is not explained why these materials could not be brought out of the site on that side with any necessary equipment parked in the bay.
35. The Covid-19 pandemic has been problematic for carrying out even routine tasks. However, we are gradually moving towards fewer restrictions and such work mainly outside would not be prevented. If the situation deteriorated in future, the Council has the ability to allow more time to comply.
36. The 6 months requested would perpetuate the increased use of the roof during the summer when it will be the most attractive time of year to use it. That is also the season when windows in the adjoining flats are most likely to be open.
37. Three months strikes a reasonable and proportionate balance and the appeal on ground (g) therefore fails.

Conclusion

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

Andy Harwood

INSPECTOR