



Appeal Decision

Site visit made on 16 November 2021

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

an Inspector appointed by the Secretary of State

Decision date: 31 January 2022

Appeal Ref: APP/H5390/X/21/3275244

Flat Second Floor, 4 Bishop's Road, LONDON, SW6 7AB

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Michael Clifford against the decision of London Borough of Hammersmith and Fulham.
 - The application ref 2020/03060/CLE, dated 20 November 2020, was refused by notice dated 22 January 2021.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is described as *'Existing use of roof terrace, in use since 1988, by owners of Second floor flat, 4 Bishops Rd, London SW6 7AB. Fully described in 'Use of Roof Terrace Statement' and 'Terrace Use Detail' documents, both appended as part of this application.'*
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Preliminary Matters

2. No 4 Bishop's Wood is a two storey plus mansard terrace property, converted into self-contained flats. The rear of the property includes a flat roof, two storey outrigger. The LDC is sought in respect of the use of that roof as a terrace.
3. Although the appellant's evidence makes reference to railings around the edge of the roof, their lawfulness is the subject of a separate appeal and decision¹.
4. I sought clarification from the parties as to whether it was intended to submit evidence referred to but not provided. I subsequently received Google Street View images from the Council and appeal decisions from the appellant. The parties were offered opportunity to comment on those respective submissions.
5. An application under s191(1)(a) of the 1990 Act seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful. S191(2)(a) of the Act explains that uses are lawful if no enforcement action may be taken in respect of them because they did not involve development or require planning permission or because the time for enforcement action has expired.

¹ Appeal Decision Reference: APP/H5390/X/21/3279095

6. I've noted the concerns expressed by a neighbouring resident on matters including privacy, noise, smell and health hazards. I've also noted the submissions made in support of the LDC, on matters such as appearance and benefits. However, planning merits form no part of the assessment of an application for a LDC, which must be considered in the light of the facts and the law.
7. The burden of proof lies with the appellant to make his case and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough. Evidence should not be rejected simply because it is uncorroborated.

Background and Main Issues

8. The Council refused to grant the LDC on the basis that the evidence fails to demonstrate that the flat roof had been converted to a roof terrace for at least four years, from the date of the application. The reason for refusal also states that no formal access onto the roof had been created, and it did not benefit from a form of enclosure for the last six years, which would have facilitated the use of the roof as a terrace.
9. There are a number of issues with the approach taken by the Council. Firstly, it is necessary to consider whether the use of the roof as a terrace amounts to development requiring planning permission. That question is not addressed in the Council's officer report but is raised by the appellant, and the aforementioned appeal decisions have been submitted in support of that issue².
10. Secondly, if it is development, should the immunity period be 10 years rather than four, as stated. S171B(2) states that '*Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.*' However, the application does not seek to confirm whether the use of the building as a single dwellinghouse is lawful. The use therefore falls to be considered against s171B(3), which is that '*In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.*'
11. Consequently, the main issues for determining whether the Council's decision to refuse to issue a LDC was well-founded, turns on:
 - whether the use of the flat roof as a terrace amounts to development as defined in s55 of the 1990 Act; and
 - if so, whether the use of the roof materially changed to use as a roof terrace on or before 20 November 2010³ and then that use continued for at least 10 years thereafter, without material interruption, and has not been subsequently extinguished.

² Appeal Decision References: APP/T5150/X/16/3165953; APP/Y5420/X/19/3229969 and APP/N5660/X/12/2174130

³ The date 10 years prior to the LDC application.

Reasons

12. 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. A flat is regarded as a dwellinghouse for the purposes of s55(2) of the 1990 Act⁴.
13. The flat roof of the terrace comprises the roof over the existing flats already in residential use. The use of that roof as a terrace for one of the flats for sitting out etc., is incidental to the residential use of that dwellinghouse. Consequently, no material change of use has occurred amounting to development requiring planning permission. My findings on this issue are consistent with the appeal decisions referred to by the appellant.
14. As noted, the Council's reason for refusing the LDC also refers to a lack of formal access and the roof not benefiting from a means of enclosure which would have facilitated use as a terrace. However, the photographs provided by the appellant show that access onto the roof terrace has been achieved over many years, regardless of whether a formal access has been created.
15. Moreover, whilst an appropriate form of enclosure would make the use second floor terrace safer and likely more attractive, the absence of a means of enclosure does not preclude the incidental use as a terrace. That again is borne out by the photographs which show its use during the period when there were no railings in place. Consequently, the lawfulness of the use does not rely on operational development.
16. In the circumstances, it is not therefore necessary to consider whether or not the use is immune from enforcement action through the passage of time. That is because, the use of the second floor roof as a terrace is incidental to the enjoyment of the dwellinghouse as such and is not taken for the purposes of the 1990 Act to involve development. No material change of use had occurred for which planning permission was required.
17. I shall issue a certificate in respect of the use, modifying the description to accord with the facts and evidence, under the powers afforded to me by s191(4) of the 1990 Act.

Conclusion

18. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Richard S Jones

INSPECTOR

⁴ That is not the case for certain parts of the Town and Country Planning (General Permitted Development) (England) Order 2015, including Part 1 of Schedule 2 (development within the curtilage of a dwellinghouse) for which 'dwellinghouse' does not include buildings containing one or more flats or a single flat contained within a building.

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 20 November 2020 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged 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:

The use of the second floor roof as a terrace is incidental to the enjoyment of the dwellinghouse as such and is not taken for the purposes of the Town and Country Planning Act 1990 (as amended) to involve development. No material change of use had occurred for which planning permission was required.

Signed

Richard S Jones

INSPECTOR

Date: [31 January 2022]

Reference: APP/H5390/X/21/3275244

First Schedule

Existing use of second floor flat roof as roof terrace

Second Schedule

Land at Flat Second Floor, 4 Bishop's Road, London, SW6 7AB

IMPORTANT NOTES – SEE OVER

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 described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was 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 described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use 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: [31 January 2022]

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

Land at: Flat Second Floor, 4 Bishop's Road, London, SW6 7AB

Reference: APP/H5390/X/21/3275244

Scale: Not to Scale

