



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/21/3279095

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 2020/03061/CLE, dated 20 November 2020, was refused by notice dated 22 January 2021.
 - The application was made under section 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 described as '*Existing railings on second floor roof terrace, at Second floor flat, 4 Bishops Road, London, SW6 7AB. Installed in 1988, these are lawful having been in place for more than 4 years. The existing railings were replaced in 2020.*'
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Decision

1. The appeal is dismissed.

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 railings around the perimeter of the flat roof. I've noted the appellant's references to the use of the roof as a terrace, but that is the subject of a separate appeal and decision¹.
3. I sought clarification from the Council as to whether it intended to submit Google Street View images referred to in its evidence but not provided. Those were subsequently received and the appellant was offered opportunity to respond. The Council were similarly offered opportunity to comment on three appeal decisions provided by the appellant, as referred to in his evidence, for sites in London (Edbrooke Road² and The Chase³) and Port Talbot⁴.
4. An application under s191(1)(b) of the Town and Country Planning Act 1990 as amended (the 1990 Act) seeks to establish whether, at the time of the application, any operations which have been carried out are lawful. S191(2)(a) of the 1990 Act explains that operations 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 Ref: APP/H5390/X/21/3275244

² Appeal Ref: APP/X5990/X/16/3159960

³ Appeal Ref: APP/N5660/X/18/3210374

⁴ Appeal Ref: APP/Y6930/C/10/2123808

5. I've noted the appellant's reference to the reasonableness of a safety rail in the context of the use of the rooftop as a means of escape. However, such considerations relate to the planning merits and can 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.
6. Although a means of escape is discussed in the Edbrooke Road appeal decision, that flowed from arguments relating to a condition that specifically allowed such a use and the particular circumstances of that case. This LDC appeal relates only to the railings, not the use of the roof.
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.

Main Issue

8. The main issue is whether the Council's decision to refuse to issue a LDC for the railings was well-founded. That turns on:
 - whether the railings amount to development as defined by s55 of the 1990 Act;
 - if so, whether the development was granted planning permission by the Town and Country Planning (General Permitted Development) (England) Order 2015 (the 2015 GPDO); or
 - whether the operational development was substantially completed at least four years before the date of the LDC application, so as to be immune from enforcement action through the passage of time⁵. The material date in this case being 20 November 2016.

Reasons

9. S55(1) defines development for the purposes of the 1990 Act and includes the carrying out of 'building operations'. Although the Council's reason for refusal refers to s53 of the 1990 Act, that mistake has been picked up by the appellant, who has been able to make his case in relation to the provisions of s55. I have also considered the appeal afresh and on the basis of the evidence before me. No prejudice has therefore arisen.
10. As set out in s55(1A)(c) and (d) of the 1990 Act, 'building operations' include additions to buildings and other operations normally undertaken by a person carrying on business as a builder. In my view, the railings have the attributes of a building operation, given their size, permanence and physical attachment to the roof, and are likely to have been installed by a builder.
11. S55(2) of the 1990 Act makes exemptions to the definition of development, providing that particular operations shall not be taken for the purposes of the Act as involving development, including the carrying out for the maintenance, improvement or other alteration of any building or works which do not materially affect the external appearance of the building.

⁵ S171B(1) of the 1990 Act

12. For the reasons explained below, the building operations go beyond what can reasonably taken to be maintenance or improvement. Moreover, given the roof top location and design of the railings, they materially affect the appearance of the building. Consequently, the exemptions do not apply.
13. I therefore find, on the balance of probabilities, that the railings amount to development for the purposes of the 1990 Act.
14. The appellant correctly identifies that caselaw directs that the date on which the development commenced determines which Statutory Instrument it is to be judged against⁶. For the reasons explained below, that is May 2020, when the 2015 GPDO was in force, rather than the Town and Country Planning General Development Order 1988 (1988 GDO), as referred to by the appellant.
15. Class C of Part 1 of Schedule 2 of the 2015 GPDO (hereafter referred to as Class C), provides, subject to limitations and conditions, that any other alteration to the roof of a dwellinghouse is permitted development⁷. However, whilst I note the appellant's reference to caselaw⁸ and the aforementioned appeal decisions, Article 2(1) of the 2015 GPDO (interpretation) states that 'dwellinghouse' does not include buildings containing one or more flats or a single flat contained within a building. Consequently, Class C permitted development rights do not apply to the appeal site flat. That outcome would not change even if the 1988 GDO was in force because the same critical provisions were similarly applied.
16. Article 3 and Schedule 2, Part 2, Class A of the 2015 GPDO do grant planning permission for the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure. However, limitation A.1.(b) states that development is not permitted by Class A *if the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed 2 metres above ground level*. In this case, the railings are erected at second floor level so clearly exceed 2 metres above ground level, in breach of limitation A.1.(b).
17. I return to the issue of permitted development rights below but first consider the issue of immunity. It is undisputed that metal railings were installed around the edge of the roof in 1988. As they remained in place until mid-2014, it appears more likely than not, that those railings would have gained immunity from enforcement action through the passage of time⁹. However, by the appellant's own admission, the railings were removed in mid-2014 to allow for repairs to be carried out to the roof. Due to issues encountered repairing the roof, railings were not reinstated until around mid-2020 (during the period May to July), some six years later. Consequently, the railings have not been in place throughout the period from 1988 to the present, as suggested.
18. Therefore, the crux of the immunity dispute lies in the implications arising from the removal of the original railings and their replacement with the railings in place at the time of the application.

⁶ Williams Le Roi v SSE & Salisbury DC [1993] JPL 1033 and R (oao Orange Personal Communication Services Ltd & Others) v Islington LBC [2006] EWCA 157; [2006] JPL 1309

⁷ Class B firstly provides permitted development rights for the enlargement of a dwellinghouse consisting of an addition or alteration to its roof, hence the reference in Class C to 'other alterations'. Even if the operations could be argued to be an enlargement, the GPDO interpretation of a dwellinghouse would preclude the appeal property.

⁸ Hammersmith and Fulham LBC v SSE & Davison [1994] JPL 957

⁹ They may also have been permitted development under Class C in 1988 if the appeal property had not been converted into flats at that time.

19. The appellant explains that the original railings were corroded beyond safe use and that the railings were 'reinstated' to replace the original railings on a like-for like basis. That is not borne out by the Google Street View images. Notwithstanding the ambiguity of having a 'similar' height and placement, the original railings appeared to be visually lightweight in street level views, with very limited vertical bars and few horizontal bars. In photographs from the roof there appears to be a meshing applied but it is not clear whether that is applied or forms part of the railings. In contrast, the LDC railings have much greater solidity arising from the width of the main supporting vertical bars and the inclusion of more slender intervening vertical bars with limited spacing.
20. I appreciate that it may have been the appellant's intention to reinstate the railings once removed in 2014, and that difficulties repairing the roof may have delayed doing so. Nevertheless, a gap of around six years is significant and cannot reasonably be taken as a temporary removal, particularly as the original railings were not maintained and re-instated.
21. The question of whether if the original railings were reinstated shortly after their removal would have required planning permission is a moot point because that did not occur. Moreover, even if the roof continued to be used for a terrace without the railings in place, that does not assist the appellant's case as to whether the operational development was substantially complete at least four years before the date of the LDC application.
22. Returning to Class A of the 2015 GPDO, limitation A.1.(c) is that development is not permitted if the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or a height of 2 metres¹⁰ if erected or constructed, whichever is the greater. However, such wholesale changes, with a significant intervening period, go beyond what can reasonably be described as maintenance, improvement or alteration for the purposes of limitation A.1.(c).
23. As a matter of fact and degree, given the materially different design and appearance as well as the significant intervening period, the Council are correct to refer to the railings as new building operations. Indeed, the appellant acknowledges that new railings were purchased as the original railings were incapable of reinstatement due to their condition.
24. Accordingly, the appellant has not shown, on the balance of probabilities, that the existing second floor railings did not amount to development as defined in s55 of the 1990 Act; or that they would have been granted planning permission by the 2015 GPDO on 20 November 2020; or that they were substantially complete at least four years prior to the date of the application, so as to be immune from enforcement action through the passage of time.
25. In reaching my decision I've noted the written statements and all other evidence submitted in support of the appeal, but the facts presented do not alter or conflict with those considered above.

Conclusion

26. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development was well-founded and that the appeal

¹⁰ The height referred to in paragraph A.1.(b) as the height appropriate

should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Richard S Jones

INSPECTOR