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## Appeal Decision

Site visit made on 12 May 2022

**by John Whalley**

**an Inspector appointed by the Secretary of State**

**Decision date: 23 May 2022**

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### **Appeal A - Appeal ref: APP/U5360/C/21/3271922 34 Wilberforce Road, London N4 2SR**

- The appeal is made by Mr Devlin Singh under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against an enforcement notice issued by the London Borough of Hackney Council.
- The notice was issued on 4 March 2021; reference No. 2020/3166/ENF.
- The breach of planning control was: Without planning permission the installation of a roof terrace & decking on the roof of the lower ground floor extension on the rear elevation; the installation of a second roof terrace on the roof of the third floor rear outrigger; & the installation of a door on the third floor rear elevation.
- The requirements of the notice are:
  - (1) Remove the railings, bamboo screening and decking from the rear roof of the ground floor rear extension.
  - (2) Remove the balustrades and glass panels from the roof of the third floor outrigger.
  - (3) Remove the French doors installed on the rear elevation at third floor level and restore the rear elevation at third floor level to its previous state before the development took place.
  - (4) Restore the rear roof areas of the property to their previous state before the development took place.
  - (5) Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises.
- The period for compliance with the requirements is 6 months.
- The appeal was made on grounds (a), (d) and (f) as set out in the amended Act. As the fee for the application for planning permission deemed to have been made in respect of the ground (a) appeal was paid, the application falls to be considered.

*N.B. the ground (d) appeal was made in respect of the lower terrace only.*

**Summary of decision: The enforcement notice is upheld. Planning permission is not granted to retain the operational development set out in the allegation in the enforcement notice**

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### **Appeal B - Appeal ref: APP/U5360/X/21/3269121 34 Wilberforce Road, London N4 2SR**

- 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 refusal by the London Borough of Hackney Council to grant a certificate of lawful use or development.
- The appeal was made by Devlin Singh.

- The application, reference 2020/3210, was validated on 25 October 2020. It was refused by a notice dated 20 December 2020.
- The development for which a certificate of lawful use or development was sought was for the balcony/roof terrace at the rear of Flat 2 having been in situ for more than 4 years at Flat 2, 34 Wilberforce Road, Hackney, London N4 2SR.
- The application was made under sections 191(1)(a) and 191(1)(b) of the Act for a certificate of lawfulness for the construction and use of the balcony/roof terrace at the rear of Flat 2, 34 Wilberforce Road, Hackney, London N4 2SR.

*N.B. the certificate of lawful development and use and appeal was made in respect of the lower terrace only.*

**Summary of decision:** A certificate of lawfulness is not issued.

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### **Appeal property**

1. No. 34 Wilberforce Road is a semi-detached house in a residential road within the Brownswood Conservation Area of Hackney, an area designated on 24 February 2020 and described as a high quality late Victorian suburb with a clear hierarchy of housing types set out from the 1860's onwards.
2. Planning permission 2013/2216 dated 16 September 2013 for the conversion of No. 34 Wilberforce Road into 4 flats included demolition of an existing single storey rear addition, erection of a three-storey extension to existing three storey back extension. Condition No. 5 to that permission said: *"The flat roof the extensions hereby approved shall not be used as balconies, terraces, or similar amenity areas."*
3. In the event No. 34 was divided into 3 separate self-contained flats. The deep rear outrigger to No. 34 was built in implementation of the 2013/2216 planning permission. That involved the demolition of the earlier, smaller outrigger and included the construction of 2 areas of flat roof, now set up as roof terraces to Flats 2 and 3.
4. The split level Flat 1 occupies the ground floor. Flat 2 above has access onto the lower of the appeal rear terraces built upon the flat roof of the Flat 1 rear bedroom. Flat 3 extends over the top 3 floors, including the roof space with its large dormer windows. The upper, large appeal roof terrace is accessed via a low headroom door from the floor below the Flat 3 roof bedroom.
5. A metal framed frosted glass walled parapet about 1.3m high, described in the notice as balustrading, has been built around the outer edge of the upper roof terrace. The lower narrow 'L' shaped roof terrace is bounded by vertical steel bar railings, (again as described in the notice).
6. The appeal on ground (d) applies to the lower Flat 2 roof terrace only. The lawful development certificate application appeal concerns the construction and use of the same lower roof terrace accessed from the rear of Flat 2.

### **The enforcement notice appeal on ground (d) and the lawful development certificate application appeal – the Flat 2 lower roof terrace**

7. Section 171B of the Act - Time limits, says – at (1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of 4

years beginning with the date the operations were substantially completed, (the 4 year rule - in the case of any other breach of planning control, (except change to residential use), no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach).

8. It was the Appellant, Mr Singh's case that the lower roof terrace was constructed between July and September 2016. He said the statutory declarations submitted with the certificate application said the balcony had been in continuous use as such for in excess of 4 years and was therefore immune from enforcement proceedings. The Council noted that all the declarations stated: "... *have known the existence of the balcony at Flat 2 34 Wilberforce Road, London N4 2SR on the plan annexed to this Statutory Declaration since September 2016.*".
9. There appears to be some uncertainty in the Appellant's case separating operational development, (works to build the roof terrace, decking, parapet and security fencing), and the amenity use of the roof terrace. The works are subject to the 4 year rule. The use, (breach of condition 5 - *The flat roof extensions hereby approved shall not be used as balconies, terraces, or similar amenity areas.*"), is subject to the 10 year rule. Success in this instance on the ground (d) appeal and the LDC application appeal on the 4 year rule would mean the works would be immune from enforcement action, but the roof terrace could not continue to be used for amenity purposes because of the continuing application of condition 5. A claim of a lawful residential amenity use of the terrace is futile. A planning condition can validly restrict existing use rights, (*Kingston-on-Thames RBC v SSE [1973] 1 WLR 1549*).
10. As less than 10 years elapsed between the claimed construction of the Flat 2 roof terrace and the issue of the enforcement notice, no continuing breach of condition immunity from enforcement action can be shown in relation to the amenity use of the roof terrace. Nor are the terrace works immune, as I consider that it was not shown, on the balance of probabilities, that works to the flat roof of the outrigger at the rear of No. 34 to build the lower amenity terrace were substantially completed more than 4 years before the notice was issued. The words in the Appellant's statutory declarations refer to "... the existence of the balcony at Flat 2 ...". They do not refer to the works or their completion and retention.
11. The Appellant accepted that whilst the railings were installed around November 2016, they had to be taken down due to problems with the roof. Once the problems were fixed, the railings were reinstalled. But I note that when the railings were removed, there would not have been an ongoing breach of planning control. The Council could not have taken enforcement action at that time, (*Thurrock BC v SSETR & Holding [2002] EWCA Civ 226; [2002] JPL 1278*). When the railings were refitted, the 'clock' would have re-started.
12. No dates were given for the removal and reinstatement of the railings. No completion details or receipts for payment for the work from a builder, for example, were submitted. However, a neighbour's photograph taken in December 2017 clearly shows the rear flat roof above Flat 1 with no railings around the perimeter. A photograph taken in February 2018 shows railings around the terrace had been fitted. Therefore less than 4 years had elapsed between a time just before the end of February 2018 and the issue of the enforcement notice on 4 March 2021. The appeal on ground (d) fails, as does the appeal against the refusal by the Council to issue a certificate of lawful

development for the balcony/roof terrace works at the rear of Flat 2 not having been in situ for more than 4 years.

### **The appeal on ground (a)**

13. Scope of the deemed planning application - that must follow the wording of the enforcement notice's alleged breach of planning control. That is: *The installation of a roof terrace and decking on the roof of the lower ground floor extension on the rear elevation; the installation of a second roof terrace on the roof of the third floor rear outrigger; and the installation of a door on the third floor rear elevation at No. 34 Wilberforce Road* – as built.
14. Success on ground (a) would therefore not include permission for use of the 2 roof terraces as Condition 5 to planning permission 2013/2216 of 16 September 2013 would still bite, (... *shall not be used as balconies, terraces, or similar amenity areas*). Nor can planning permission be granted for an alternative form of development that is different to that described in the alleged breach.
15. Section 55(1) of the Act says that "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, ... ". Section 55(2) excludes certain works from the definition of development, - including - s.55(2)(a)(ii) works which "do not materially affect the appearance of the building.". In the case of *Burroughs Day v Bristol CC* [1996] 1 PLR 78; 1 EGLR 167 it was held that such judgment will involve consideration of the change to the external appearance of the building as a whole and not a part in isolation; the degree of visibility by an observer outside the building; the nature of the building; and the nature of the alterations or work. Here, the erection of the parapet barriers around the edges of the 2 flat roofs at the rear of No. 34, especially the frosted glass safety fencing on the edge of the upper terrace and the insertion of the new low doorway to access its roof has materially affected the appearance of the rear of the building. Those changes to the permitted layout, effectively embellishments to the building, required planning permission.
16. S.69 of the Planning (Listed Buildings and Conservation Areas) Act 1990 - Designation of conservation areas, says at (1) Every local planning authority - (a) shall from time to time determine which parts of their area are areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance, and (b) shall designate those areas as conservation areas.
17. No. 34 Wilberforce Road lies within the Brownswood Conservation Area. In that Area's appraisal, Wilberforce Road is described as having buildings which are largely identical in design, with a consistent rhythm and massing throughout the road. Brownswood Conservation Area is described as a high quality late Victorian suburb with a clear hierarchy of housing types set out from the 1860s onwards. Buildings are adorned with detailed decorative architectural features which greatly enriches the overall character and appearance of the area. This ranges from ornate stucco work to contrasting brick bands and distinctive sloped porches on Finsbury Park Road. The appraisal goes on to say that common architectural characteristics and unaltered features give strong architectural cohesion and the buildings have notable group value. The use of traditional materials and methods is an important element in preserving the character and appearance of the Conservation Area.

18. In determining the ground (a) appeal, I need to consider whether the works to construct the 2 roof terraces and the decking preserve or enhance the character or appearance of the Brownswood Conservation Area. Also, the decision is to be made in accordance with the development plan unless material considerations indicate otherwise, (Planning and Compulsory Purchase Act 2004, s.38(6)).
19. It was the Council's case that the addition of the 2 roof terraces on the rear elevation of No. 34 have harmed the heritage asset and failed to comply with the London Plan policy HC1 Heritage Conservation and Growth. That states that *"Development proposals affecting heritage assets, and their settings, should conserve their significance by being sympathetic to the assets significance and appreciation within their surroundings.* London Plan policy D3 says that development proposals should; *respond to the existing character of a place by identifying the special and valued features and characteristics that are unique to the locality and respect, enhance and utilise the heritage assets and architectural features that contribute towards the local character.* The modern, new additions of two roof terraces were at odds with the Conservation Area not being traditional features of the Victorian properties.
20. In my view, the 2 modern roof terraces at the rear of No. 34 have significantly and detrimentally altered the appearance of the original building. Particularly the upper roof terrace, with its balustrading and frosted glass walling, can be seen not only in glimpses from Wilberforce Road but also seen directly and prominently from the rear of a number of properties in Somerfield Road and Finsbury Park Road. The appeal balconies fail to respect the original Victorian host building by adding modern features that do not blend in with the rear of No. 34 or with adjacent buildings. Such features are recognised as threats as set out in the appraisal to the Conservation Area which include the introduction of new architectural features that detract from the area's character. The 2 roof terrace works fail to preserve or enhance the character or appearance of this part of the Brownswood Conservation Area. They are at variance with London Plan policies HC1 and D3 by failing to be sympathetic with Victorian features of the original building at No. 34.
21. The terrace works also fail to comply with Hackney Local Plan LP33 policy LP1 – *all new developments must be of the highest architectural and urban design quality.. ii) development must be compatible with the existing townscape including urban grain and iv) preserve or enhance the character and appearance of the historic environment xi) use attractive, durable high quality materials which complement the local character.* The modern additions of two roof terraces are not traditional features of the Victorian properties. There is also conflict with Local plan policy LP3 Designated Heritage which states that *"development proposals affecting conservation area or their settings will be permitted only where they preserve and enhance the established positive characteristics of the area including the special character of individual buildings and groups of buildings (in terms of height, massing, scale, form, design, materials, detailing and use)."*
22. Benefits provided by the sitting out areas of the terraces to the flats' occupants as noted by the Appellant are not available, had works to construct the terraces been found acceptable. Condition 5 to planning permission 2013/2216 persists. The appeal on ground (a) fails. Planning permission is not granted on the application deemed to have been made to retain the works to construct the 2 roof terraces at the rear of No. 34 Wilberforce Road.

### **The appeal on ground (f)**

23. An appeal on ground (f) asserts that the requirements of the enforcement notice are too onerous and that something less should be substituted. Section 173(4) of the Act sets out the purposes of the requirements. They are:
- (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
  - (b) remedying any injury to amenity which has been caused by the breach.
24. The Council sought to remedy injury to amenity. They said the upper terrace was oversized. Its modern design was at odds with the host building and with surrounding properties. The access door was also incompatible with the design of the building. The lower roof terrace was said to be of poor design with low quality materials having been used in its construction. The two terraces significantly altered the host building's design and failed to respect the historic host building or the adjoining buildings. The terraces created overlooking to the surrounding and neighbouring properties. There was a potential for extra noise created when the elevated outside spaces were in use, harming the amenity of surrounding residents.
25. The Appellant's ground (f) appeal was limited to the assertion that no enforcement action could be taken against the balcony at Flat 2 as the development has been in situ for over 4 years. To insist that both balconies be removed in their entirety was excessive.
26. As I concluded above, the ground (d) and lawful development certificate appeals fail. No immunity from the enforcement notice's requirements arises. The notice's requirements to remove the works described in the allegation are entirely reasonable and appropriate. They are not excessive. No suitable lesser requirements were suggested. The appeal on ground (f) fails.

### **FORMAL DECISIONS**

#### **Appeal A - the enforcement notice appeal ref: APP/U5360/C/21/3271922**

27. The appeal fails. The enforcement notice is upheld. Planning permission is not granted on the application deemed to have been made for the installation of a roof terrace and decking on the roof of the lower ground floor extension on the rear elevation; the installation of a second roof terrace on the roof of the third floor rear outrigger; and the installation of a door on the third floor rear elevation at No. 34 Wilberforce Road, Hackney, London N4 2SR.

#### **Appeal B - the lawful development certificate application appeal ref: APP/U5360/X/21/3269121**

28. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful development for the balcony/roof terrace at the rear of Flat 2, No. 34 Wilberforce Road, Hackney, London N4 2SR was well founded and that the appeal should fail. I exercise the powers transferred to me in section 195(3) of the 1990 Act as amended.

*John Whalley*

INSPECTOR