



Appeal Decisions

Site visit made on 18 October 2022

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 November 2022

**Appeal Ref: Appeal A APP/A5840/C/21/3289883 & Appeal B: 3289884
56 Peckham High Street, London SE15 5DP**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended (the Act). Appeal A is made by Treadgold Ltd and Appeal B is made by Tolani Cole against an enforcement notice issued by the Council of the London Borough of Southwark.
- The notice was issued on 21 December 2021.
- The breach of planning control as alleged in the notice is:
 - 3.1 Without planning permission, the construction of a first floor rear roof terrace including the installation of rear bi-fold doors and roller shutter (shown for indication purposes only hatched blue on the plan attached at Appendix 1) ("the Unauthorised Terrace") at the Property.
 - 3.2 Without planning permission, the construction of a metal shed on the first floor front projection (shown for indication purposes only hatched green on the plan attached at Appendix 1 ("the Unauthorised Shed") at the Property.
- The requirements of the notice are to:
 - (i) Remove the Unauthorised Terrace (which for the avoidance of doubt includes the demolition and removal of all foundations and supporting structures) from the Property;
 - (ii) Following the removal of Unauthorised Terrace block up any openings in the rear elevation created in association with the works to create the Unauthorised Terrace and return the Property to its appearance before the breach occurred;
 - (iii) Remove the Unauthorised Shed from the Property;
 - (iv) Remove any materials and debris resulting from the carrying out of steps 5(i), (ii) and (iii) above from the Property.
- The period for compliance with the requirements is: Five (5) months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Appeal C Ref: APP/A5840/W/21/3281656

56 Peckham High Street, London SE15 5DP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by D Nelson of Threadgold Ltd against the decision of the Council of the London Borough of Southwark.
- The application Ref 21/AP/1054, dated 26 March 2021, was refused by notice dated 19 May 2021.
- The development proposed is described as the 'retention of roof terrace with the following hours of operation: Monday to Thursday 10:00 to 03:00 (next day) Friday to Sunday 10:00 to 04:00 (next day).'

Appeal D Ref: APP/A5840/W/21/3288596

56 Peckham High Street, London SE15 5DP

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by D Nelson of Threadgold Ltd against the decision of the Council of the London Borough of Southwark.
- The application Ref 21/AP/3014, dated 21 August 2021, was refused by notice dated 12 November 2021.
- The development proposed is described as the 'retention of roof terrace with the following hours of operation: Monday to Sunday 09:00 to 00:00 (next day).'

Decisions Appeal A APP/A5840/C/21/3289883 & Appeal B: 3289884

1. The appeals are dismissed and the enforcement notice is upheld.

Decision: Appeal C Ref: APP/A5840/W/21/3281656

2. The appeal is dismissed.

Decision: Appeal D Ref: APP/A5840/W/21/3288596

3. The appeal is dismissed.

Preliminary Matters

4. Since the issue of the enforcement notice, the Council has adopted The Southwark Plan 2019-2036 (February 2022)(the SP). The SP replaces the Core Strategy and Southwark Plan 2007. The Council has provided a copy of those policies of the SP it considers of relevance to the appeals and the appellants have been given the opportunity to comment on these policies through the appeal.
5. Section 174 appeals were initially made in the names of Mr D Nelson of Treadgold Ltd, the company secretary and the company director. However, it has since been confirmed that these individuals do not have any interest in the property as individuals. Since a director of a company has no right of appeal on a company's behalf, the section 174 appeals shall proceed in the company name, Treadgold Ltd (Appeal A) and Tolani Cole (Appeal B), the freeholder.

Appeals A and B: S174

Ground (b)

6. An appeal under ground (b) is made on the basis that the matters stated in the notice as constituting the breach of planning control have not occurred.

Metal shed

7. With respect to the metal shed, the appellants assert that there is no breach as the shed is a temporary 'flat pack' unit assembled on site without being permanently affixed to the host building. It is stated that the shed is used for temporary storage of operational equipment required for the lawful existing use and there are no services provided to or associated with the shed and its use.
8. While I saw that the metal shed has now been removed, the appellant does not dispute that a shed has been located on the roof of the premises. The alleged breach has therefore occurred as a matter of fact. The appellants' arguments in relation to the shed concern whether planning permission is required and should therefore be considered under ground (c). Since the Council has responded to the points raised by the appellants, there would be no injustice in my dealing with it in this way.

Roof terrace

9. The appellants do not dispute that a roof terrace has been created. Whilst the appellants make a number of assertions under this ground in relation to the appearance of the roof terrace and its effect, such matters relate to the planning merits of the appeal scheme, which cannot be considered under a legal ground of appeal.

10. The appellants' assertion that the installation of the bi-fold doors and roller shutter door do not materially affect the appearance of the host building, such that planning permission is required, is a matter which should be considered under ground (c) and, since the Council has responded to the points raised by the appellants, there would be no injustice caused in my dealing with it in this way.
11. The appellants point out that the notice does not allege any breach of development control in regard to the existing use or proposed use of the roof terrace. However, since the notice alleges operational development and requires that operational development to be removed, it is not necessary for the notice to include the use of the roof terrace in the allegation.
12. Thus, for the reasons given above, the appeals under ground (b) must fail.

Ground (c)

13. An appeal under ground (c) is made on the basis that those matters (if they occurred) do not constitute a breach of planning control.

Metal shed

14. Section 55 of the Act describes development as 'the carrying out of building, engineering, mining or other operations in, on, over or under land...'. Building operations include other operations normally undertaken by a person carrying on business as a builder. Section 336 of the Act defines building as 'any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building.'
15. It was established in *Skerritts of Nottingham Ltd v SSETR & Harrow LBC* (No. 2) [2000] EWCA Civ 5569; [2000] JPL 1025 there are three primary factors in determining what is a building: size, permanence and physical attachment, none of which is necessarily decisive.
16. The metal shed was located on the roof of the elevation facing Peckham High Street and appears to have been of sufficient size to be of significance in terms of its visual impact. While the shed has now been removed, it is stated to have been in the same position for at least 16 months. Thus, it remained in place for sufficient time to have the quality of permanence. I consider that given its size and permanence, as a matter of fact and degree, the shed is a building for the purposes of the Act. Consequently, the appeal under ground (c) must fail.

Bi-fold doors and roller shutter

17. Section 55(2) of the Act sets out operations or uses of land which shall not be taken for the purposes of this Act to involve development of the land (a) the carrying out for the maintenance, improvement or other alteration of any building of works which (ii) do not materially affect the external appearance of the building.
18. The insertion of the bi-fold doors and roller shutter form part and parcel of the creation of the roof terrace. The doors provide access to the terrace and the roller shutter provides security when the terrace is not in use. There is no substantive evidence to show that they were not constructed as part and parcel of the roof terrace.

19. Moreover, even if they were not constructed as part of the roof terrace, the bi-fold doors and roller shutter can be seen from the car park below and comprise modern materials, and, in my view, materially alter the external appearance of the building, which was previously served by a window. I therefore consider the works are development for the purposes of the Act and the appeal under ground (c) must fail.

Ground (f)

20. An appeal under ground (f) is made on the basis that the steps required by the notice to be taken... exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach. Given the requirements of the notice, it is clear that the purpose of the notice is to remedy the breach of planning control.
21. The steps are asserted to be unreasonable and excessive in respect of the metal shed, bi-fold doors and roller shutter as it is asserted, they do not constitute a breach. However, as set out above, I have found planning permission is required for these elements.
22. The appellants state that access to the roof was previously obtained by an open window, with a roller shutter fitted on the interior of the opening to secure the building. From the photograph provided by the appellants, it seems steps and hand rails were previously located on the roof, suggesting that access to it could also be obtained externally from the car park below.
23. While the bi-fold doors afford access to the roof, which may continue to be required following the removal of the roof terrace, the bi-fold doors are not the only means of obtaining access. Since the notice requires the recipient of the notice to return the property to its appearance before the breach occurred, the appellants would be able to reinstate the window, which could be used to provide access to the roof.
24. The appellants suggest that the notice does not require the removal of the external roller shutter. However, the notice refers to the construction of a first floor rear roof terrace including the installation of rear bi-fold doors and roller shutter as "the Unauthorised Terrace" and paragraph 5.1(i) requires removal of the Unauthorised Terrace. Moreover, requirement 5.1(ii) requires the blocking up of any openings in the rear elevation and the property to be returned to its appearance before the breach occurred. It is therefore clear from the four corners of the notice that this includes the bi-fold doors and roller shutter.
25. The bi-fold doors facilitate access to the roof terrace and the roller shutter provides security when the doors are not in use. The works are identified within the breach and there is no evidence to show that they were carried out prior to the creation of the roof terrace. Section 173(4) sets out the purpose of a notice is (a) remedying the breach by...restoring the land to its condition before the breach took place. Consequently, it is not excessive to require their removal.
26. Although the metal shed has now been removed, it had been erected within the site by the date the notice was issued. It is therefore necessary to uphold the requirement to remove the structure, since failure to require its removal would mean the appellants could bring it back to the site.

27. The appellants suggest the submission of a scheme to approve paint colours for the timber elements. However, leaving the works *in situ* would fail to remedy the breach. I consider the steps required by the notice to be taken do not exceed what is necessary to remedy the breach and so the appeals under ground (f) must fail.

Ground (g)

28. An appeal under ground (g) is made on the basis that any period specified in the notice...falls short of what should reasonably be allowed. The appellant asserts that 5 months is too short and that 9 months would be a reasonable period for compliance.

29. The metal shed has already been removed and, given the scale of the works to the roof terrace, I consider 5 months is sufficient to appoint a suitably qualified contractor and for the works to be carried out. Given the harm arising to the living conditions of nearby residents, particularly as a result of noise, I consider it would be undesirable to extend the compliance period. Thus, I consider 5 months is reasonable and proportionate and the appeals under ground (g) therefore fail.

S174 Conclusion

30. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice.

Appeals C and D: Section 78

31. Both applications sought the retention of the roof terrace, however, the hours would vary, with the hours proposed for Appeal C between 10:00 and 03:00 Monday to Thursday and 10:00 to 04:00 Friday to Sunday and the hours proposed for Appeal D between 09:00 and 00:00 Monday to Sunday.

32. Given the similarities between the appeals, I shall consider them together.

Main Issues

33. The main issues of the appeals are the effect of the proposal on:

- The living conditions of nearby occupants, with regards to noise;
- The character or appearance of the area bearing in mind it would be within the Rye Lane Conservation Area (RLCA) and the setting of No 58 which is a grade II listed building;
- The effect on the outlook of neighbouring properties due to excessive scale.

Reasons

Noise

34. The appeal scheme comprises an open-air terrace which is accessed via bi-fold doors from the main building. The terrace is laid out with a number of tables and chairs, though given the circulation space available, I consider patrons are also likely to stand. I saw there are a number of speakers located around the terrace, including two affixed to the main building itself, suggesting that music is played on the terrace.

35. Policy P56 of the SP states that development should not be permitted when it causes an unacceptable loss of amenity. The appellant has submitted a noise assessment in support of the appeals, which considered the effect of the roof top terrace on the occupants of No 3 Central Buildings, Rye Lane. However, there are buildings either side of the terrace, with windows which overlook or are adjacent to the terrace.
36. Although I was not able to determine how the neighbouring buildings are used from my visit, the appellant's heritage statement refers to planning permission 00/AP/1098 at 52-54 Peckham High Street, which granted change of use from first and second floor vacant office/storage space, to residential flat with external access. I have no evidence to show No 54 and 58 are not used for residential use. These buildings are significantly closer to the roof terrace than No 3 Central Buildings.
37. The noise assessment states that continuous automated monitoring was undertaken between 14:10 on 4 June 2021 and 12:15 on 7 June 2021. The rooftop terrace is identified as 'Terrace with timber perimeter fencing, lined with acoustic panels to prevent line of sight between the terrace and noise sensitive receiver.' The report states that measurements were undertaken at a point approximately 1m from the rooftop terrace in the direction of the nearby noise sensitive receiver.
38. However, noise attenuates with distance and so the noise experienced by occupants of No 3 Central Buildings, which is identified as 22m away from the noise measurement, is likely to be significantly less than that experienced by occupants of No 52-54. Furthermore, no 'acoustic panels' are fixed to the fencing facing No 52-54.
39. I saw that speakers have been erected around the roof terrace at height, meaning that the fencing is unlikely to be effective at attenuating noise from the speakers. The position of the speakers and the level the music is being played at, and the number of patrons present will have a significant effect on the level of noise generated from the use of the roof terrace. However, the noise assessment does not state the number of patrons present at the time of the assessment, nor does it give any detail as to the location of speakers and the level at which the music was played.
40. Noise levels were measured '1m from the rooftop terrace during activity on Sunday 6th between 20:00 and 23:00' and are stated to be representative of 'normal' noise breakout conditions from the terrace. However, in my experience, Sunday nights tend to be less well attended compared with Friday and Saturday nights. I therefore consider it unlikely that this is representative of noise generated by the roof terrace, particularly on Friday and Saturday nights.
41. The assessment makes reference to a roof top party on the Saturday evening, however, no indication is given as to where that party was, whether it was within the appeal site or outside of it. A single background noise reading is given for the hours 18:00 – 00:00. However, readings are not provided for Monday – Thursday, when background noise levels are likely to be lower. A graph of 'Environmental Noise Time History' is provided, however, it is difficult to read, with no labels showing what the different coloured lines represent and no times or dates on the x-axis to show precisely when the readings were taken.

42. The microphone is stated to have been positioned outside the terrace screening. During my visit, I saw that panels have been fixed to the outside of the fencing, between the appeal site and No 3 Central Buildings. The plans submitted show 50mm PIR insulation fixed to the back of fencing on that elevation. I saw that, although the boarding was covered in some sort of plastic sheeting, some of the edges were exposed. As a consequence, they may be degraded by the weather over time or damaged by general wear and tear. I am therefore not persuaded this is a suitable long term solution.
43. Furthermore, I do not know what level of attenuation is required, such that retention of an effective noise barrier may be secured by condition. Moreover, the insulation is not fitted to the fencing facing Nos 52-54. I consider it would be unreasonable to require it to be fitted, since its visual impact on the character and appearance of the area has not been considered.
44. I note a number of individuals have written in support of the roof terrace, including some who feel noise generated by it is acceptable, including an occupant of No 3 Central Buildings who advises they have been offered 'triple glazed windows' by the appellant. However, other occupants of nearby residential units raise concern with the noise generated by the site during weekdays and at weekends.
45. It would not be possible to secure triple glazing by condition in neighbouring buildings and although it would be possible to limit the hours of operation of the terrace by condition, given the concerns I have with the robustness of the noise assessment, I do not know what hours would be appropriate. I consider it highly unlikely that the hours proposed by Appeal C or Appeal D would be acceptable.
46. I recognise the appeal site currently comprises a nightclub, which will generate noise. However, prior to the creation of the roof terrace, noisy activities would have taken place within the building. Given the open air nature of the terrace, I consider it highly likely that the noise generated on the roof terrace is harmful to the living conditions of nearby residents, particularly at night time, when occupants of nearby dwellings are likely to be trying to sleep, contrary to policy P56 of the SP, the requirements of which are set out above and the National Planning Policy Framework (the Framework)(2021) which seeks a high standard of amenity for existing and future users.

Character or appearance

47. The appeal site is located in the Rye Lane Conservation Area (RLCA). Next to the appeal site is No 58, a grade II listed building, which is a 1720s house, described in the listing as a rare survival of a small house of this date. In my view, the significance of the RLCA and the listed building within is derived from the pattern of development, and the attractive architectural detailing, including the use of traditional materials.
48. In determining this appeal, I have a statutory duty, under Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, to consider the impact of the proposal on the special architectural and historic interest of the listed buildings affected, and their settings. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires me to pay special attention to the desirability of preserving or enhancing the character or appearance of the RLCA.

49. Paragraph 199 of the National Planning Policy Framework ('the Framework')(2021) states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation.
50. Although the roof terrace is located to the rear of the building, it is highly visible from Bellenden Road. The proposed plans show a metal stair which would provide access from the terrace to the car park below. The wooden fencing, atop brick and rendered walls appears an odd feature, which contrasts with the more traditional materials used elsewhere in the RLCA. Although I saw wooden fencing is used elsewhere in the RLCA, the narrow slats with irregular heights appears makeshift and contrasts with the traditional design of the appeal building and adjacent buildings.
51. I acknowledge that bamboo fencing has been used to the rear of No 54, however, I do not have full details of the erection of this fencing. Bamboo fencing is not characteristic of the RLCA and does not, therefore weigh in support of the appeal scheme. Moreover, the fencing is at a lower level and as a consequence is less prominent.
52. In my view, the appeal schemes do not conserve or enhance the character or appearance of the RLCA, contrary to policy P13 of the SP, which seeks to conserve and enhance the significance of the local historic environment, policy P14 seeks high standards of design including building fabric and composition and policy P20 which seeks to preserve or enhance the character or appearance of conservation areas and their settings. It is also contrary to policy D4 of the London Plan (2021)(LP) which seeks to deliver good design and Policy HC1 of the LP which states that proposals affecting heritage assets and their settings, should conserve their significance by being sympathetic to the assets' significance and appreciation within their surroundings.
53. No 58 Peckham High Street is listed principally because of the survival of original fabric including internal features and the layout of the building. The works to the appeal building do not directly affect the listed building itself and due the setback of the listed building compared with the appeal building and its position to the rear, I consider the terrace has a neutral effect on the setting of the listed building. Nevertheless, I have found the roof terrace fails to conserve or enhance the character or appearance of the RLCA.
54. Paragraph 189 of the Framework states that heritage assets are an irreplaceable resource, and should be conserved in a manner appropriate to their significance. Paragraph 202 goes on to advise that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including, where appropriate, securing its optimum viable use. Given the location of the fencing to the rear of the building, I consider that the harm arising to the significance of the designated heritage assets would be less than substantial in the context of paragraph 202 of the Framework.
55. The appellant has not quantified the level of use of the roof terrace or suggested to what extent the terrace supports the viability of the business. Nevertheless, the use of the roof terrace provides additional space for patrons, which in turn is likely to increase revenue for the business. I also note that support for the proposal has been expressed by a number of interested parties,

some of whom point to the premises providing a space that is predominantly used for young people from diverse backgrounds. However, I consider the benefits of the appeal schemes are outweighed by the harm I have identified to the RLCA, the conservation of which I attribute great weight to.

Outlook

56. Given the position of the limited height of the fencing relative to the windows to Nos 54 and 58, while occupants of the buildings will be able to see the fencing, I consider they are unlikely to find it overbearing, such that it harms their outlook. Consequently, there would be no conflict with policy P56 of the SP, which seeks to protect the outlook of occupiers, amongst other things and the Framework, which seeks a high standard of amenity for existing and future users.

Other Matters

57. An interested party suggests that since the addition of the roof terrace, there has been less fly tipping in the car park below due to being overlooked. However, I have no substantive evidence that fly tipping is a particular problem in this location or that the installation of roof terrace is the only means of addressing it.
58. The Council refers to its 2015 Technical Update to the Residential Design Standards (2011) in its decision notices for the respective appeals. However, the guidance sets out the standard of design expected from residential development. Since the use of the appeal premises is commercial, the document is not directly relevant to the appeal schemes before me.

Appeals C & D Conclusion

59. The roof terrace provides an outdoor space which patrons to the venue can enjoy and which is likely to improve the viability of the business. However, I have found there is harm to the living conditions of nearby residents and harm to the RLCA. While I have found no harm to the living conditions of neighbouring occupants with respect to outlook, this is a neutral factor in my consideration of the appeal.
60. I have had due regard to the Public Sector Equality Duty (PSED) as set out under the Equality Act 2010 but the harm to living conditions of nearby occupants and the character and appearance of the RLCA outweighs its benefits in terms of eliminating discrimination against persons with the protected characteristics of age or race, advancing equality of opportunity for those persons and fostering good relations between them and others.
61. I conclude that the appeal schemes conflict with the development plan as a whole and there are no material considerations which indicate that the decisions should be taken otherwise in accordance with the development plan.

M Savage

INSPECTOR