



Appeal Decision

Site visit made on 2 November 2022

by Thomas Shields MA DipURP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 January 2023

Appeal Ref: APP/X5210/C/22/3302957

3 Agar Place, First Floor, London, NW1 0RG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (hereafter “the Act”).
 - The appeal is made by Mr Jonathan Barker against an enforcement notice issued by the Council of the London Borough of Camden.
 - The enforcement notice was issued on 31 May 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the erection of a glass balustrade to enable the use of the first floor flat roof as a terrace.
 - The requirements of the notice are:
 1. Completely remove the glass balustrade from the first floor flat roof of the building and make good any resulting damage; and
 2. Remove any resultant debris from the premises as a result of the above works.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (d), (e) and (f) of the Act. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

Procedural Matters

2. For clarity I point out that the **use** of the flat roof by occupiers as a terrace for residential purposes does not require planning permission, because such use is not a “material change of use” of the property, and hence not “development” as defined by s55 of the Act. However, there is no dispute between the parties that the erection of the glass balustrade at the edge of the flat roof does constitute “development” requiring planning permission, hence it is only the balustrade that is subject of the requirements at Section 5 of the notice.
3. The appellant’s case includes legal grounds of appeal (d) and (e). For such legal grounds the Courts have established that the onus of proof falls to an appellant¹, with the test of the evidence being on the balance of probabilities². Also, an appellant’s evidence should not be rejected simply because it is not corroborated. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted³.

¹ *Nelsovil v SSE* [1962] 13 P&CR 151

² *Thrasyvoulou v SSE & Hackney LBC (No1)* [1984] JPL 732

³ *Gabbittas v SSE & Newham LBC* [1985] JPL 630, *Ravensdale Ltd v SSCLG & Waltham Forest LBC* [2016] EWHC 2374 (Admin)

Appeal on ground (e)

4. The appellant (as the land owner) argues that a copy of the enforcement notice was not served on him as required by section 172 of the Act, it being sent to an address he has not lived at since 2013.
5. Section 329(1) of the Act prescribes the method of service of notices. Those include: (a) by delivering it to the person on whom it is to be served; or (b) by leaving it at the usual or last known place of abode of that person; or (c) by sending it in a prepaid registered letter, or by the recorded delivery service, addressed to that person at his usual or last known place of abode.
6. Section 329(2)(a) provides that where the notice is required to be served on any person as having an interest in premises, and the name of that person cannot be ascertained after reasonable inquiry, or where the notice or document is required or authorised to be served on any person as an occupier of premises, the notice or document shall be taken to be duly served if it is addressed to him either by name or by the description of "the owner" or, as the case may be, "the occupier", and is delivered or sent in the manner specified in section 329(1)(a), (b) or (c).
7. The Council say in their statement⁴ that the notice was served on all those listed on HM Land Registry. However, they do not confirm who was listed on Land Registry and a copy has not been provided. No documentary evidence has been provided by the Council to establish who was served, when they were served, or where they were served. There is no evidence before me of any method(s) of service that were employed, and no certification of service from any officer. On balance, therefore, given the lack of any supporting evidence from the Council, I am unable to conclude that the notice was served properly as required by the Act.
8. However, s176(5) of the Act gives me the power to disregard any failure to serve a notice on anyone as required, where they have not been substantially prejudiced. In this regard I note the appellant must have been able to obtain a copy of the notice at some point, otherwise, if not, he would have been unable to lodge and argue his appeal on the grounds he has set out. I conclude therefore that at any failure of service did not substantially prejudice him in making his appeal. Consequently, the failure can be disregarded.
9. For these reasons the appeal on ground (e) fails.

Appeal on ground (d)

10. For the appeal on ground (d) to succeed the appellant needs to demonstrate that the glass balustrade was erected for at least 4 years before the notice was issued, hence on or before 31 May 2018. As set out earlier the burden of proof, tested on the balance of probability, falls to the appellant.
11. The appellant states that the balustrade has been in place since at least 21 March 2016. In support he has submitted a copy of a digital photograph showing the balustrade in place, with the corresponding recorded time and date as 21 March 2016. The Council have not commented on the photograph.

⁴ Council Statement of Case - ground (e)

12. In weighing the evidence I find the appellant's case is sufficiently precise and unambiguous. It does not need to be corroborated, but nonetheless it is supported evidentially by photographic evidence. It is also not contradicted by any evidence submitted by the Council or others to make it less than probable.
13. To conclude, I find that the appellant has demonstrated, on the balance of probability, that the balustrade was immune from enforcement action at the date the notice was issued.
14. For the reasons given above, I conclude that the appeal should succeed on ground (d). The enforcement notice will be quashed.
15. In these circumstances, the appeal on grounds (a) and (f) and the application for planning permission deemed to have been made under section 177(5) of the Act do not fall to be considered.

Thomas Shields

INSPECTOR