



Appeal Decisions

Site visit made on 4 January 2023

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

an Inspector appointed by the Secretary of State

Decision date: 22 February 2023

Appeal A Ref: APP/L5810/C/22/3294396

Appeal B Ref: APP/L5810/C/22/3294397

76 Castelnau, London, SW13 9EX

- Appeal A is made under section 174 of the Town and Country Planning Act 1990 as amended (the 1990 Act). The appeal is made by Mrs Amy Shackleton against an enforcement notice issued by Richmond Upon Thames London Borough Council.
- Appeal B is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mr Ashley Shackleton against an enforcement notice issued by Richmond Upon Thames London Borough Council.
- The enforcement notice, numbered 22/0010/EN/BCN, was issued on 8 February 2022.
- The breach of planning control as alleged in the notice is failure to comply with conditions imposed on a planning permission ref 20/2105/HOT granted on 30 October 2020.
- The development to which the permission relates is: *Rear and side ground floor extension and rear first floor extension.*
- The conditions in question are GD01A (restriction on use of roof) and U0089635 (approved drawings) which state that:
GD01A - *Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking or re-enacting that Order) no part(s) of the roof of the building(s) hereby approved shall be used as a balcony or terrace nor shall any access be formed thereto.*
U0089635 - *The development hereby permitted shall be carried out in accordance with the following approved plans and documents, where applicable:*
5060-LA-001; 5060-PL-001; 5060-PL-002; 5060-PL-003; 5060-PL-004; 5060-PL-005; 5060-PL-008; 5060-PL-009; 5060-PL-010; 5060-PL-013; 5060-PL-014; 5060-PL-017, received 29th July 2020.
5060-PL-006A; 5060-PL-007A; 5060-PL-016A, received 8th September 2020.
D013-A002; D013-A003; D013-A010; D013-A020, received 29th October 2020.
- The notice alleges that the conditions have not been complied with in that:
 - (i) The use of the roof of the rear first-floor extension as a roof terrace in breach of condition GD01A (Restriction on Use of Roof) of planning permission ref. 20/2105/HOT; and
 - (ii) The installation of railings along the periphery of the roof of the rear first-floor extension and the failure to install Juliet balconies to the rear second-floor doors, in breach of condition U0089635 (Approved Drawings) of planning permission ref. 20/2105/HOT.A copy of the above mentioned planning permission 20/2105/HOT with the approved drawing no. D013-A003 is attached hereto.
- The requirements of the notice are to:
 - (i) Cease the use of the roof of the rear first-floor extension as a roof terrace;
 - (ii) Remove the railings installed along the periphery of the roof of the rear first floor extension;
 - (iii) Install permanently fixed 2 x Juliet balcony incapable of being opened as depicted in approved drawing no. D013-A003 of planning permission ref. 20/2105/HOT.
- The period for compliance with the requirements is one calendar month.

- Appeal A is proceeding on the grounds set out in section 174(2)(a), (b) and (f) of the Town and Country Planning Act 1990 as amended. 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.
 - Appeal B is proceeding on the ground set out in section 174(2)(b) and (f) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
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Decisions

Appeal A

1. It is directed that the enforcement notice is corrected and varied by:
 - Deleting 'Operational Development -' from the title (third line).
 - Deleting 'section 171A(1)(b)' in section 1 and replacing with 'sections 171A(1)(a) and (b)'.
 - Deleting all of the text below the title in section 3 and replacing with:

'On 30 October 2020 planning permission was granted under reference 20/2105/HOT for a rear and side ground floor extension and rear first floor extension. Condition GD01A states that notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any Order revoking or re-enacting that Order) no part(s) of the roof of the building(s) approved shall be used as a balcony or terrace nor shall any access be formed thereto. Condition U0089635 states that the development permitted shall be carried out in accordance with the specified approved plans, where applicable. It appears to the Council that the conditions have not been complied with because of:

 - (i) The use of the roof of the rear first-floor extension as a roof terrace in breach of condition GD01A (Restriction on Use of Roof) of planning permission ref. 20/2105/HOT; and
 - (ii) The failure to install both Juliet balconies to the rear second-floor doors, in breach of condition U0089635 (Approved Drawings) of planning permission ref. 20/2105/HOT.

Also, without planning permission:

 - (iii) The installation of railings along the periphery of the roof of the rear first-floor extension.'
2. Subject to the corrections and variations, Appeal A is allowed insofar as it relates to the land edged in red on the plan attached to the enforcement notice and the installation of railings along the periphery of the roof of the rear first-floor extension and planning permission is granted on the application deemed

to have been made under section 177(5) of the 1990 Act as amended, for the installation of railings along the periphery of the roof of the rear first-floor extension at 76 Castelnau, London, SW13 9EX.

3. Appeal A is dismissed and the enforcement notice is upheld as corrected and varied and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended insofar as it relates to carrying out development without complying with the conditions being enforced against.

Appeal B

4. It is directed that the enforcement notice is corrected and varied as per Appeal A. Subject to the corrections and variations, the enforcement notice is upheld.

Preliminary Matters

5. The appeals were made under grounds (a) and (f). However, the appellants have raised issues which amount to hidden ground (b) appeals. The Council has had an opportunity to consider the representations made by the appellants and I have therefore determined the appeals with the additional ground.

The Enforcement Notice

6. S173(1)(b) of the 1990 Act provides that an enforcement notice shall state '*the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls*'. In this case, the Council has identified s171A(1)(b), which is '*failing to comply with any condition or limitation subject to which planning permission has been granted*'. That is correct insofar as it relates to the alleged use of the roof as a first floor terrace and the failure to install Juliet balconies.
7. However, the alleged installation of the railings would be better characterised as falling within s171A(1)(a), which is '*carrying out development without the required planning permission*'. The notice should therefore be corrected to refer to both 171A(1)(a) and (b) and to delete the sole reference to operational development in the title.
8. Also, the reasons for issuing the enforcement notice should add, in respect of the alleged railings, that the breach of planning control occurred within the last four years, as per s171B(1) of the 1990 Act.
9. Moreover, where an enforcement notice alleges a breach of condition, it should recite the details of the relevant planning permission and condition(s).
10. I am able to make those corrections, which do not alter the substance of the notice, under the powers transferred to me by s176(1)(a) of the 1990 Act, without injustice to any party.

Background

11. The appeal relates to a large, two storey detached dwelling with additional accommodation in the roof. As detailed above, planning permission was granted on 30 October 2020 for a rear and side ground floor extension and rear first floor extension to the appeal dwelling¹. The roof of the rear first floor

¹ Ref: 20/2105/HOT

extension is level with, and adjacent to, two patio style doors in the rear elevation of the main roof space.

12. Condition GD01A of the planning permission states that no part(s) of the roof of the building shall be used as a balcony or terrace nor shall any access be formed thereto. The reason for imposing that condition is to '*safeguard the amenities of the occupiers of adjoining property*'. The first allegation is the use of the roof of the rear first-floor extension as a roof terrace, in breach of that condition.
13. The second breach is the failure to install Juliet balconies to the rear second-floor doors, in breach of Condition U0089635, which requires the development be carried out in accordance with a list of approved plans, including the proposed second floor plan which is attached to the enforcement notice².
14. The third breach, as corrected, is the installation of railings along the periphery of the roof of the rear first-floor extension, without planning permission.

Appeals A and B on Ground (b)

15. A ground (b) appeal is that the breach of control alleged in the enforcement notice has not occurred as a matter of fact. The onus is on the appellants to make their case on the balance of probabilities.
16. The appellants do not seek to argue that railings have not been installed around the periphery of the roof. However, they do assert that the roof was not being used recreationally and remains unused. Photographs are provided of an empty roof space purported to be from the time of the enforcement inspection, however those are undated so do not assist the appellants' case that the use had not occurred by the date of the enforcement notice. Although the appellants refer to the roof surface as unfinished, the photographs in the Council's enforcement report³ show a flat surface that would provide no impediment to its use as a terrace.
17. The submission from the neighbouring occupants of No 74 Castelnau is that the appellants were using the flat roof as a terrace. A WhatsApp message is provided, which is purported to be from one of the appellants, that refers to an intention to include planting to prevent overlooking. The inference of that is that it was to be used as a terrace.
18. Two pictures taken from that neighbouring property show a man on the roof but the way he is looking down may well indicate that he was carrying out work, rather using it as alleged.
19. Therefore, whilst I have no evidence of actual use, I have nothing to show that it was not used as alleged. Given that the evidential burden lies with the appellants, the ground (b) appeal, insofar as it relates to the use of the roof, must fail.
20. The appellants assert that one of the Juliet balconies was installed at the time of the Council's enforcement investigation. I have no evidence from the Council to the contrary and given that the railing immediately abuts the centre of that glass Juliet balcony, it would have been very difficult, and therefore unlikely, that the Juliet balcony was installed after the railings had been installed. I shall

² Drawing number A003

³ Which reflect my own observations

therefore correct the enforcement notice to reflect the failure to install the second Juliet balcony. The ground (b) appeal succeeds to that extent.

Appeal A on Ground (a)

Main Issue

21. When an enforcement notice is issued under s171A(1)(b), the planning application deemed to have been made is to carry out the development subject to the planning permission without complying with the conditions being enforced against.
22. Consequently, the main issue for breaches (i) and (ii) is the effect of not complying with Conditions GD01A and U0089635 on the living conditions of the neighbouring occupiers, with particular regard to privacy and noise disturbance. For breach (iii), the main issue is the effect of the railings along the periphery of the roof on the living conditions of the neighbouring occupiers, for the same considerations.

Reasons

23. By not providing balcony enclosures to both of the second floor level patio doors, the occupiers of the appeal dwelling have direct access onto the roof of the first floor extension, thereby facilitating its use as a terrace. The railings around the edge of the roof space allow for its safe use.

Breach of condition

24. The roof area at second floor level affords largely unrestricted views into the gardens of neighbouring dwellings and, due to its relative depth, it also allows views into the windows of the neighbouring dwellings on either side. Indeed, the occupiers of No 74 Castelnau object to overlooking into their master bedroom and kitchen (which has a glass roof). The resultant loss of privacy is significant and harmful to the living conditions of the occupants of the properties on both sides.
25. I am mindful that the neighbouring property at No 74 Castelnau also has a roof terrace, which the Council confirm as having been approved. That is smaller than the roof area of the appeal property but still allows for significant overlooking into the garden of the appeal property and down through the glass roof of the ground floor extension.
26. However, it is very unlikely that the terrace at No 74 allows for comparable loss of privacy by looking back into neighbouring habitable room windows. Therefore, although there is mutual overlooking, the loss of privacy is greater in views from the appeal property.
27. In any case, No 78 Castelnau, on the other side of the appeal property, does not have a roof terrace that I could see. Consequently, there is no mutual overlooking which mitigates the overall degree of harm to that property.
28. The appellant also refers to other roof terraces at Nos 72 and 80 Castelnau. However, they acknowledge that No 80 is similarly subject to a condition that it is not to be used as a balcony or terrace.
29. As for No 72, I am unaware of the planning status of its roof level terrace or of the policy context of when it was carried out. The appellants explain it has

been in place for many years and as such may pre-date prevailing Local Plan⁴ Policy LP 8 and the Council's House Extensions and External Alterations SPD⁵. The former states that the Council will ensure balconies do not raise unacceptable overlooking to nearby occupiers while the latter states that using the roof of an extension as a balcony, will normally be unacceptable.

30. Moreover, the appellant acknowledges that a 2017 planning application approved at 72 Castelnau for a ground floor rear extension is also subject to a condition that states that its roof is not to be used for any purpose other than as a means of escape or for maintenance. By implication, that condition also precludes use as a terrace or balcony. The examples cited therefore do not justify significant additional overlooking harm arising from the appeal property and allowing development contrary to development plan policy and adopted SPD.
31. I note that the appellant feels that the Council's actions are unfair, but in overall terms the evidence points to a consistent approach to preventing the use of new roofs for terraces or balconies. Although I appreciate that the appellant has no intention of using the roof as a terrace, that may not be the case for any future occupants.
32. Due to the size of the roof space there is a possibility that it could be used for parties, with resultant noise disturbance. However, that would likely be infrequent and not significantly different, in terms of noise impact, to a party in the rear garden. A normal level of use would also result in a similar noise impact on neighbouring occupants as the use of a ground level patio.
33. Nevertheless, Condition GD01A is necessary to prevent unacceptable levels of overlooking and loss of privacy. It follows, that not complying with Condition GD01A in particular, results in unacceptable harm to the living conditions of the neighbouring occupiers, contrary to Local Plan Policy LP 8, the NPPF⁶ and the Council's House Extensions and External Alterations SPD. Those state, amongst other things and in addition to the above, that all development will be required to protect the amenity and living conditions for occupants of new, existing, adjoining and neighbouring properties.

The railings and other matters

34. I note the appellant's concern over safety but an appropriate balcony enclosure to the second floor patio doors would prevent access to the roof by her young children. Indeed, a glass balcony of appropriate height would provide greater protection from climbing than the railings, which incorporate three different horizontal bars.
35. I appreciate that the roof will need to be accessed for maintenance purposes and that the wraparound ground floor extension, which includes a glass roof, makes it more difficult to achieve access from ground level. Clearly it would be much more straight forward and less costly to access the roof from balconies serving the second floor accommodation.

⁴ London Borough of Richmond Upon Thames Local Plan July 2018

⁵ Local Plan Supplementary Planning Document House Extensions and External Alterations May 2015

⁶ The National Planning Policy Framework, paragraph 130

36. Building Regulations⁷ state that if access will be required less frequently than once a month, it may be appropriate to use temporary guarding or warning notices. The appellants' architect refers to the need for access for maintenance purposes from 'time to time'. The response from their appointed building control firm refers to the need for guarding, or a fall arrest system.
37. As it is not shown that access will be required more frequently than once a month, the evidence does not support the appellant's assertion that the railings are required to comply with Building Control minimum requirements.
38. The dwelling falls within the Castelnau Conservation Area, as well as being locally listed as a building of townscape merit. In respect of the former designation I have a statutory duty to under s72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to pay special attention to the desirability of preserving or enhancing the character or appearance of that area.
39. Taken in isolation, the railings are relatively recessive and are not harmful to the appearance of the appeal dwelling. Nor do they appear out of place within the context of an established residential area where similar provision is evident. Moreover, the use of the roof for purposes incidental to the residential use of the appeal dwelling would not materially affect the character of the site or the surrounding area. I therefore find that the matters result in a neutral effect on the Conservation Area as a whole, as well as the locally listed building, thereby preserving the same.
40. Therefore, whilst it has not been shown that the railings are required for safety purposes, the railings in themselves are not harmful. Moreover, even if the railings were to remain, access to the roof and its use as a terrace, with the associated harm, would be prevented by Condition GD01A.
41. As pointed out by the appellant, even though use of the roof of No 80 is similarly restricted, the approved plans show railings to the edge of the roof and French doors out onto the roof space. Therefore, given the other high-level railings to neighbouring properties and the other controls over the use of the roof, it is unnecessary for the appellant to have to incur the costs of removing the railings. I will therefore grant planning permission for the railings, which are part of the matters.
42. The appellant queries the planning status of a number of aspects associated with the terrace at No 74, including the railings and doors. However, that is beyond the scope of this appeal and is a matter for the Council - as is its reasons for refusing to consider a retrospective application in relation to the appeal property.

Conditions

43. The Council has not suggested any additional conditions and I consider none are necessary in relation to the railings around the edge of the roof.

Conclusion on Ground (a)

44. For the reasons given above I conclude that Appeal A should succeed in part only, and I will grant planning permission for the installation of railings along

⁷ Approved Document K

the periphery of the roof of the rear first floor extension, but otherwise I shall refuse to grant planning permission on the application deemed to have been made under s177(5) of the 1990 Act as amended, to carry out development without complying with the conditions being enforced against.

Appeals A and B on Ground (f)

45. An appeal on ground (f) is that the requirements of the enforcement notice are excessive to remedy the breach of planning control or, as the case may be, the injury to amenity caused by the breach.
46. The breaches in this case are identified above. The requirements of the notice are, in short, to cease the use of the roof as a terrace, to remove the railings and to install two permanently fixed Juliet balconies incapable of being opened as depicted in approved drawing no. D013-A003. The purpose of the enforcement notice is therefore to remedy the breach of planning control.
47. Requirement (i) is clearly necessary to remedy the corresponding breach arising from the use of the roof as a terrace, in breach of a condition which specifically seeks to prevent the same.
48. I have found the railings to be acceptable under ground (a). Consequently, requirement (ii) of the notice will cease to have effect insofar as is inconsistent with the planning permission which I will grant by virtue of s180 of the 1990 Act.
49. Turning to the third requirement, an approved plans condition cannot require that all features shown on the plans are provided or retained, or that the development and all of its component parts must be completed. The condition can only ensure that the development accords with the plans if and insofar as it is carried out. If it is essential that some specific feature shown on the plans is provided, such as Juliet balconies, an additional condition must be imposed to ensure that the feature is delivered and, if necessary, retained. In this case, there is no additional condition to that effect.
50. Accordingly, the enforcement notice cannot require the installation of fixed Juliet balconies incapable of being opened as depicted in approved drawing no. D013-A003. In any case, that is not what is shown on the plans. Rather, the approved details, including drawing number A003, show two small balconies to the patio doors at second floor level; not Juliet balconies, which, due to their limited depth, typically allow little or no access and therefore lesser functionality.
51. It follows, that it is excessive, for the purposes or remedying the breach, to specifically require the installation of Juliet or small balconies.
52. Moreover, it is also unnecessary to require two Juliet balconies are installed because one is already in place and was, on the balance of probabilities there when the notice was issued. Although the appellants state that they intend to and are currently in the process of constructing the second Juliet balcony, I saw no evidence of that at my site visit.
53. Whilst the plans condition cannot require Juliet balconies to be installed, Condition GD01A does seek to preclude access to the roof in addition to precluding its use as a balcony or terrace. The provision of balcony enclosures to the patio doors would prevent existing and direct access to the roof.

However, Condition GD01A is not prescriptive in the manner in which access shall be precluded. It would again therefore be excessive, for the purposes of remedying the breach, to include a requirement that is prescriptive.

54. For the reasons explained, I will vary the notice to delete requirement (iii) to install permanently fixed Juliet balconies.

55. The appeal on ground (f) succeeds.

Richard S Jones

INSPECTOR

Appendix 1

List of those who have appealed

Reference	Case Reference	Appellant
Appeal A	APP/L5810/C/22/3294396	Mrs. Amy Shackleton
Appeal B	APP/L5810/C/22/3294397	Mr. Ashley Shackleton