
Appeal Decisions

by A A Phillips BA(Hons) DipTP MTP MRTPI AssocIHBC

an Inspector appointed by the Secretary of State

Decision date: 23 May 2023

Appeal A: APP/A5270/C/22/3290025

Appeal B: APP/A5270/C/22/3290026

174A Northfield Avenue, West Ealing, London W13 9SB

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Edwin Moore and Ms Janet van der Meulen against an enforcement notice issued by the Council of the London Borough of Ealing.
- The enforcement notice was issued on 22 November 2021.
- The breach of planning control as alleged in the notice is the material change of use of the land by extension of the planning unit to incorporate the flat roof of the ground floor rear extension as external amenity area.
- The requirements of the notice are:
 - a) Cease the use of the flat roof of the ground floor rear extension as external amenity space; and
 - b) Remove the planters, low level fence, lights and artificial turf from the flat roof area.
- The period for compliance with the requirements is one month.
- The appeals are proceeding on the grounds set out in section 174(2)(d) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeals are dismissed and the enforcement notice upheld.

Preliminary Matters

1. In this case the appeals have been made on legal ground (d) only; that at the time the enforcement notice was issued, it was too late for the Council to take enforcement action against the matter stated in the notice. A site visit has previously been cancelled and the appellant did not show up on the rearranged date of 3 May 2023. In these circumstances I have carefully considered if a site visit is, in fact, required at all having regard to the circumstances and facts presented. Given the fact that the appellants have only submitted appeals on ground (d), the historic evidence submitted and there are no planning merits to be determined, I am satisfied that the appeals can be determined without a site visit.
2. Paragraph 4.1 of the Notice, relating to reasons for issuing it states that the alleged breach of planning control has occurred within the last 4 years. The Council now accepts that the immunity period identified is incorrect because the matter alleged is a material change of use for which, as set out in s171B of the Act, the time limit for taking enforcement action is ten years beginning with the date of the alleged breach.
3. The appellant appears to be aware of the error because their Statement dated 28 February 2022 identifies a 10 year period in the specific responses to Ealing

Council's reasons for issuing their notice. The Council contends that the Notice can be corrected without causing injustice because the appellants have sought to demonstrate 12 years of use of the roof terrace in question. Also, the effect of the alleged gap in use would be the same irrespective of whether the immunity period is 4 or 10 years, the effect of the sub-division of the first floor flat would be the same and the alleged breach and associated requirements would not need to be changed.

4. In these specific circumstances, and without prejudice to my assessment of the evidence presented, the Notice is capable of being amended to reflect the correct immunity period, without causing injustice to the appellants or any other parties.

The appeals on ground (d)

5. In order for an appeal on ground (d) to succeed it has to be shown that at the time the notice was issued it was too late for enforcement action to be taken. In this case it has to be shown that the material change of use alleged commenced on or before 22 November 2011 and that the use then continued without significant interruption for 10 years after the date of the change.
6. As evidence to support their appeal the appellants have submitted photographs taken by former tenants and satellite images. These are intended to support their claim that the terrace has been in use since 2007. Aerial photographs from 2007 are blurred and show insufficient detail to be conclusive in what they show at the appeal property, and it cannot be concluded from them that at that time there was a small, discreet and low impact rear first floor roof terrace as contended by the appellants.
7. Photographs dated 10 May 2009 and 10 January 2010 show some timber balustrading in place. The earlier photograph appears to show some chairs and washing racks but it is not at all clear which flats had access to the area. A later photograph dated 24 April 2010 shows an external roof area being used by people as an outdoor cooking and dining area. I do not dispute the dates shown.
8. There is another satellite image taken in June 2010 which, according to the appellants, shows a parasol on the roof terrace of the first floor flat of the appeal property. However, in my judgement the image is not sufficiently clear to prove that a parasol is in place or that a terrace was being used.
9. A copy of a document signed on 6 October 2018 allegedly shows the rules for usage of the roof terrace at the appeal property. However, there is no evidence between the period June 2010 and October 2018 which is a significant gap. It cannot be assumed that the use continued throughout this period.
10. Evidence from the Council indicates that there was a significant time gap between the implementation of planning permission 16979FUL which was approved in June 2016 and the resumption in the use of the roof terrace in March 2021. It appears that the roof covering and boundary features were removed during that particular period. In addition, the approved plans indicate that it was intended to cease the use of the roof terrace as part of the upper flat by blocking it off from the adjoining bedroom. Consequently, based on the evidence presented, at that time the roof terrace no longer formed part of 174A which is the first floor flat.

11. The evidence before me also suggests that there was a material change to the upper floor flat 174A as it was divided into two self-contained flats around October 2017. Therefore, the planning unit to which the current enforcement notice relates is different from the planning unit that existed during the 10 year period before the notice was issued.
12. My attention has also been drawn to an enforcement notice that was issued in 2013 which targeted operational development; namely the construction of a roof terrace on the flat roof rear extension. That notice required the removal of timber balustrading, bamboo screening and timber decking. This shows that the operational development which facilitates the unauthorised material change of use is also itself unlawful.
13. The appellants have failed to demonstrate lawful continuous use of the roof terrace in question for the required 10 year period and the appeals on ground (d) cannot succeed.

Other matters

14. The appellants have commented on some other matters such as the effect of the use on the living conditions of neighbouring residential occupants and other support in favour of roof terraces. However, there are no appeals on ground (a) and therefore the planning merits of the development are not before me to be considered.

Formal Decision

15. I hereby direct that the notice shall be corrected by the deletion from paragraph 4.1 of "4 years" and the substitution thereof of "10 years" as the immunity period with respect to the alleged breach of planning control.
16. Subject to this correction, the appeals are dismissed and the enforcement notice is upheld.

Conclusion

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

A A Phillips

INSPECTOR