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# Appeal Decision

Site visit made on 12 September 2023

**by R Satheesan BSc PGCert MSc MSc MRTPI**

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

**Decision date: 22 September 2023**

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**Appeal Ref: APP/N5660/C/23/3321306**  
**67 Mount Nod Road, London SW16 2LP**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (1990 Act).
  - The appeal is made by Mr Elisha Koppel against an enforcement notice issued by the Council of the London Borough of Lambeth.
  - The enforcement notice was issued on 29 March 2023.
  - The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised installation of black painted metal railings atop the parapets of (and including the steps between) the split level two-storey flat roofed rear extension, facilitating the use of the roofs as terraces (“the unauthorised balustrades and steps”).
  - The requirements of the notice are:
    - a) Remove the unauthorised balustrades and steps (and all associated fixtures and fittings from the premises) and reinstate the roofs as existed prior to the breach of planning control, and
    - b) Remove all associated waste and debris resulting from compliance with the above steps, from the premises.
  - The period for compliance with the requirements is 3 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. 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 as amended have lapsed.
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## Decision

1. The appeal is dismissed, and the enforcement notice is upheld.

## Procedural Matters

2. The site visit procedure was altered from an accompanied site visit to an unaccompanied site visit, as neither the appellant/appellant’s representative nor the Council Officer were present when I arrived at the site at the pre-arranged time and date. However, I was able to view the development from public land. Both parties were subsequently written to explaining the change in procedure, and therefore I am satisfied that neither party would be prejudiced by this. The appeal will be determined on this basis.
3. The appeal has been lodged under grounds (b), (f) and (g). However, it is clear from the substance of the appeal submissions that the appellant is also seeking to appeal under ground (c), in so far as they consider that the flat roofs can already be used as terraces, and that the Council are using the balustrades which have been installed to prevent an already permitted use. As the Council

has provided comments on the appellant's statement, I am satisfied that neither party would be prejudiced by consideration of the ground (c) appeal. I have therefore determined the appeal on this basis.

### **The Appeal on Ground (b)**

4. This ground of appeal is that the matter stated in the notice which may give rise to the breach of planning control, has not occurred. The burden of proof lies with the appellant, the relevant test of the evidence being the balance of probability.
5. However, this has not been demonstrated. On the contrary, the appellant confirms that the balustrades around the flat roofs have been installed, but states that this is for decorative purposes only. These are the same balustrades that were subject to the recently refused retrospective planning application 22/00455/FUL, and subsequently dismissed on appeal. Since the appellant confirms that the balustrades have been installed, I consider that the matters as alleged in the notice have occurred as a matter of fact.
6. Whilst the appellant states that a unilateral undertaking (UU) would be submitted to the Council which would serve to prevent the roofs from being used as roof terraces, no evidence of this has been provided, and in any event, this does not demonstrate that the matters stated in the notice has not occurred.
7. Accordingly, the appeal on ground (b) must fail.

### **The Appeal on ground (c)**

8. This ground of appeal is that the development enforced against does not constitute a breach of planning control. Like ground (b) the onus of proof lies with the appellant, the relevant test of the evidence being the balance of probability.
9. Under s55(1) of the 1990 Act, 'development' comprises 'two limbs':
  - 1) The carrying out of building, engineering, mining, or other operations in, on, over or under land (operational development);
  - 2) The making of any material change in the use of any buildings or other land.
10. It is clear that the allegation is referring to 'operational development,' and that the installation of metal balustrades and steps relates to a 'building operation.' Operational development' comprises activities which result in some physical alteration to land which has some degree of permanence. The term 'building operations' is defined for the purposes of the 1990 Act in s55(1A) as including:
  - (a) demolition,
  - (b) rebuilding,
  - (c) structural alterations of or additions to buildings, and
  - (d) other operations normally carried on by a person in business as a builder.The list is not exhaustive.

11. S55(2)(a) of the 1990 Act excludes from the definition of development works for the maintenance, improvement, or other alteration of any building which:
  - (i) affect only the interior; or
  - (ii) do not materially affect the external appearance of the building. (Materially affecting the external appearance means an impact capable of having some effect in planning terms.)
12. With regard to s55(2)(a)(i), the metal balustrade and steps installed do not affect only the interior of the building. Turning to s55(2)(a)(ii), the appellant states that the Council are using the balustrades which have been installed for decorative purposes only, to stop a use which is already permitted. However, the metal balustrades and steps, have a utilitarian and functional appearance and clearly facilitate the use of the flat roofs as roof terraces. Indeed, without these features the use of these outside areas as terraces on the upper floors of this building would fail to comply with Building Regulations and would be unsafe.
13. Furthermore, the works carried out, are located at high level and are highly prominent in views from neighbouring properties and from public vantage points on Hitherfield Road. As a matter of fact and degree, these works materially affect the external appearance of the building as a whole, and therefore are not exempt from the definition of 'development' under s55(2)(a).
14. I therefore find that, on the balance of probabilities, the matters stated in the notice amounts to a building operation for the purposes of s55 of the 1990 Act. Planning permission is required for these works. There is none in place, and the works are not permitted development. Therefore, based on all the evidence before me, there has been a breach of planning control and the appellant has not discharged the onus to demonstrate otherwise.
15. Accordingly, the appeal fails on ground (c).

### **The Appeal on Ground (f)**

16. The appeal on this ground is "that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters (i.e. the matters alleged in the notice) or, as the case may be, to remedy any injury to amenity which has been caused by any such breach".
17. The enforcement notice requires the removal of the unauthorised development and restoration of the land to its condition before the breach took place. Therefore, the purpose of the notice is to remedy the breach of planning control.
18. The appellant states that removing the balustrades is excessive, and that the Council's concerns could be overcome by a planning condition or UU which prevents the roofs from being used as roof terraces. However, since there is no appeal on ground (a), there is no deemed planning application. Therefore, I cannot assess the planning merits of the case, and cannot impose the suggested planning conditions or UU. I must take the notice at face value, which has been issued to remedy the breach of planning control. That would not be achieved by the steps outlined by the appellant, as it would not remedy the breach of planning control and planning permission would still be required.

In this respect, I note that a retrospective planning application for the metal balustrades, the subject of this appeal, has already been refused and dismissed on appeal.

19. There are no lesser steps drawn to my attention or any obvious alternative that would remedy the breach of planning control which is the purpose of the notice.

20. On this basis, the Ground (f) appeal fails.

### **The Appeal on Ground (g)**

21. This ground of appeal is that the time given to comply with the notice is too short. The Council has given a 3-month compliance period. The appellant states that 6 months is required since there is no side passage to remove the balustrade, and therefore access is required from various tenants and leaseholders.

22. Given that a ground (a) appeal has lapsed, I must take the notice at face value. The notice identifies harm in relation to the living conditions of neighbouring occupiers, with regards to noise and disturbance and loss of privacy. This harm will continue to exist until such time as the notice is complied with. There is no suggestion that the actual works cannot be completed in 3 months, simply that access is required from various tenants/leaseholders. There is nothing before to suggest that the removal of the balustrade and steps is overly complex, and I note that the works are external and would not be likely to affect the living accommodation for the occupiers within the flats.

23. I conclude that three months is a reasonable and proportionate time to comply with the notice and the appeal on ground (g) fails.

### **Conclusion**

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

*R Satheesan*

INSPECTOR