



Appeal Decision

Site visit made on 20 March 2023

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 9th October 2023

Appeal Ref: APP/T5150/C/22/3298027

The land or premises affected at 102B Ivy Road, London, NW2 6XJ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended).
- The appeal is made by Mr John Welsh against an enforcement notice issued by London Borough of Brent.
- The notice, numbered E/21/0102, was issued on 25 March 2022.
- The breach of planning control as alleged in the notice is, without planning permission, the increase in the height of the first floor outrigger and the alterations carried out to the roof to create a roof terrace ('the unauthorised development').
- The requirements of the notice are to: STEP 1A Cease the use as a roof terrace and remove the unauthorised roof terrace, including the balustrade, screens, flooring materials and all items associated with the roof terrace from the premises. STEP 2A Re-construct the original pitched roof and alter the first floor outrigger so that it replicates what existed before the unauthorised development took place. STEP 3A Remove all debris, items and materials, arising from compliance with the above steps, from the premises.
OR
STEP 1B Cease the use as a roof terrace and remove the unauthorised roof terrace including the balustrade, screens, flooring materials and all items associated with the roof terrace from the premises. STEP 2B Alter the first floor outrigger and roof, and construct a terrace, ensuring it complies with the approved drawings and conditions of planning permission ref. 18/3701. STEP 3B Remove all debris, items and materials, arising from compliance with the above steps, from the premises.
- The period for compliance with the requirements is: 6 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) 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.

Summary Decision: The appeal succeeds in part and permission for that part is granted, but otherwise the appeal fails, and the enforcement notice is upheld in the terms set out below in the Formal Decision.

Procedural Matters

1. The enforcement notice (the notice) was issued because it appeared to the Council that there has been a breach of planning control within paragraph (a) of section 171A(1) of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the 1990 Act as amended), namely, carrying out development without the required planning permission.
2. Planning permission was granted subject to conditions for 'loft conversion with rear dormer; rear roof terrace with 1.7m obscure glass balustrade and insertion

of 3 x front rooflights to first floor flat' on 21 November 2018¹ (the 2018 permission). The Council's building control records indicate that the existing development, which was not built in accordance with the approved plans, was undertaken in mid-2020².

3. I have considered whether the alleged breach of planning control should more properly be described as falling within paragraph (b) of section 171A(1) of the 1990 Act as amended, specifically, failing to comply with any condition or limitation subject to which planning permission has been granted. However, from the evidence before me and my observations on site, what has been built differs materially from the approved plans in a number of key ways, including, an increase in the height of the first floor outrigger, a larger roof terrace area and a shorter glass balustrade. Consequently, I am satisfied that the alleged breach of planning control is properly described as falling within paragraph (a) and I have determined the appeal on this basis.

The appeal on ground (a) and the deemed planning application

4. The appeal on ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted. As such, in this instance, planning permission is sought for the increase in the height of the first floor outrigger and the alterations carried out to the roof to create a roof terrace as built.

Main Issues

5. The main issues are the effect of the development as built on i) the living conditions of neighbours, with regard to privacy; and ii) the character and appearance of the host property and the area.

Reasons

6. The appeal property forms part of a two storey, mid-terraced building constructed of painted brick with a tiled roof. The building has been divided into two flats, No 102A Ivy Road on the ground floor, and No 102B Ivy Road on the first and second floor level which, in part, was facilitated by the 2018 permission.
7. The development as built comprises a roof terrace that extends the full depth of the first floor rear outrigger. To facilitate this and achieve level access onto the roof terrace from the flat, the height of the outrigger has been increased by what the appellant states is six courses of brick. The roof terrace is enclosed by an obscured glass balustrade of 1.1m in height.

Living conditions of neighbours, with regard to privacy

8. Residential properties and their gardens/outdoor private amenity spaces are located in the vicinity of where the roof terrace as built is sited. The Council's concerns in respect of this main issue principally relate to the adjacent windows serving habitable rooms in No 104 Ivy Road and the rear gardens of Nos 100, 104, 106 and 108 Ivy Road, and 93 and 95 Olive Road.
9. The elevated position, open form and short glass balustrade of the roof terrace as built, in such close proximity to No 104 Ivy Road, give rise to increased

¹ Application ref: 18/3701.

² Council ref: BA/20/07728.

levels of perceived and actual overlooking into adjacent habitable rooms within this property. Additionally, these features of the roof terrace as built, combined with its substantial depth covering the full extent of the outrigger, mean that it also permits perceived and actual overlooking into nearby gardens/outdoor private amenity spaces of neighbours.

10. In both of the above respects, this is contrary to the guidance within the Council's Supplementary Planning Document 2: 'Residential Extensions and Alterations', 2018 (the SPD), which states 'Any proposal should be designed not to overlook the habitable room windows or gardens of adjoining properties.'³
11. These outcomes of the development as built result in a reduction in the level of privacy experienced by the occupants of these neighbouring properties. In turn, this materially harms their living conditions and diminishes their enjoyment of the use of these spaces and the properties as their homes.
12. These harmful effects are most keenly felt by occupants of Nos 100, 104 and 106 Ivy Road and, whilst I acknowledge the separation distances, it is reasonable to say that they are still experienced by occupants of No 108 Ivy Road and Nos 93 and 95 Olive Road, albeit to a lesser degree.
13. I recognise that the outrigger of the appeal property possesses windows at first floor level that face the windows serving habitable rooms of No 104 Ivy Road. Moreover, the dormer granted as part of the 2018 permission allows views into some of the gardens/outdoor private amenity spaces cited by the Council. However, these established viewpoints are more restricted in their angle and range; and are not comparable to the extensive and panoramic views permissible from the open roof terrace as built. Consequently, their presence does not justify the development as built.
14. Drawing the above together, I conclude that the development as built has a harmful effect on the living conditions of neighbours, with regard to privacy. This is contrary to Policy DMP1 of the Brent Local Plan 2019-2041, adopted 2022 (the Local Plan), guidance in the SPD, and Paragraph 130 of the National Planning Policy Framework 2023 (the Framework), in so far as they seek to protect the amenity of neighbours.

Character and appearance of the host property and the area

15. The area surrounding the appeal property is predominantly characterised by two storey residential properties, constructed of brick with tiled roofs, laid out in terraces. This results in a generally uniform townscape when the properties are viewed from the main public routes through the area. At the rear, from the parties' evidence and what I was able to view on my site visit, the individual properties and terraces are less consistent in their form. Whilst the individual buildings commonly possess two-storey outriggers, many incorporate other extensions and/or alterations, some of which are at roof level, that vary in size, scale and design. Some of these have been cited by the appellant⁴.
16. In all of the above respects, prior to the breach, the appeal property and the building of which it forms part, reflected the general pattern and characteristics

³ SPD Section 2.6 Balconies and Roof Terraces, p11.

⁴ Nos 81, 83 and 106 Ivy Road and 105 and 107 Olive Road.

of development within the area in terms of its residential use, form, design and materials.

17. The increase in the height of the outrigger is not significant. Moreover, photographs submitted by the appellant show that the additional courses of brick have been painted to match the rest of the outrigger. Consequently, of itself, the increased height of the outrigger does not appear as a discordant addition to, or alteration of, the host property or the rear of the terrace within which it sits.
18. However, notwithstanding the above, the roof terrace as built on the appeal property is of a size, scale and form which physically and visually dominates the outrigger of the host property and is wholly out of keeping with any other addition and/or alteration to the rear of properties in the immediately surrounding area. Indeed, this is acknowledged by the appellant, who confirms that the roof terrace comprised the first of its kind around this part of Ivy Road.
19. Accordingly, I conclude that the development as built has a harmful effect on the character and appearance of the host property and the area. This is contrary to Policies DMP1 and BD1 of the Local Plan, guidance in the SPD, and Paragraph 130 of the Framework, in so far as they require development to be of materials, detailing and design that complements the locality and of a high quality.

Alternative Schemes- Options A, B and C

20. Additionally, as part of the appeal on ground (f), the appellant has advanced three alternative schemes with plans, Options A, B and C, which they assert would overcome the Council's planning objections at less cost and disruption.
21. Section 177(1)(a) of the 1990 Act as amended sets out that on the determination of an appeal under section 174, the decision maker may grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates.
22. On this basis, to be considered and potentially permitted, any alternative scheme(s) must form 'part of the matters' or achievable through the imposition of a condition on any planning permission. It is held in settled case law that whether an alternative scheme forms part of the matters is a matter of planning judgement. Differences in the design of the alleged and proposed development, plus any differences in the use of the land or building are relevant but not necessarily determinative factors.
23. Option A includes the retention of the development as built, with the addition of light weight trellising using tension wires and screening plants in planters⁵ adjacent to the glass balustrade to bring the total height of the screening to at least 1.7m⁶.
24. Option B includes the retention of the increased height of the outrigger, the existing 1.1m glass balustrade and the addition of the trellising and screening

⁵ Such as Jasmin, Wisteria, Prunus, Ceanothus and Camelia.

⁶ Plans APL-315-001 and APL-315-002.

plants. However, it would also include the reduction in the depth of the roof terrace and extent of the glass balustrade to match the 2018 permission; and the reinstatement of a roof over the rear element of the outrigger to match the pitch of the retained gable end⁷.

25. Option C includes the retention of the increased height of the outrigger but, in terms of the extent of the roof terrace, the extent and form of the roof over the outrigger, and the form and height of the glass balustrade, it reflects the plans approved as part of the 2018 permission⁸.
26. As set out above, Options A, B and C all include an increase in the height of the outrigger. Moreover, they all include variations of what could reasonably be described as, alterations to the roof to create a roof terrace. In these respects, I consider Options A, B and C fall within the definition of part of the matters, such that I may go on to determine whether it would be appropriate to grant planning permission for any of these alternative schemes. Therefore, although they have been raised under ground (f), I have considered them under ground (a).
27. The Council and an interested party have not referenced or commented on Options A, B and/or C in their submissions. Nonetheless, as they had the opportunity to do so as part of the appeal process, I consider that there would be no injustice in me taking the above approach.

Main Issues

28. The main issues are the effect of Options A, B and C on i) the living conditions of neighbours, with regard to privacy; and ii) the character and appearance of the host property and the area.

Reasons

Living conditions of neighbours with regard to privacy

29. In relation to Options A and B, whilst it is reasonable to conclude that these Options would mitigate the identified harmful effects in relation to the privacy of neighbours to a degree, especially Option B, I am not persuaded that it would be to such a level that would make either of them acceptable in planning terms.
30. This is particularly in relation to the proposed additional wires and foliage screening to negate the effects of retaining the short 1.1m glass balustrade. Whilst I note this form of screening has been accepted and conditioned in another appeal decision⁹, I have little detail regarding the context of that appeal site and detailed circumstances of the case. Considering the appeal before me on its own merits, I am not convinced that this approach would adequately address what would be the harmful effects of Options A and B in this instance.
31. In relation to Option C, the height of the outrigger and thus the roof terrace would be greater than prior to the breach. However, in my opinion, the combined reduction in the extent of the roof terrace, the roof terrace's enclosure by the roof structure at the end of the outrigger, and the increased

⁷ Plans APL-315-003 and APL-315-004.

⁸ Plans APL-315-005 and APL-315-006.

⁹ Appeal Ref: APP/X5210/C/16/3150172.

height of the obscured glass balustrade to 1.7m, would inhibit any perceived and actual overlooking into adjacent windows serving habitable rooms in No 104 Ivy Road and the gardens/outdoor private amenity spaces of Nos 100, 104, 106 and 108 Ivy Road, and Nos 93 and 95 Olive Road.

32. Consequently, I conclude that Options A and B would have a harmful effect on the living conditions of neighbours, with regard to privacy. This is contrary to Policy DMP1 of the Local Plan, guidance in the SPD, and Paragraph 130 of the Framework. However, I conclude that Option C would not have a harmful effect on the living conditions of neighbours, with regard to privacy. This would comply with Policy DMP1 of the Local Plan; guidance in the SPD; and Paragraph 130 of the Framework.

Character and appearance of the host property and the area

33. My conclusions set out above regarding the harmful effects of the development as built in relation to this main issue also apply to Option A. However, in reducing the extent of the roof terrace and enclosing it with the roof structure at the end of the outrigger, I consider that Option B would not appear as an incongruous addition to, and alteration of, the outrigger and roofscape of the host property or the rear of the terrace within which it sits. Nevertheless, this does not offset my conclusions in relation to Option B and its harmful effects on the living conditions of neighbours.
34. For similar reasons to those set out above in relation to Option B, in my judgement, Option C would not appear as a discordant addition to, and alteration of, the outrigger and roofscape of the host property or the rear of the terrace of which it is part. Whilst it would not incorporate a setback as advised in the SPD¹⁰, I am mindful that this is guidance, and in stating 'where possible' it does allow for some flexibility.
35. Accordingly, I conclude that Option A would have a harmful effect on the character and appearance of the host property and the area. This is contrary to Policies DMP1 and BD1 of the Local Plan, guidance in the SPD, and Paragraph 130 of the Framework. However, I conclude that Options B and C would not have a harmful effect on the character and appearance of the host property and the area. This would comply with Policies DMP1 and BD1 of the Local Plan; guidance in the SPD; and Paragraph 130 of the Framework.

Other Matters

36. The appellant has drawn my attention to the development at No 106 Ivy Road which was granted planning permission by the Council¹¹. Whilst this L-shaped extension is of a considerable size, its use, form and design are not comparable to an open roof terrace which is the subject of this appeal. Moreover, I do not know the detailed circumstances which led to it being granted. As such, it is a matter to which I attach little weight.
37. I have had regard to the comments submitted by an interested party. I agree that the development as built is harmful to the living conditions of neighbours, with regard to privacy. However, for the reasons outlined above, I am satisfied that Option C would adequately mitigate the identified harmful effects in this

¹⁰ SPD Section 2.6 Balconies and Roof Terraces, p11. Designs should aim to minimize the impact on the elevation, match existing materials and colours, and use setbacks where possible.

¹¹ No 106 Ivy Road Council Ref: 16/3312.

respect. The structural soundness of the development as built is not within the remit of my considerations as part of an appeal under section 174 of the 1990 Act as amended.

Conditions

38. I find that Option C forms part of the matters stated in the notice and would overcome the Council's objections and comply with relevant policies within the development plan. However, because the deemed planning application is made in respect of the development as alleged and built, there is no mechanism for incorporating any revised plans into any deemed planning permission granted. As such, it is necessary to grant planning permission for the development alleged, subject to a condition which requires that a scheme of works is submitted to the Council for its approval and implemented.
39. The purpose of the condition is to require the appellant to comply with a strict timetable for altering elements of the development as built which needs to be addressed in order to make the development acceptable. In this respect I have had regard to the time for compliance as set out in the notice, which the appellant has not challenged.
40. The condition is drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matter because the development has already taken place. The condition therefore provides for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable then the planning permission falls away.

Conclusion on the appeal on ground (a) and the deemed planning application, and the alternative schemes- Options A, B and C

41. I have found that the breach of planning control alleged in the notice and the development as built has a harmful effect on both the living conditions of neighbours with regard to privacy, and the character and appearance of the host property and the area. This conflicts with relevant policies in the Local Plan, guidance in the SPD and the Framework.
42. Additionally, whilst the alternative Options A and B would lessen the identified harmful effects, they would not do so to a satisfactory level to make those alternative schemes acceptable in relation to both main issues. As such, there would still be conflict with the relevant policies in the Local Plan, guidance in the SPD and the Framework.
43. However, I find that the alternative Option C would not have a harmful effect on the living conditions of neighbours with regard to privacy, or the character and appearance of the host property and the area. On this basis, the development would comply with the relevant policies in the Local Plan, guidance in the SPD and the Framework.

44. Section 180(1) of the 1990 Act provides that where, after the service of an enforcement notice, planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission. In other words, the requirement in the notice to 'alter the first floor outrigger so that it replicates what existed before the unauthorised development took place' or 'alter the first floor outrigger, ensuring it complies with the approved drawings and conditions of planning permission ref. 18/3701' will be overridden by the grant of the planning permission, but only in relation to the increase in the height of the first floor outrigger and the alterations carried out to the roof to create a roof terrace as shown in Option C submitted by the appellant. In relation to all the other parts of the development to which the notice relates, the notice and the requirements to comply with it will still have effect.
45. For the reasons given above, I conclude that the appeal on ground (a) should succeed in part only, and I will grant planning permission for Option C, subject to a condition which requires that a scheme of works is submitted to the Council for its approval and implemented, but otherwise I will uphold the notice and refuse to grant planning permission in respect of the other part of the matters. The requirements of the notice will cease to have effect so far as inconsistent with the planning permission which I will grant by virtue of Section 180 of the 1990 Act as amended.

The appeal on ground (f)

46. The matters raised in the appeal on ground (f) have been considered under ground (a) above.

Formal Decision

47. The appeal is allowed insofar as it relates to Option C 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 increase in the height of the first floor outrigger and the alterations carried out to the roof to create a roof terrace, at the land or premises at 102B Ivy Road, London, NW2 6XJ as shown on the plan attached to the notice and subject to the following condition:
- 1) The building operations hereby permitted shall be demolished and all materials resulting from the demolition shall be removed within 2 months of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 1 month of the date of this decision a scheme for the increase in the height of the first floor outrigger and the alterations carried out to the roof to create a roof terrace – Option C, shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for its implementation.
 - ii) If within 3 months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.
 - iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.

- iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved increase in the height of the first floor outrigger and the alterations carried out to the roof to create a roof terrace – Option C, specified in this condition, that increase in the height of the first floor outrigger and the alterations carried out to the roof to create a roof terrace – Option C, shall thereafter be maintained.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

48. The appeal is dismissed and the enforcement notice is upheld insofar as it relates to the development as built and Options A and B where planning permission is refused in respect of the alterations carried out to the roof to create a roof terrace on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

F Cullen

INSPECTOR