



Appeal Decision

Site visit made on 15 November 2023

by Roy Curnow MA BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th January 2024

Appeal Ref: APP/V5570/X/22/3307520

37 Mildmay Grove North, London N1 4RH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Ollie Thornton against the decision of the Council of the London Borough of Islington.
 - The application Ref P2021/2909/COL, dated 4 October 2021, was refused by notice dated 13 April 2022.
 - The application was made under section 191(1) of the Town and Country Planning Act 1990 as amended ('the Act').
 - The use for which a certificate of lawful use or development is sought is use of flat roof area to rear as an amenity terrace area by second floor flat (Flat 3).
-

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use which is found to be lawful.

Procedural Matter

2. As a result of some confusion over the timing of the site visit, the Council was not present when I visited at the site. Given the nature of the appeal, I undertook this on the basis of an Access Required Site Visit. The Appellant gave me access to the flat-roofed area that is the subject of the appeal, but no discussion of the merits of the case was undertaken. Following my site visit, I wrote to the Council asking whether it had any objection to the appeal proceeding on this basis. It replied, saying that did not.

Reasons

3. Section 191(a) of the Act provides the legal basis for anyone wishing to ascertain whether the existing use of land or buildings is lawful. Where such an application is refused, s195 provides the framework for an appeal to be made against the decision. The onus lies with the Appellant to make his case on the balance of probability.
4. The main issue is whether the Council's decision to refuse to issue a certificate was well-founded.
5. 37 Mildmay Grove North ('No 37') is an end of terrace property that has been divided into flats. To its rear is a two-storey 'outrigger', with a flat roof. The Appellant seeks to demonstrate that the use of the flat roof as an amenity

terrace is lawful. His case is that the occupants of the second floor flat, Flat 3, have used it for this purpose for more than 4 years.

6. The start point in the assessment of the case is to ascertain whether what is proposed is development, as defined in section 55 of the Act. S55(2) lists operations or uses that shall not be taken for the purposes of the Act to involve development of the land. Of these, s55(2)(d) states "the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such" is not development.
7. Access to the roof is via a second-floor window on the stairs at the rear of the property. The window has not been altered; an internal step enables one to go through the lower part of the window when the sash is raised. When I visited, there was low trellis fencing on the sides of that part of the roof closest to the main part of the building, which the Council acknowledges is likely to have been in position for more than 4 years. The part of the flat roof further away had no fencing. There were potted plants on the former area of roof, with a table and chairs on the latter area.
8. The Appellant's submissions show that the use of the flat roof as an amenity area has been agreed by the Freeholders of No 37 and the occupant of the flat below. This has not been challenged and, therefore, I take it to be the case on the balance of probability. The Council does not dispute the use of the flat roof terrace. Its position is that this use cannot be lawful as, without fencing, it is an incomplete development. As it puts it, in its conclusions in its Statement of Case, the Appellant has failed to demonstrate that this is a "fully functional terrace with proper enclosures and that this has been in situ in excess of 4 years". However, the Council has not drawn my attention to any requirement under planning legislation that the lawful use of a flat roof for amenity purposes is dependent on the provision of fencing. That it might be necessary under other legislation is not pertinent here.
9. Notwithstanding this, a flat is to be regarded as a dwellinghouse for the purposes of s55(2). Thus, the flat roof should be considered to be part of a dwellinghouse. Where, as here, there is agreement for its use as an amenity area by another flat, its use is incidental to the enjoyment of a dwellinghouse. This is not held to be development by reason of s55(2)(d).
10. I consider the Appellant's description of the flat roof as a terrace to be correct and that its use has been incidental to that of a dwellinghouse. What has occurred is not development and, therefore, immaterial of how long it has been carried out or whether fencing has been installed, the use that the roof is being, and has been, put to is lawful. The certificate should be issued by reason of a191(2)(a) of the Act.

Conclusion

11. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of use of flat roof area to rear as an amenity terrace area by second floor flat (Flat 3) was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Roy Curnow

Inspector

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 4 October 2021 the use of flat roof area to rear as an amenity terrace area by second floor flat (Flat 3) described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The use of the flat roof as an amenity terrace area is incidental to the use of Flat 3 as a dwellinghouse. As this is not development, by reason of section 55(2) of the Town and Country Planning Act 1990, planning permission is not required for its use in this manner and it could not be enforced against by the Council.

Signed

Roy Curnow
Inspector

Date: 8th January 2024

Reference: APP/V5570/X/22/3307520

First Schedule

Use of flat roof area to rear as an amenity terrace area by second floor flat (Flat 3)

Second Schedule

Land at 37 Mildmay Grove North, London N1 4RH

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 8th January 2024

by Roy Curnow MA BSc(Hons) DipTP MRTPI

Land at: 37 Mildmay Grove North, London N1 4RH

Reference: APP/V5570/X/22/3307520

Scale: Not to scale

