

Appeal Decision

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 14 January 2025

Appeal Ref: APP/G5180/X/23/3326927

59 Park End, Bromley BR1 4AN

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Stuart Brown against the decision of the Council of the London Borough of Bromley.
 - The application ref DC/22/00998/ELUD, dated 7 March 2022, was refused by notice dated 9 May 2023.
 - The application was made under section 191(1)(b) of the Town and Country Planning Act 1990 as amended.
 - The development for which a certificate of lawful use or development is sought is an existing roof terrace.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. Having considered the evidence submitted, the main considerations in this case, and the particular matters in dispute, I am satisfied that no injustice would be caused to any party in determining the appeal without a site visit. The views of the parties were, however, sought on this matter before my determination of the appeal. No objections to this were raised.

Main Issue and Main Considerations

3. Section 191(4) of The Town and Country Planning Act 1990 as amended (the 1990 Act) indicates that if, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application was lawful at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application. For the avoidance of doubt, the planning merits of the development, including any of the objections to the appearance of the development and its effect on privacy, are not relevant to the determination of the appeal. My decision is based on the facts of the case and judicial authority. The main issue is whether the Council's decision to refuse to grant a LDC was well founded.
4. Section 191(1) of the 1990 Act sets out the three matters for which an LDC application may be made. An LDC application may be made to ascertain whether any of these three matters are lawful. These matters are, in short (a) any existing use of buildings or other land; (b) any operations which have been carried out in, on, over or under land; and (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted.

5. The LDC application form indicates that the development for which the LDC is sought is for an 'existing roof terrace'. In the Council's officer report, under the heading 'proposal', it is suggested that the application relates to the use of a flat roof as a roof terrace. Much of the appellant's evidence also refers to the 'use of the terrace above the kitchen and bathroom'.
6. Notwithstanding the above, on the LDC forms, in selecting one of three options when confirming the reason for the LDC application, the appellant has selected 'existing building works', rather than selecting 'an existing use'. Furthermore, when selecting one of the several options given on the form for the grounds of the application, the appellant has selected 'The building works (for instance, building or engineering works) were substantially completed more than four years before the date of this application'. The plans submitted with the application (drawing number HBS-125-11) also show a balustrade around an area of the flat roof of the single storey annexe at the rear of the property, with an annotation pointing to this as the 'existing roof terrace to be retained'.
7. In view of the above, I have determined the appeal on the basis that the LDC application was made under section 191(1)(b) of the 1990 Act (i.e. for operations carried out), rather than section 191(1)(a) (i.e. for a use of buildings or other land). Indeed, the Council has approached the application and this appeal on this basis and has stated that 'the use of the flat roof for domestic purposes including sitting out, or the placing of a bench or other domestic paraphernalia' would not constitute development for the purposes of section 55 of the 1990 Act. I do not disagree with this.
8. As for the operations that comprise the development subject of the appeal, there is reference to the balustrade, as shown on the plans. In their appeal statement the appellant also refers to decking and a gate. The main consideration in this case is whether, at the time the LDC application was made, a period of four years had passed beginning with the date on which these operations were substantially completed. The test in this regard is the balance of probability and the burden of proof is on the appellant.
9. Paragraph 006 of the Planning Practice Guidance document on Lawful development certificates advises that, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability.

Reasons

10. The appellant has provided three statements from his partner and two daughters. All three refer to having lived at the appeal site for in excess of 10 years and refer to their use of the area above the kitchen and bathroom for this period as a sitting out area. This is corroborated by the street view image from 2012 which shows a garden bench on the roof of the rear annex.
11. Aerial images from 2017 also show that there are some items on the roof of the annexe. However, what these items are is not entirely clear. The images are not sufficiently clear to persuade me that these show the balustrade or any other of the operations referred to by the appellant in place at this time.

12. It may well have been the case that the flat roof of the rear annexe has been used for a substantial number of years as a sitting out area. The statements do not, however, refer to the balustrade, decking or gate. Furthermore, the 2012 image does not show any form of balustrade around an area of the roof that is visible. Neither can I be satisfied that any of the photographs provided show the presence of a balustrade (as illustrated on the submitted plans), decking or a gate.
13. The Council has provided street view images dated 2016, 2018, 2019 and 2020. I can see a balustrade in the images dated October 2020 and April 2019, the appearance of which is similar to that shown on the plans submitted with the LDC application. These show what appears to be a decorative metal balustrade across the elevation facing more towards the north and what appears to be a timber post and rail balustrade on the elevation facing more towards the south.
14. The images dated April 2018 are taken from 2 different perspectives showing a view from the street each side of the annex. The first shows what appears to be some decorative balustrade on one side, but there is no timber balustrade visible in either photograph. Whilst I note the appellant's suggestion that one view is obscured by vegetation, this does not obscure the entirety of the location of the timber balustrade that is visible in the images dated 2019 and 2020.
15. As with the appellant's 2012 photograph, the Council's photograph dated April 2016 shows a bench on the flat roof, but there is no obvious balustrade present in the photograph.
16. The angle of the street view photographs is such that any surfacing across the flat roof, including decking, is not visible.
17. All things considered, I am not satisfied that the appellant has discharged the burden of proof that is upon them. Their evidence is not sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability. In addition to this, the evidence provided by the Council makes the appellant's version of events less than probable. Accordingly, I find it more likely than not that at the time the LDC application was made, a period of four years had not passed beginning with the date on which the operations subject of this appeal were substantially completed.

Conclusion

18. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the existing roof terrace was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

J Moss

INSPECTOR