

Appeal Decision

Site visit made on 17 February 2025

by John Whalley

an Inspector appointed by the Secretary of State

Decision date: 25th February 2025

Appeal A - ref: APP/T3725/X/23/3332727

15 South Terrace, Whitnash, Leamington Spa CV31 2HY

- The appeal is made under section 195 of the Town and Country Planning Act 1990, (the Act), as amended by the Planning and Compensation Act 1991 against the refusal of Warwick District Council grant a certificate of lawful use or development.
- The appeal was made by Mrs A Hooppell.
- The application, reference W/23/0852, for a certificate of lawfulness was registered on 22 June 2023. It was refused on 14 August 2023.
- The application was for a Certificate of Lawful Development, (LDC), for use of a roof terrace and installation of a balustrade at No. 15 South Terrace, Whitnash, Leamington Spa, CV31 2HY.

Summary of decision: The appeal is allowed in respect of the use of the roof terrace and a certificate of lawful use is issued, in the terms set out below in the Formal Decision. The appeal is not allowed in respect of the installation of a balustrade.

Appeal B - ref: APP/T3725/W/23/3332726

15 South Terrace, Whitnash, Leamington Spa CV31 2HY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against the refusal of Warwick District Council to grant planning permission.
- The appeal was made by Mrs A Hooppell.
- The application, reference W/23/1019, for planning permission was submitted on 7 July 2023. It was refused on 18 September 2023.
- The application was for Erection of balustrade around existing flat roof rear projection (Retrospective) at No. 15 South Terrace, Whitnash, Leamington Spa, CV31 2HY.

Summary of decision: The appeal is not allowed. Planning permission is not granted for the erection of the roof balustrade.

Appeal property and development

1. No. 15 South Terrace, Whitnash is a small 2 storey terraced dwelling in a short row of similar Victorian houses. It has a rear outshot, about half part width at ground floor level with part of the outshot at first floor level. There is a narrow roof terrace above the ground floor part of the outshot, accessed from a glazed door in the end of a bedroom on the first floor. A black painted steel balustrade about 1.2m high is fixed around the edge of the roof terrace.
2. The 2 appeals deal with firstly, the question of the lawfulness of the use of the roof terrace and the lawfulness of the installation of the balustrade, (Appeal A). The second appeal deals with the planning application for retention of the balustrade, (Appeal B).

Appeal A - Certificate of Lawful Development, (LDC)

3. This application and appeal is in 2 parts, the lawfulness of the use of the roof terrace and of the erection of the balustrade. As to use of the balustrade enclosed roof space as an

amenity terrace in association with the residential use of the dwelling, (Use C3 - The Town and Country Planning (Use Classes) Order 1987), that use does not constitute a material change of use. It is not development and does not require planning permission, the case of *R (on the application of Nisbet) v SSCLG* [2014] EWHC 1202 is authority for that position. A roof terrace is 'incidental to the enjoyment of the dwelling house' and is ancillary to the existing residential use. Also, s.55(2)(d) of the Act - *u - 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 shall not be taken for the purposes of this Act to involve development of the land.*

4. It is therefore not necessary, as was submitted, to examine whether or not the use of the terrace started more than 10 years before the LDC application was made. The only relevance of the history of the terrace might have been in respect of any works affecting the appearance of the dwelling resulting from the provision of the door in the first floor outshot to gain access to the terrace that might have required planning permission. However, there was no intimation that such works were at issue between the parties.
5. For the Appellant, Mrs Hooppell, it was said she was not aware that the physical development – the balustrading, needed to have been in situ for over 4 years in order to be immune from enforcement action. It was accepted they had only been in place for 3 years. I agree with the Council that fitting the appeal balustrade amounted to operational development that required planning permission, there being no concession in the Town and Country Planning (General Permitted Development) (England) Order 2015 that would have granted permission by virtue of Article 3, Schedule 2, Part 1, Classes A or B or any other part of the Order.
6. As was suggested, it is reasonable for the decision maker to produce a 'split decision' in such cases, by granting an LDC in respect of the use of the roof terrace and refusing to issue an LDC for the erection of the balustrading fixed around the outer edge of the terrace. Section 193(4) of the Act provides that an LDC may be issued under s.191 or s.192 for the whole or part of the land specified in the application; and, where the application specifies two or more uses, operations or other matters, for all of them or some of them. The Appellant accepted that such situation could arise, having applied for planning permission to retain the balustrade, now the subject of Appeal B, below.

Conclusions – Appeal A - LDC

7. 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 that part of the application for use of the roof terrace at No. 15 South Terrace, Whitnash, Leamington Spa, CV31 2HY in association with the residential use of the dwelling at No. 15 was not well-founded and that the appeal should succeed in that regard. I will exercise the powers transferred to me by s.195(2)(a) of the Act accordingly.
8. I also conclude that the Council's refusal to grant a certificate of lawful development in respect of that part of the application for the installation of a balustrade to the roof terrace at the rear of No. 15 South Terrace, Whitnash, Leamington Spa, CV31 2HY was well-founded and that the appeal should fail in that regard.

FORMAL DECISION – LDC application

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9. The appeal is allowed in part and attached to this decision is a certificate of lawful use and plan for the use of the roof terrace ancillary to the use of the dwelling at No. 15 South Terrace, Whitnash, Leamington Spa, CV31 2HY, which is found to be lawful.
10. The appeal in respect of the installation of the balustrade to the roof terrace is dismissed.

Appeal B - ref: APP/T3725/W/23/3332726

11. This appeal seeks planning permission for the retention of the balustrade around existing flat roof rear outshot at No. 15 South Terrace.
12. The dwelling at No. 15 lies within the Whitnash Conservation Area. Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 imposes a duty when exercising planning functions to pay special attention to the desirability of preserving or enhancing the character of a conservation area. The National Planning Policy Framework at para. 199 states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation.
13. I consider that the tall balustrading on the narrow roof terrace at No. 15 appears intrusive. It unhappily dominates the look of the outshot. Although public views to the rear of No. 15 are limited, particularly by houses on the south side of Heathcote Road, there is a fairly wide gap between Nos. 1A and 3A Heathcote Road which allows a clear view to the rear of No. 15 South Terrace. The otherwise pleasant Victorian appearance and character this part of the Whitnash Conservation Area has not been preserved or enhanced by the appeal balustrade, thereby also failing to comply with Whitnash Neighbourhood Plan Policy W4 that requires development to be of a scale, mass and built form which responds to the characteristics of the site and its surroundings.
14. Warwick District Local Plan policy BE3 says that development will not be permitted which has an unacceptable adverse impact on the amenity of nearby uses and residents and/or does not provide acceptable standards of amenity for future users and occupiers of the development. The Council's Residential Design Guide SPD says balconies, patios and/or roof gardens on flat roofed extensions are not generally acceptable due to the potential for overlooking. Also, outdoor fixtures and fittings can be visually intrusive. Although the use of the balcony associated with the normal enjoyment of the dwelling at No. 15 is lawful, the balustrade facilitates its safe use. That is likely to encourage its use and allow for overlooking of close neighbours.

FORMAL DECISION

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15. The appeal is dismissed.

John Whalley

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 (GENERAL DEVELOPMENT PROCEDURE) ORDER 1995: ARTICLE 24

IT IS HEREBY CERTIFIED that on 22 June 2023 the use described in the First Schedule hereto in respect of the premises specified in the Second Schedule hereto, was lawful within the meaning of section 191(1)(a) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The use of the roof terrace is incidental to the enjoyment of the dwelling house by virtue of s.55(2)(d) of the Act in that 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 shall not be taken for the purposes of the Act to involve development of the land.

John Whalley

INSPECTOR

Date: 25 February 2025

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First Schedule

Use of the roof terrace incidental to the enjoyment of the dwelling house.

Second Schedule

No. 15 South Terrace, Whitnash, Leamington Spa, CV31 2HY.

IMPORTANT NOTES OVERLEAF
NOTES

1. This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the use described in the First Schedule and specified in the Second Schedule was lawful on the certified date and thus would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.
3. This certificate applies only to the use described in the First Schedule and specified in the Second Schedule and identified on the attached plan. Any use or development materially different from that described, or which relates to any other land, may result in a breach of planning control that is liable to enforcement action by the Local Planning Authority.
4. The effect of the Certificate is subject to the provision in Section 191(6) of the 1990 Act, as amended, which states that the lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

Lawful Development Certificate Plan

Appeal reference: APP/T3725/X/23/3332727 Date: 25 February 2025

No. 15 South Terrace, Whitnash, Leamington Spa, CV31 2HY

Heathcote Road.



Plans attached to the Lawful Development Certificate – No scale

John Whalley

INSPECTOR