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## Appeal Decision

Site visit made on 4 November 2025

by **Grahame J Kean BA (Hons), Solicitor Advocate, MRTPI**

an Inspector appointed by the Secretary of State

Decision date: 12 November 2025

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**Appeal Ref: APP/K5600/X/24/3346902**

**Second Floor Flat, 13 Cornwall Crescent, London, W11 1PH**

- 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 Mr Nicolas Bihler against the decision of Royal Borough of Kensington and Chelsea.
  - The application ref CL/23/06723, dated 13 October 2023, was refused by notice dated 24 April 2024.
  - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990 (as amended).
  - The failure to comply with any condition or limitation for which a certificate of lawful use or development is sought is the use of the roof of the building as a terrace in contravention of Condition 5 of the planning permission Ref TP/96/1782 dated 8 November 1996.
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### Decision

1. The appeal is dismissed.

### Preliminary Matter

2. The Council and the appellant agreed to the appeal being determined on the basis of written representations, although in the appeal submissions there was, in the appellant's view, conflict between the statutory declarations as to how the roof was accessed, and the Council who said (before the hatch in question was created):

*"Whilst access to the roof may have been achievable, it is not considered plausible that the flat roof would have been accessed in a manner that would establish the use of this space as a terrace."*

3. The appellant says that this statement accuses the signatories of the declarations of dishonesty and perjury. I have reviewed whether in the interests of both parties it would be appropriate to change the mode of determination of the appeal. However, the information available which includes several photographs and views of the mansard roof noted from my visit, have enabled me to assess the evidence and make a judgement accordingly on the balance of probabilities.

### Procedural matters and legal framework

#### "Case law"

4. A section of the appeal statement entitled "case law" refers mainly to appeal decisions which, as the solicitor agent will know, are not legal precedents. The case of Gabbitas is however cited<sup>1</sup>, this is an established principle, trite law even, that evidence is not to be rejected just because it is uncorroborated.

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<sup>1</sup> Gabbitas v SSE & Newham LBC [1985] JPL 630.

5. It would be useful to note that this principle was re-stated in Ravensdale<sup>2</sup> where David Elvin QC (sitting as a Deputy Judge of the High Court) noted three principles related to immunity from enforcement having regard to the time limits:

*“(1) The onus in proof in establishing on balance of probabilities that a period of immunity has accrued falls on the appellant, not the local planning authority, see Nelsovil v Minister of Housing and Local Government [1962] 1 WLR 40. In Ozyurekliler v Secretary of State [2013] EWHC 2648 (Admin) the Deputy Judge, Frances Patterson QC (as she then was), summarised the position at [17]-[18]:*

*“The burden of proof lies on the party seeking to establish that a breach of planning control has given rise to immunity from enforcement action ... Government policy is that the burden is: ‘Firmly on the applicant whose evidence is to be sufficiently precise and unambiguous.’ (See Circular 10 of 1997).”*

*(2) The Appellant must be able to establish that a local planning authority could have taken enforcement action against the breach at any time during the relevant period - in other words an unlawful change of use must be active and continuous. See Schiemann LJ in Thurrock BC v Secretary of State [2002] 2 PLR 43 and Keene LJ in Swale BC v First Secretary of State [2006] JPL 886 at [8] and [25].*

*(3) It is incumbent on parties to a planning appeal to place before an Inspector the materials on which they rely and that an Inspector is entitled to reach a decision on the basis of materials put before him.”*

6. It is to be noted also that the previous government policy in 1997 has been carried through to the Planning Practice Guidance (PPG). Paragraph: 005 Reference ID: 17c-005-20140306 states that without sufficient or precise information, a local planning authority may be justified in refusing a certificate. Paragraph: 006 Reference ID: 17c-006-20140306 states that the applicant's evidence should be “sufficiently precise and unambiguous” on the balance of probability.
7. As to the appeal decisions cited, no copies are provided, and they relate to appeals outside the Council's area. The first is cited merely because it is said to make it clear that significant weight should be given to statutory declarations. As with all evidence, that depends in part on its substance. The second repeats matters of principle, as does the third, in which there is heavy emphasis on Circular 10/97, a government circular which is withdrawn a long time since.

#### *Section 191(3) is relevant to breach of conditions*

8. The Council may have misunderstood the basis on which the appeal was made. Its reference to s191(2) of the 1990 Act in its report and lack of reference to the condition, the breach of which formed the substance of the LDC application and hence this appeal, is misplaced. Rather, the legal framework for assessing the lawfulness of the development is s191(3) which states:

*“For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if (a) the time for taking enforcement action in respect of the failure has then expired; and (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.”*

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<sup>2</sup> Ravensdale Limited v Secretary of State for Communities and Local Government [2016] EWHC 2374 (Admin), see para 4.

## Reasons

9. At issue is whether the roof of the appeal premises has been used continuously as a terrace in breach of Condition 5 of the Planning Permission (96/1782/M) for at least 10 years.
10. There is no real dispute that the roof may have been used as a terrace since May 2016 when a hatch was created from within the premises that gave out onto the roof top. The dispute is about whether and if so to what extent the top part of the roof was accessed via a third-floor bedroom window and then used as a “roof terrace” on an active and continuous basis for ten years prior to the LDC application in October 2023.
11. Mr Bihler, the appellant was registered as owner of the property on 11 June 2013. 3 June 2013 is the probably the date when possession was taken of the premises.
12. The appellant and his family lived in this second/third floor flat until they moved in December 2016 and rented it out. In his statutory declaration he emphasises that it is “really easy” to climb out of the third-floor bedroom sash window. He claims that there is “a ‘safe’ alleyway” outside the window between the exterior of the house and the parapet wall and that “*you can very easily walk down to access the roof*”.
13. I disagree. Considering the photographs supplied, especially nos 5, 7 and 8, the gap between the parapet wall and the front elevation is extremely narrow and it would not be expected to be used except perhaps in an emergency or for essential maintenance by suitably qualified or experienced persons. There any no obvious means of accessing the top of the roof as the declarations try to establish.
14. Mansard roofs have a steep pitch and this one is no different from most others in that, to access the top one would have to scale the steeply pitched element. I would judge it to be at least 70%, possibly more, which is tantamount to a wall (and treated as such for building regulation purposes). That is nowhere explained in any of the submitted declarations. Presumably if one gave a full picture of the exact process that accessing the top of the roof involved, it would highlight the real difficulty and danger inherent in the climb and point up the implausibility of this being an active and continuous use.
15. It is also of note that when advice was sought from the Council in October and November 2015 on a proposal to erect rooftop railings, the Council did not support it, due to various planning issues, but more importantly for present purposes the officer stated at paragraph 4.4:  
  
*“As there is currently no access onto the roof, I was unable to get access onto the flat roof.”*
16. The photographs of the window in question demonstrate very clearly that it is not intended to be an access to the mansard roof, the lower sill is some 0.5m from the 3<sup>rd</sup> floor level and directly above a radiator. Also of note is that it has a sash frame, meaning it does not have the advantages of a casement window for this purpose.
17. To explain, a sash window opens by sliding one panel (sash) vertically or horizontally (in this case vertically) over the other. When fully open, only about half of the total window area is available for escape, as the open sash rests in front of the fixed (or other sliding) sash.

18. The declaration in which Mr Bihler highlights which bedroom window was used, refers to the dimensions of the room, ie 3.24m x 2.96m, but the dimensions of the window are not given. Some of the submitted plans are indistinct. Being at the top of the building, windows are generally proportionately smaller on mansard roofs. An estimate of the size of the window in question would be in the region of 1.5m square but slightly taller than wider. It is nowhere explained that the frame area does not equate to the space available to be used as an access, which would be slightly less than half the frame area. Not commenting on the size and obviously restrictive nature of this sash window, adds to my doubts that Mr Bihler openly and candidly has addressed the difficulties in negotiating it.
19. The Council puts it in this way:

*“The set up of the sash window, parapet and narrow gap between the mansard and parapet provide a very constrained situation where it would be very unlikely to use the flat roof of the mansard as a roof terrace as described within the statutory declaration.”*
20. No images were supplied to illustrate use over the period up to 2016. The hatch was created, according to Mr Bihler’s sworn testimony:

*“because we wanted a safer way to access the roof in case of an emergency and enjoy the terrace. We had our first child in July 2014 and our second in April 2016, so we were worried that we could not safely exit the building through the stairs in case of a fire in the lower floors/flats, especially with two young children.”*
21. This can only mean the roof is to be used as an emergency secondary exit. For higher floors such as the appeal premises, fire escape strategies usually depend on internal protected routes, ie a single internal escape route. Being trapped on the roof with no way down to the ground is not an acceptable final exit strategy.
22. Mr Bihler is a long leaseholder. It is not disclosed who is the reversionary landlord, ie the freehold owner of 13 Cornwall Crescent. As of May 2023, there appears to be a charge on the appellant’s flat in favour of the Nationwide Building Society. It is unclear whether proper provision is made for a lawful fire escape strategy in the building. Nor is it clear whether the hatch is approved under building regulations.
23. It seems to me that if the appellant were so concerned about what should be a protected internal route, as he would have a right to be, he would clarify what deficiencies exist with the single protected route of exiting the building through the stairs. It does not make sense to ignore any such deficiencies and not to ensure there is a lawfully acceptable secondary emergency route down to the ground.
24. For these reasons, although of course I accept the concern for his family in the event of a fire, I consider it likely that in creating the hatch, the appellant was more concerned to *“enjoy the terrace”*. After all, the first child was born in July 2014 but was exposed to the supposedly deficient single protected exit route via the stairs, until the hatch was created nearly two years later in May 2016.

#### *The other statutory declarations*

25. Beginning 2023, Mr Bihler attempted to contact former tenants to obtain statutory declarations.

26. Mr Teale, an Australian based at the time in London, made a declaration. It refers only to the period from 21 November 2021 to 17 August 2023 referable to his occupation of the premises up to that date. In any case this period is when Mr Bihler had already installed the hatch giving access to the roof. Mr Teale states “*you can also access the roof via the sash window of the guest bedroom*” but adds “*I access the roof via a hatch.*” Mr Teale makes no pretence of having used the roof before the hatch was created and unsurprisingly fails to explain how his view about access via the window is relevant to his own experience.
27. A draft statutory declaration was prepared for a Mr Hall, never completed, but correspondence about attempts to get him to complete it, was submitted. Mr Hall emails Mr Bihler that he cannot remember specific dates. This is in reply to Mr Bihler’s email asking a series of questions about when and how often the roof was used by Mr Hall as a terrace. The email also contained the following:

*“The spirit of it is to be as descriptive as possible [w]ith anything that would help my case and inversely so for anything that doesn’t :-)” (emphasis supplied).*
28. The clear implication behind the wording I have highlighted, including the smiley emoji, is that Mr Bihler is suggesting to Mr Hall, in a “wink wink, nudge nudge” sort of way, that he might withhold information of a descriptive nature related to such matters that would be unhelpful to his case.
29. Government guidance in Planning Practice Guidance Paragraph: 013 Reference ID: 17c-013-20140306 clearly states that:

*“A local planning authority can revoke a certificate if a statement was made, or document used, which was false or untrue in any way; or if any information was withheld.” (emphasis supplied).*
30. In the event and for whatever reason, Mr Hall did not complete the statutory declaration as Mr Bihler requested. It is of course an offence to withhold any material information in order to obtain a certificate which can result in a fine on summary conviction, and on indictment the maximum penalty is 2 years’ imprisonment or a fine, or both.<sup>3</sup> The draft was submitted, according to Mr Bihler’s declaration “for expediency reasons”. Whether he was advised to so do is unclear.
31. These declarations, or drafts thereof, were those submitted with the LDC application to the Council.

*The late declarations from visitors to the premises*

32. After the Council initially queried the reliability of the evidence, a further two declarations were provided. These were from Mr De Chauvin dated 11 April 2024 and Mr Derlon dated 27 March 2024. Both swore on oath that they visited the appeal property from June 2013 until 2016. Mr de Chauvin stated:

*“We accessed the roof via the sash window of the guest bedroom, which is the bedroom situated on the third floor with the dimensions 3.24m x 2.96m as shown on approved drawings in Exhibit NB4. I understand that there are concerns about the ability to head out of the sash window. Yet the sash window is really easy to*

<sup>3</sup> Paragraph: 013 Reference ID: 17c-013-20140306, and see s194 TCPA 1990: (1) If any person, for the purpose of procuring a particular decision on an application (whether by himself or another) for the issue of a certificate under section 191 or 192—  
... (c) with intent to deceive, withholds any material information, he shall be guilty of an offence.

*climb out of as it is large and the base of the window sill is approximately only 0.5m high off the ground. The gutter/ parapet outside the window is made of a wall that is approximately 0.75m high, so there is a safe 'alleyway' between the exterior of the house and the parapet that you can very easily walk down to access the roof. The sash window and the parapet wall are depicted in Photographs 5, 7 and 8 in Exhibit NB2."*

33. Mr Deron stated:

*"We accessed the roof via the sash window of the guest bedroom, which is the bedroom situated on the third floor with the dimensions 3.24m x 2.96m as shown on approved drawings in Exhibit NB4. I understand that there are concerns about the ability to head out of the sash window. Yet the sash window is really easy to climb out of as it is large and the base of the window sill is approximately only 0.5m high off the ground. The gutter/ parapet outside the window is made of a wall that is approximately 0.75m high, so there is a safe 'alleyway' between the exterior of the house and the parapet that you can very easily walk down to access the roof. The sash window and the parapet wall are depicted in Photographs 5, 7 and 8 in Exhibit NB2."*

34. These passages are almost word for word the same passage as was drafted for Mr Bihler's declaration.

35. Mr de Chauvin's declaration is dated 11 April 2024 in which he testified that he had *"particular knowledge to make this statutory declaration as a frequent visitor to the Property at least twice a month from September 2013"*. He also declared:

*"I am 1m85 height [sic] and we would simply and easily climb up and out, and usually bring beers or wine with nibbles and / or Turkish food bought at Fez Mangal restaurant, which is located nearby."*

36. Mr de Chauvin adopts with relish what might be supposed to be a similar plea made of Mr Hall to be as descriptive as possible, perhaps as it is sometimes said that colour and detail give authenticity to testimony. Such detail is less helpful than would be a precise and unambiguous explanation of how the obvious difficulties inherent in such a climb were overcome; how, despite his height which is clearly something he wishes to emphasise, he nevertheless could *"simply and easily"* get through the window in question and manage the climb up to the roof top. I find it improbable that this was done with ease and simplicity.

37. I note also that Mr Derlon declared that he has attached as "Exhibit NB9" a *"summary of all of the AST Agreements that have been signed in respect of the Property since it was purchased, as well as copies of the agreements themselves."* Clearly, this is a cut and paste job gone wrong.

38. I do not read the Council's position as saying it was physically impossible to access the roof from 2013, (such that there cannot by definition be a lawful change of its use). It may have happened. In my view there would have to be some form of recognisable access to make the top part of the roof usable. For example, a ladder fixed to the mansard slope. The declarations refer to no such specific method of access. One is left with Mr de Chauvin and Mr Derlon's words (both given the exact same wording to which to attest): *"there is a safe 'alleyway' between the exterior of the house and the parapet that you can very easily walk down to access the roof."*

39. This is not plausible in my judgement. It is not an alleyway as the word is normally understood. It is a gully or a gutter. One cannot walk “down” this gully to access the roof or indeed walk along it to any significantly more advantageous position from which to ascend the mansard slope. More purchase might be gained, in my view from using the outside window structure, or perhaps by using one of the two corners where, as I saw, the fire break wall meets the mansard slope. However, neither one of these methods, nor the use of a ladder is mentioned. Overall, the description of the means of access is imprecise and ambiguous.

### *Summary*

40. All declarations covering the period from 2013 assert on oath that the roof of the property has since that date been in “continuous” use as a terrace.
41. I am quite satisfied that the appellant and the declarants who attest to use of the roof top between 2013 and 2016 have exaggerated the degree of use. Overall, I am unpersuaded on the balance of probability that the unlawful change of use during this period has been sufficiently active and continuous such that the Council would have been able to take enforcement action.
42. The position did change in May 2016 when the hatch was created, as can be seen from the images supplied. Conversely however, it is likely that Mr Bihler has underplayed the degree to which, from then on, he and his family used the roof (“*if anything we used the roof slightly more frequently*” (my emphasis)). From all that I have read, I find it probable that he does not wish to accentuate the intensity of use by contrasting the two periods in question more than he (or those advising him) might consider necessary or helpful to his case.
43. The period from 2016 to the date of the LDC application is insufficient to enable me to grant a certificate. It remains to be seen whether the Council take enforcement action before the immunity period accrues, however that is a matter for it to consider.

### **Conclusion**

44. For the reasons given above, I conclude that the Council’s refusal to grant a certificate of lawful use or development for the use of the roof of the building as a terrace in contravention of Condition 5 of the planning permission Ref TP/96/1782 dated 8 November 1996 is 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 (as amended).

*Grahame J Kean*

INSPECTOR