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DEPARTMENT OF THE ENVIRONMENT

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Council's Ref: 4/0516/86E/MS

Mr K G Marsh
53 Hillfield Road
Hemel Hempstead
Herts
HP2 4AB

Your reference

Our reference
APP/A1910/C/86/1283

516/86E

Date

Sir

TOWN AND COUNTRY PLANNING ACT 1971 - SECTION 88
LAND AT THE ABOVE ADDRESS
APPEAL BY YOURSELF

1. I am directed by the Secretary of State for the Environment to refer to your appeal against the enforcement notice issued by Dacorum Borough Council on 26 February 1986 relating to the erection of balcony railings around three sides of a flat-roofed single storey rear extension and the insertion of patio doors in lieu of a window in the rear wall of the upper part of the dwellinghouse to gain access to the flat-roofed single storey rear extension.

2. The appeal against the enforcement notice was made on the grounds set out in section 88(2)(a), (b) and (g) of the Town and Country Planning Act 1971, as amended by the Local Government and Planning (Amendment) Act 1981.

3. The written representations made in support of the appeal, and those of the Council have been considered. An officer of the Department has visited the site and has furnished a description of it. A copy of the report of the site visit is annexed to this letter.

SUMMARY OF THE DECISION

4. The formal decision is set out in paragraph 14 below. The appeal succeeds and the enforcement notice is being quashed.

REASONS FOR THE DECISION

5. On 9 December 1986 the Department wrote to you and to the Council about the appeal made on ground (b) of section 88(2) drawing attention to the conclusions reached in a decision given on appeal under this Department's reference T/APP/5251/G/83/68 which was reported in the Journal of Planning and Environmental Law in September 1984 at page 674. Further representations were invited having regard to the operation of Class I.1 of Schedule I to the Town and Country Planning General Development Order 1977 (as amended).

6. Although you originally appealed against both allegations in the enforcement notice you subsequently stated, following the determination of your appeal against

the refusal of planning permission for the balcony railings and the door to the balcony, that you wished to pursue the matter of the insertion of patio doors and to add grounds (b) and (g) to your appeal. However, in response to the Department's letter of 9 December inviting further representations, you submitted comments about both the railings and the patio doors. As you did not specifically withdraw that part of the appeal relating to the balcony railings and as you have now put forward submissions concerning both allegations in the enforcement notice, the Secretary of State proposes to consider the appeal against the whole of the enforcement notice on the evidence submitted.

7. In support of your appeal, you stated that planning permission was not required for replacing or enlarging existing windows: this was explained in a booklet produced by Dacorum Borough Council and there was a precedent at No 49 Hillfield Road where a large upstairs conservatory window overlooked the same surrounding areas as your balcony. The enlargement of your existing window amounted to only 4 rows of glass panes each 12 sq ins in size. This did not materially affect the visual appearance of the house and has had minimal visual impact on the surrounding area. You used the flat roof for sunbathing on the grounds that limited usage does not constitute a material change of use for which planning permission is required. You stated that planning permission given by the Council for new residential development in Hillfield Court resulted in first floor windows overlooking the surrounding area including your garden. The use of your balcony did not decrease your neighbour's privacy since it gave the same view as existing windows. As the windows leading onto the flat roof were in the main bedroom, use of the balcony was likely to be restricted to those adults who were the occupants of the house and this use would be further limited by the fact that the sun was only on the balcony in late afternoon, which would further diminish any possible intrusion on neighbours' privacy. The erection of safety railings to building regulations safety standards was necessary to protect your children who could gain access to the balcony. When the railings were erected, full screening was given by tall fir trees, but as these had been cut down you undertook to screen off the balcony view by planting Cypressi Leylandi shrubs around the balcony area. Neither of your neighbours at Nos 51 or 55 Hillfield Road had objected to you about the balcony, and your neighbour at No 55 had built a garage along his west wall, which screened much of the overlooking. The facts of limited access to the balcony and its mainly north facing aspect were part of your argument that the erection of the balustrades did not in this case lead to a material change of use of the balcony space and as such planning permission for the erection of railings was not required.

8. On behalf of the Council, it was stated that insofar as the substitution of a window by french doors materially affected the external appearance, development requiring planning permission had occurred; the Council referred to a previous appeal decision where the provision of french doors to provide access to balconies had been held to constitute development, namely T/APP/5251/C/81/353. The new development at Hillfield Court was not considered by the Council, at the time planning permission was given, to give rise to undue overlooking of surrounding property. The view from a balcony must be considerably more extensive than that from a window where sight lines were more restricted. The screening on the eastern boundary had now been removed, giving rise to unrestricted overlooking of the neighbouring gardens, albeit loss of privacy was reciprocal. Control over access to the balcony could not be satisfactorily achieved or enforced by the Council. Safety and aesthetic considerations were not considered relevant. The Council concluded that, in an urban situation such as this, the degree of overlooking created by the use of the flat roof area as a balcony was unreasonable. They maintained that planning permission was required for the balcony railings, door and use. While it was acknowledged that there may be a degree of doubt with regards to the door itself, the use of the door to gain access to a flat roof without safety railings would be in breach of building regulations and would render the occupier liable to prosecution.

9. The planning appeal (T/APP/A1910/A/86/043219/P2) concerning this site was made against a refusal to permit the first floor balcony with railings and an access door

from a bedroom. As no representations were made on the question of whether planning permission was required for the railings, door and use of the roof as a balcony, this was not considered in the determination of the appeal. The Planning Inspector who determined the case reference T/APP/5251/C/81/353 referred to by the Council, considered that the use of an area as a balcony or open amenity area and erection of a door and safety balustrade did not benefit from the provisions of either Class I(3) or II(1) of Schedule I to the Town and Country Planning GDO 1977 (as amended) or from section 22(2)(d) of the Town and Country Planning Act 1971. The parties' attention was drawn, in the Department's letter of 9 December, to a later appeal decision (reference APP/5272/G/83/68) where it was determined that the insertion of a door onto a roof terrace and the use of the flat roof of a single-storey extension as a balcony would not constitute development for which an application for planning permission is required under Part III of the 1971 Act. An appeal also made in respect of that site concerning the Council's refusal of planning permission for the erection of balcony railings on that extension was dismissed because the planning permission had been subject to a condition that no further development, whether or not it was permitted by the GDO, was to be carried out without the consent of the local planning authority.

10. Although the use of the flat roof area for the purposes of a balcony was not included in the enforcement notice as an alleged breach of control, both you and the Council have made representations about whether or not the use requires planning permission. For the avoidance of doubt, therefore, the matter has been considered. Both you and the Council have also made representations about the impact of the use of the balcony on the amenities of neighbouring residents by reason of overlooking. The view is taken that any impact of development on its surroundings, as a matter of planning merit, is not a material consideration in the legal assessment of whether, as a matter of fact and degree, a 'material change of use' has occurred. Any question of whether or not a change of use of land constitutes a material change of use has to be considered in the context of the relevant "planning unit". In this case, applying the criteria laid down in the case of Burdle and Williams v SSE and New Forest RDC (1972) 2 AER 240 and 1 WLR 1207, the view is taken that the planning unit is the whole unit of occupation, namely the house and its garden. In the case reference T/APP/5251/C/81/353, referred to by the Council, it was considered that a house extension and its roof were not part of the curtilage but part of the dwellinghouse itself, and for that reason, section 22(2)(d) of the 1971 Act would not apply. That view is noted but it is concluded in the present case that while the use of the flat roof extension may well have an impact on the amenities of neighbouring residents by reason of overlooking, it is, nevertheless, as a matter of fact and degree, an activity which is incidental to the enjoyment of the dwellinghouse as such, and is therefore permitted by virtue of section 22(2)(d) of the Town and Country Planning Act 1971.

11. As regards the patio doors which give access to the balcony, it is noted that they are of a similar design to the window of the other bedroom which overlooks the balcony and that their size has been increased by the addition of 4 panes of glass, each about 0.36 m sq, in the lower part of the windows. It is considered that, in relation to the external appearance of the building as a whole, and bearing in mind that the enlarged window resembles the existing window, as a matter of fact and degree the alteration does not materially affect the external appearance of the building. The insertion of the doors in place of the existing window is therefore not considered to involve development by virtue of section 22(2)(a) of the 1971 Act. Furthermore, even if the doors were considered to materially affect the external appearance of the dwelling, it is considered that they would be an improvement or other alteration of the dwellinghouse, which would be permitted by Article 3 and Class I.1 of Schedule 1 to the GDO.

12. As regards the balcony railings, the view is taken that although they have not detracted from the appearance of the house, they have materially affected the external appearance of the building: thus they do not fall within the provisions of section

22(2)(a) of the 1971 Act and their construction constituted building operations within the meaning of section 22(1) of the 1971 Act. It is also considered that the railings cannot benefit from the provisions of Class II of the GDO since the height of enclosures permitted by Class II.1 has to be measured from ground level. However, it is considered on the evidence that the railings were an improvement or other alteration of the dwellinghouse and it must therefore be considered whether their erection can be regarded as permitted development by Article 3 and Class 1.1 of Schedule I to the GDO. In this connection the view is taken that the area enclosed by the balcony railings, though for a use incidental to the enjoyment of the dwellinghouse, does not represent an extension to the dwellinghouse and therefore does not add any further volume to be taken into account for the purposes of Class I.1(a)(ii) of Schedule I to the GDO. Since the Secretary of State is satisfied, from the approved plans to the planning permission (dated 23 April 1985 reference 4/0285/85) for the single storey side and rear extensions, that all the other limitations and conditions attached to Class I.1 of Schedule I to the GDO are complied with, it is considered that the erection of the balcony railings is development permitted by the provisions of Article 3 of that Order.

13. The appeal against allegations 1 and 2 in the enforcement notice therefore succeeds on ground (b) and it is proposed to quash the notice. In the circumstances the Secretary of State proposes to take no further action on the other grounds of appeal.

FORMAL DECISION

14. For the reasons given above the Secretary of State allows the appeal and directs that the enforcement notice issued on 26 February 1986 be quashed.

RIGHT OF APPEAL AGAINST DECISION

15. This letter is issued as the Secretary of State's determination of the appeal. Leaflet C, which is enclosed for those concerned, sets out the right of appeal to the High Court, on a point of law, against the decision.

I am Sir
Your obedient Servant

P PASCOE
Authorised by the Secretary of State
to sign in that behalf