

Date: 03/09/99

Ref: 45/3/134

Note: The following letter which has had personal details edited out was issued by our former department, the Department for Environment, Transport and the Regions (DETR). DETR is now Communities and Local Government - all references in the text to DETR now refer to Communities and Local Government.

Building Act 1984 - Section 39

Appeal against refusal by the Borough Council to relax or dispense with Requirement K2 (Protection from falling) of the Building Regulations 1991 (as amended) in respect of the height of the balustrades to the first floor balconies to apartments

The appeal

3. The building work to which this appeal relates is the part internal demolition and rebuild, and part complete demolition and rebuild of a 7 storey (including basement storey) terrace block of Victorian houses to provide 64 self-contained apartments with 3 levels of underground car parking to the rear. The building is listed and located in a conservation area.
4. The east elevation contains the 7 front doors of the original dwellings (ie Nos) and fronts onto The front doors are accessed by several steps up from pavement level which are vaulted over the basement wells. Separate doors at basement level are accessed by stairs leading from the pavement level into the wells.
5. The original building contained a continuous balcony running at first floor level in front of the reception room windows on the front elevation, and opening out into larger areas over the porticoed porches of each of the 7 front doors.
6. To achieve the re-development that part of the building to the south and centre which originally contained 5 of the 7 dwellings (ie Nos) was partially demolished and re-built behind the retained facade. However, the remaining part of the building at the northern end of the building (ie Nos) was demolished and completely re-built with a replicated stucco facade, on anti-vibration bearings in order to minimise the intrusion of noise from the underground railway.

7. As re-developed, the existing balustrade to the first floor balcony of Nos (and as accessed by Apartments) are the original height of approximately 700 mm. The newly constructed balustrades to the first floor balconies of Nos on the east and north elevations (ie that adjacent to the living rooms and bedrooms of Apartment Nos) are comprised of pre-cast concrete balusters to match the existing balustrades and are approximately 850 mm in height. This height is in accordance with the listed building planning consent, and appears to be the maximum height increase over the existing 700mm balustrading which was considered compatible in order to retain a matching appearance.

8. Notwithstanding the fact that it had been possible to increase the height of the new balustrades on the re-built section of the building on the east and north facades the Borough Council took the view that the height of the new balustrades should comply with the guidance given in *Approved Document K (Protection from falling, collision and impact)*. Although they accepted that the purpose of the planning permission restriction was to retain a match in appearance between the existing and re-built elevations, they considered in order to achieve compliance with Requirement K2 then either the height of the balustrades on the re-built section should be increased to 1100 mm or that access to the balconies should be prevented.

9. To overcome the conflict between the planning permission constraints on height and the need to comply with the Building Regulations, you advise that it was agreed that access to the new balconies should be prevented by the installation of permanent barriers across the casement windows which open onto the balconies from the living rooms and bedrooms in Apartments However, this has led to complaints from the purchasers of these apartments who feel that they are being denied access to their balconies unreasonably when compared to the apartments in the southern and western parts of the building. You therefore applied to the Borough Council for a relaxation of Requirement K2 of the Building Regulations 1991 in respect of the height of the new balustrades to the first floor balconies to the newly built north and east facades of the building at Nos It appears that the Borough Council treated your application as a request for a dispensation of Requirement K2 and refused it. It is against that decision that you have appealed to the Secretary of State.

The appellant's case

10. You point out that the new balustrades to the balconies on the northern section of the building have been rebuilt to match the existing balustrades on the east elevation, and are 850 mm high. You argue that it is unreasonable to prohibit use of these new balconies on grounds of safety because they are no less safe than the other retained balconies on the building, which have been in use for many years without problem; and because the balconies are of limited area and width and so are unlikely to be used frequently or by a large number of people.

The Borough Council's case

11. The Borough Council have applied Regulation K2 (Protection from falling) to the new balconies. This regulation states that:

"(a) Any stairs, ramps, floors and balconies and any roof to which people have access, and

(b) any light well, basement area or similar sunken area connected to a building,

shall be provided with barriers where it is necessary to protect people in or about the building from falling."

12. The guidance in *Approved Document K*, which supports the requirement, is that barriers to balconies should be at least 1100 mm high. Because the barrier in question is only 850 mm high the Borough Council do not consider that it satisfies Requirement K2 and have therefore secured, through the plans as approved, the prevention of occupants gaining access to the balconies by the installation of grills over the casement windows which open on to the balconies.

13. The Borough Council consider this precaution to be necessary because they understand that some 12 deaths and 400 non-fatal injuries occur annually as a result of falls from balconies.

14. The Borough Council have not been able to prevent access and use of the original balconies because no new building work has been carried out on them, with the result that the Building Regulations were not applicable.

The Department's view

15. Regulation 8 limits Parts A to K and N to Schedule 1 of the Building Regulations 1991 (as amended) to securing reasonable standards of health and safety. The Department is sympathetic to the need to preserve the appearance of heritage buildings, and considers that in some cases where Building Regulation requirements conflict with aesthetic considerations, it may be reasonable to accept a lower standard than that recommended in the guidance. However, in the Department's view it would not be reasonable to dispense with a requirement seeking to protect health and safety.

16. In this case the barrier is 850 mm high, compared with the recommended minimum height of 1100 mm, and so it is necessary to consider if a relaxation would maintain a reduced, but still reasonable, level of safety.

17. The recommended 1100 mm height was arrived at as being sufficient to deter young children from climbing it, and also to approximate to the centre of mass of an adult, who would therefore be in reasonably stable position when leaning on the barrier. In special circumstances, the Department accepts that it would be reasonable to reduce this height slightly.

18. In this case, the balcony is on the first floor, but the building has a basement, so there is a possibility of falling more than one storey. On the other hand, the flats are mainly two bedroom - so will not accommodate large families, and the balconies are quite narrow at the points of access, making hard collision with the barrier unlikely.

19. However, on balance the Department takes the view that the result of a fall could be life threatening and that this offsets the other mitigating considerations which might tend to reduce the likelihood of a fall. While recognising the anomaly of having a higher standard of safety in some flats than others, the Department considers that given the manner in which the Building Regulations must be applied, in the particular circumstances of this case, this anomaly is justified.

The Secretary of State's decision

20. The Secretary of State considers that compliance with Requirement K2 can be a life safety matter and as such would not normally consider it appropriate to dispense with it; and would not lightly consider relaxing it except in exceptional circumstances.

21. The Secretary of State has given careful consideration to the facts of this case and the arguments put forward by both parties. He is sensitive to the need to recognise the constraints which may be imposed on compliance with the Building Regulations when the building concerned is a listed one. However, he has concluded that the extenuating circumstances of this particular case are insufficient to counter the potential danger which would be inherent in relaxing Requirement K2 of Schedule 1 to the Building Regulations 1991 (as amended). It follows that he considers there is no case for dispensing with Requirement K2. Accordingly, he dismisses your appeal.