



Appeal Decisions

Site visit made on 17 September 2019

by JP Tudor BA (Hons), Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 18 December 2019

Appeal A - Ref: APP/X5990/W/19/3226793

72 Chester Square, London SW1W 9DU

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Jai Waney against the decision of City of Westminster Council.
 - The application Ref: 19/00535/FULL, dated 24 January 2019, was refused by notice dated 29 March 2019.
 - The application sought planning permission for '*erection of new mews building in Ebury Mews East; alterations to the rear of main house, including infill within the existing courtyard; extension to rear closet wing at second floor level; extension to roof; single storey basement excavation to create plant room; new entrance portico and internal alterations, in connection with enlargement of 72 Chester Square*' without complying with a condition attached to planning permission Ref: 18/06328/FULL, dated 14 January 2019.
 - The condition in dispute is No 1 which states that: '*The development hereby permitted shall be carried out in accordance with the drawings and other documents listed on this decision letter, and any drawings approved subsequently by the City Council as local planning authority pursuant to any conditions on this decision letter.*'
 - The reason given for the condition is: '*For the avoidance of doubt and in the interests of proper planning.*'
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Appeal B - Ref: APP/X5990/Y/19/3226794

72 Chester Square, London SW1W 9DU

- The appeal is made under section 20 of the Planning (Listed Buildings and Conservation Areas) Act 1990 against a refusal to vary or discharge conditions of a listed building consent.
 - The appeal is made by Mr Jai Waney against the decision of City of Westminster Council.
 - The application Ref: 19/00763/LBC, dated 24 January 2019, sought to vary condition No 1 of a listed building consent Ref: 18/06329/LBC granted on 14 January 2019.
 - The works proposed are '*erection of new mews building in Ebury Mews East; alterations to the rear of main house, including infill within the existing courtyard; extension to rear closet wing at second floor level; extension to roof; single storey basement excavation to create plant room; new entrance portico and internal alterations.*'
 - The condition in dispute is No 1 which states that: '*The works hereby permitted shall be carried out in accordance with the drawings and other documents listed on this decision letter, and any drawings approved subsequently by the City Council as local planning authority pursuant to any conditions on this decision letter.*'
 - The reason given for the condition is: '*For the avoidance of doubt and in the interests of proper planning.*'
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Decision – Appeal A

1. The appeal is dismissed.

Decision – Appeal B

2. The appeal is dismissed.

Procedural Matters and Background

3. The appeals relate to applications to amend a scheme, previously granted planning permission and listed building consent on 14 January 2019. The intention was to achieve this by revising the plans referred to in condition no 1 ('the plans condition') of both the original planning permission and the listed building consent. The proposed change would be to enable the closet wing to the rear of the building, which would accommodate a lift, to be extended one floor higher to third floor level.
4. Although the approved plans are not detailed within the body of condition 1 in either the original planning permission or the listed building consent, they are effectively incorporated, as the conditions refer to the drawings listed within the decision notices.
5. The reasons given for imposing the original conditions in the planning permission and the listed building consent, requiring the development/works to be carried out in accordance with the approved drawings, were for the avoidance of doubt and in the interests of proper planning.
6. The appeal building forms part of Grade II listed terrace and is located within the Belgravia Conservation Area. The Council's reasons for refusing the applications to amend the original scheme and plans, related to the alleged effect of the change on the special interest of the listed building and on the character and appearance of the conservation area. A second reason for refusal, with respect to appeal A, alleged that insufficient information had been submitted to assess the effects on daylight and sunlight reaching neighbouring properties. However, following the submission of a 'Daylight and Sunlight Study'¹ with the appeal, the Council withdrew that reason for refusal.
7. During the course of the appeal, the Court of Appeal handed down a significant judgment in the case of *Finney v Welsh Ministers* [2019] EWCA Civ 1868.² For brevity, I shall refer to the case as 'Finney' in this decision. That case concerned the limits of the power under s73 of the Town and Country Planning Act 1990 (TCPA) to grant planning permission for development without complying with conditions subject to which a previous planning permission was granted. As in the appeal proposal before me, it related to an application to amend a scheme by substituting a plan or plans specified in a 'plans condition' with new plans. In that case, which concerned a wind turbine scheme, the intention was to enable a taller wind turbine than that originally permitted to be erected.
8. Therefore, the Finney case is directly relevant to Appeal A, and its effect and logic also need to be considered in relation to Appeal B, concerning varying the same condition attached to the listed building consent. Given the recent nature of the judgment and its pertinence, both main parties were given the

¹ Prepared by Right of Light Consulting, Chartered Surveyors – dated: 15 April 2019

² Dated: 5 November 2019

opportunity to comment upon it and have done so. I have considered their responses in reaching my decisions.

Main Issue

9. Given the content of the Finney judgment, the main issue, relating to both appeals, is whether it is possible, in law, to amend the scheme by varying the 'plans condition', attached to the extant planning permission and the listed building consent, in the way proposed.

Reasons – Appeal A and Appeal B

10. In Finney, the Court of Appeal refers to s73(2) of the TCPA, which indicates that, when considering applications under s73(1) for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted, the local planning authority must only consider the question of the conditions. It cannot, therefore, consider the description of the development to which the conditions are attached. The court finds that the *'natural inference from that imperative is that the planning authority cannot use section 73 to change the description of the development.'*³
11. Moreover, Finney confirms that there should not be a conflict between what was permitted in the original consent and what the new condition requires. In that case, the original description of development referred to *'two wind turbines, with a tip height of up to 100m.'* However, when the development was allowed on appeal, subject to a condition referring to new plans showing a tip height of 125m, the new description of the permitted development excised the reference to a tip height of up to 100m. The court held that if the description of the permitted development had been left unchanged, there would have been a conflict between what was permitted (a 100m turbine) and what the new condition effectively required (a 125m turbine), and that a condition altering the nature of what was permitted would have been unlawful.
12. That is analogous to the appeal proposal before me which effectively seeks to amend the permission to allow the closet wing to be extended one floor higher, to third floor level, as shown in the revised drawings. However, the description of development in the original planning permission refers to: *'extension to rear closet wing at second floor level'*. Therefore, there would, on the face of it, be a clear conflict between the description of the permitted development, which Finney says cannot be altered via s73, and what would be shown in the revised plans referred to in condition No 1. Given the description, such a condition, requiring the development to be carried out in accordance with plans showing the closet wing to be extended to third floor level, would alter the nature of the development and be unlawful.
13. The appellant submits that the proposed amendment results in a scheme which still accords with the original description of the development and works contained in the planning permission and the listed building consent. That contention refers to the use of the word *'including'* within the descriptions, which the appellant says suggests that the list of alterations which follows is not necessarily exhaustive. Therefore, the appellant holds, that *'other alterations to the rear of the house may be approved as part of the permission/consent, and it follows that the full extent of the alterations are*

³ Paragraph 42

shown on the approved plans, referred to in Condition 1 of the Planning Permission and Condition 1 of the Listed Building Consent.'

14. While I note the appellant's view, it seems to me that the punctuation of the descriptions divides the development into a number of specific discrete elements and does not give the scope for additional elements to be added. Moreover, there is clear reference in the descriptions to an '*extension to rear closet wing at second floor level*'. Therefore, I am not persuaded by the suggestion that a condition referring to plans showing an extension to the rear closet wing to third floor level can be reconciled with that specific reference to the extension being at second floor level in the descriptions. A change from second to third floor level is a material change which, in my view, would lead to inconsistency between what would be required by the condition and the description.
15. The appellant prefers the approach of Singh J in *R (Wet Finishing Works Ltd) v Taunton Dean BC* [2017] EWHC 1837 (Admin), which held that a planning authority may impose different conditions under s73 provided that they do not amount to a '*fundamental alteration to the proposal put forward in the original planning permission*'. However, that was one of three High Court cases considered in some detail by the Court of Appeal in Finney, in relation to whether it is open to the local planning authority to alter the description of development contained in the 'operative part' of the planning permission. The Court of Appeal, which is not bound by and takes precedence over the High Court, ultimately did not find favour with the approach of Singh J in *Wet Finishing Works*.⁴ Therefore, given that the Court of Appeal judgment in Finney expresses a clear view on the scope of s73 and that it is a higher court whose decisions take precedence, it is not for me to take a different view.
16. Although the appellant also refers to reference in the Planning Practice Guidance to the use of s73 of the TCPA to seek minor material amendments⁵, there is no necessary inconsistency between that guidance and the Finney judgment, provided that the proposal does not necessitate a change in the description of the development, which Finney holds is outside the scope of the powers given by s73. In Finney, Lewison LJ observes that if a proposed change amounts to a non-material amendment, then s96A of the TCPA provides an available route. Alternatively, a fresh planning application could be made. Although there is no s96A route for a listed building consent, again a fresh application could be made.
17. While it may not be that common for listed building consents to include a 'plans condition', in this case it does, and the appellant applied to amend it in the same manner as the planning permission. Section 19 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act) allows for an applicant to apply to the local planning authority for the discharge or variation of conditions attached to a listed building consent, while s20 allows an appeal against a decision to refuse such an application. Section 19(4) of the Act gives powers to the local planning authority or the Secretary of State to vary, discharge or add conditions. However, significantly it does not give a power to amend anything other than a condition. That corresponds with similar limitations under s73(2) of the TCPA, which gives the local planning authority the power to consider only the question of the conditions.

⁴ Paragraph 46

⁵ Paragraph: 013 Reference ID: 17a-013-20140306

18. Given the above, although the Finney judgment relates to a s73 application (which concerns planning permissions), it appears reasonable to apply its rationale to the s20 application in relation to the listed building consent, as it is deeply analogous. The description of the works in the listed building consent is almost identical to that in the planning permission. Consequently, there would be the same conflict between the reference in the description to '*extension to rear closet wing at second floor level*' and what would be shown in the revised plans referred to in condition No 1. As above, such a condition, requiring the works to be carried out in accordance with plans showing the closet wing extended to third floor level, would alter the nature of the works originally consented and be unlawful.
19. I have already dealt above with the submissions made by the appellant regarding the applicability of the Finney judgment. Therefore, there is no need to repeat that analysis which equally applies to Appeal B.
20. It is also noted that the Council has confirmed that, in the light of the Finney judgment, it would have required a new planning application to have been submitted.
21. Therefore, based on relevant statute and the Finney judgment, even if the proposal were acceptable in other respects, such as in relation to the listed building and the conservation area, as the descriptions of development and works cannot be altered the proposal would not be consistent with them. It follows that the appeals cannot succeed.
22. The above factors lead me to conclude that, as a matter of law and on the facts of these appeals, it is not possible to amend the scheme by varying the 'plans' condition, attached to the extant planning permission and the listed building consent, in the way proposed.

Other Matters

23. Given my conclusion on the main issue, there would be no purpose in me considering the Council's original concerns, relating to effects on the special interest of the listed building and on the character and appearance of the conservation area, as it would not alter the outcome of the appeals.
24. Some residents of Ebury Mews East, who live opposite the rear of the appeal building have raised a range of other concerns including effects on daylight and sunlight, privacy, traffic and parking, surface water flooding and possible damage caused by excavation work to the basement. Many of these were related to the already approved scheme. While some objections also concern the proposed changes to that scheme and suggest that the effects would be exacerbated as a result, as I am dismissing the appeal on other substantive legal grounds, again it is not necessary for me to consider those issues further here.

Conclusion

25. For the reasons given above, and having regard to all other matters raised, I conclude that both Appeal A and Appeal B should be dismissed.

JP Tudor

INSPECTOR