



Appeal Decision

Site visit made on 1 September 2020

by J Bowyer BSc(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8th September 2020

Appeal Ref: APP/N5090/W/20/3244920

50-54 Shakespeare Road, London NW7 4BH

- 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 Ms Weinberger, Tov 7 Ltd against the decision of the Council of the London Borough of Barnet.
 - The application Ref 19/5433/S73, dated 7 October 2019, was refused by notice dated 18 December 2019.
 - The application sought planning permission for demolition of 3 houses and the construction of a 2.5 storey building, plus basement, featuring 9 self-contained flats with associated vehicle parking, cycle parking, and refuse storage without complying with a condition attached to planning permission Ref 17/5074/FUL, dated 1 May 2018.
 - The condition in dispute is No 2 which states that: the development hereby permitted shall be carried out in accordance with the following approved plans: Drawings numbered RE/50-54SR/1A; RE/50-54SR/2A; RE/50-54SR/3A; RE/50-54SR/4A; RE/50-54SR/5D; RE/50-54SR/6D; RE/50-54SR/7D; RE/50-54SR/8E; RE/50-54SR/9D; RE/50-54SR/10D and RE/50-54SR/11D.
 - The reason given for the condition is: for clarity.
-

Decision

1. The appeal is allowed and planning permission is granted for demolition of 3 houses and the construction of a 2.5 storey building, plus basement, featuring 9 self-contained flats with associated vehicle parking, cycle parking, and refuse storage at 50-54 Shakespeare Road, London NW7 4BH in accordance with application ref 19/5433/S73 dated 7 October 2019 without compliance with condition 2 previously imposed on planning permission ref 17/5074/FUL dated 1 May 2018 but subject to the conditions in the attached schedule.

Application for costs

2. An application for costs was made by Ms Weinberger, Tov 7 Ltd against the Council of the London Borough of Barnet. This application is the subject of a separate Decision.

Background and Main Issue

3. The appeal relates to an application made under section 73 of the Town and Country Planning Act 1990 ('the Act') for a minor material amendment to planning permission granted on appeal under application reference 17/5074/FUL ('the original permission')¹.

¹ Appeal reference APP/N5090/W/17/3292346

4. The appellant is seeking to vary condition 2 of the original permission in order to substitute revised plans which make a number of alterations to the development. The Council considers that some of these alterations would necessitate a change to the description of development approved by the original permission, and cannot therefore be considered within the scope of an application under section 73 of the Act. Notwithstanding this position, the Council has carried out a detailed assessment of the proposal, and considers that the development would be otherwise acceptable subject to conditions.
5. The main issue is therefore whether or not the proposal can be considered as a minor material amendment under section 73 of the Act.

Reasons

6. There is no statutory definition of a 'minor material amendment', but the Planning Practice Guidance (PPG) advises that it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which has been approved². The PPG further states that it would not be appropriate to amend conditions in circumstances where the resulting modifications are fundamental or substantial³, and that section 73 cannot be used to change the description of the development⁴.
7. The main parties also refer to further clarification on the scope of powers available under section 73 of the Act provided by the Court of Appeal in the 'Finney' judgement⁵. Finney confirms that the description of development constitutes the 'operative' part of a permission, and that section 73 cannot be used to change this description. It further held that there should not be a conflict between what was permitted by an original consent and what a new condition requires.
8. The description of development for the original permission was stated as 'demolition of 3 houses and the construction of a 2.5 storey building, plus basement, featuring 9 self-contained flats with associated vehicle parking, cycle parking, and refuse storage'. The appeal would result in changes to this development, but would not alter the number of flats. The building would continue to be 2.5 storey plus basement, and there would remain associated vehicle parking, cycle parking and refuse storage on the site. As a consequence, the changes proposed would result in no inherent conflict with the terms of the description of development approved by the original permission.
9. Nevertheless, the Council suggests that some of the changes would be materially important, and would have formed part of the description of development. The Council refers particularly to alterations relating to the provision of steps and a platform lift to the front of the building, the inclusion of lightwells to the front and sides of the building, the addition of a lift overrun, and excavation works to the rear to create private amenity space.
10. At my visit, I saw fairly small terraces to the rear of the existing dwellings and beyond these, gardens which generally slope gently upwards away from the buildings. Under the original permission, the building would be of greater depth

² Paragraph: 017 Reference ID: 17a-017-20140306

³ Paragraph: 001 Reference ID: 17a-001-20140306

⁴ Paragraph: 014 Reference ID: 17a-014-20140306

⁵ Finney v Welsh Ministers, Carmarthenshire County Council and Energiekontor (UK) Ltd [2019] EWCA Civ 1868 dated 5 November 2019

than these dwellings and would include a basement. There would be private amenity space to the rear of the basement level flats with stepped retaining walls to their rear and large lightwells above. The amenity spaces would be significantly below the surrounding existing ground levels, and would therefore entail reasonably significant excavation works in addition to those required to accommodate the basement itself.

11. The appeal would result in excavation across a larger area around the building, including amenity spaces of increased depth to its rear. There would also be additional lightwells to the front and side of the building. However, the resulting differences in land levels on the site in comparison to the original permission, as well as the depth of the additional lightwells, would be fairly modest. As a result, and noting also the location of the lightwells at the new ground level, the effect and visual impact of the changes would not be significant. Moreover, I note that the appeal would see a reduction in the depth below the existing ground level of the basement. The change to the amount of excavation required immediately to the rear of the building to accommodate the amenity spaces would therefore be fairly small overall.
12. Excavation works and lightwells are part of the development approved under the original permission but were not included within the description. Given the above factors, I see no reason that the proposal would fundamentally alter the development, nor that specification of excavation works or lightwells within the description of development would now be necessary.
13. The lift overrun would be of fairly small height, width and depth. Its position towards the rear part of the building and the relationship of the development with the neighbouring properties also means that views of it from the surrounding area would be fairly limited. As a consequence, it would be an unobtrusive feature which would not significantly alter the appearance or overall scale of the development on the site, or change the nature of the development approved. In my experience, it is not unusual that lift overruns are not specifically mentioned within development descriptions, and given the limited scale and visual impact of the overrun on both the development and wider area, I see no reason that direct reference to this element would be necessary in this case.
14. Alterations to the front of the building would be more visible from the street scene, and would include the addition of steps and an external lift platform. Nevertheless, while they would alter the detail of how the building would be accessed, these aspects would not fundamentally alter the essence of the approved development. The original permission would also entail significant changes from the current frontage to the appeal site, and the steps and platform would be seen against the much larger form of the building behind. In this context, I find that the overall effect of the revisions on the appearance of the building and site would not be substantial. Moreover, while I did not see examples directly comparable to the proposed steps and lift platform, I noted steps up to some buildings as an established feature of the area, and observed significant variety in the arrangement, surfacing and boundary treatment of frontages to other buildings in the vicinity of the site. Given this variety, the development would not appear significantly out of character or incongruous.
15. I accept that the description of the original permission does refer to vehicle parking and refuse storage associated with the development. However, it does

not stipulate the access or landscaping within the site, or the nature of the stepped treatment indicated to the boundary with 56 Shakespeare Road. As these would also form a notable part of the approved scheme, it is apparent that the description of development is not exhaustive with regard to the alterations to the site frontage. Given also that the proposal would not fundamentally alter the development, I do not consider that the absence of specific mention within the description of the steps or lift platform would result in conflict with the substance of the development now proposed.

16. The Council has not raised specific concerns regarding the other alterations proposed by the appeal. There would be changes to the proportions of the building, but slight increases to the height of the roof, ground floor depth and addition of terraces would be offset in part by the reduction in width. The overall difference would therefore be relatively minor. Revisions to fenestration and detailing would be cosmetic, and would not significantly change the appearance of the building. The development would therefore remain sympathetic to the varied design, form and scale of buildings in the vicinity.
17. For these reasons, I am satisfied that even taken together, the proposal would not result in fundamental or substantial modifications to the development previously approved. I also find no conflict between the terms of the development shown by the drawings at condition 2 and the description of the development which appears on the face of the original permission. As a consequence, the proposal would not amount to a change to the operative part of the planning permission.
18. In reaching this view, I have considered an appeal decision at 72 Chester Square, London⁶ where it was held that a proposal under section 73 of the Act for changes to development previously approved would be unlawful. However, the Inspector in that case found that the amendments sought included a change to extend a closet wing by an additional storey to third floor level, resulting in a clear conflict with the description of the original permission which referred to '*extension to rear closet wing at second floor level*'. It was also held that the use of punctuation within the description of the original permission divided the development into a number of discrete elements, and did not give scope for additional elements to be added.
19. It is not therefore directly comparable to the appeal before me where the changes sought would not result in inherent conflict between the development shown on the drawings and the description of the original permission, and where that description does not provide an exhaustive inventory of the development as discrete elements.
20. With regard to the PPG and the judgement in *Finney*, I am satisfied that the proposal would not amount to a substantial or fundamental modification to the original permission nor necessitate a change to the description of the original permission. I conclude that it constitutes a minor material amendment under section 73 of the Act, and that it would not be unlawful to allow the appeal.
21. I also note that the Council has considered the effect of the proposal on matters including the character or appearance of the area, living conditions for existing and future occupiers, trees and highways and that subject to conditions, it has no further concerns over its acceptability. From the evidence

⁶ Appeal references APP/X5990/W/19/3226793 and APP/X5990/Y/19/3226794

provided and my observations at my visit, I have no reason to reach a different view. Accordingly, I find no conflict with Policies CS NPPF or CS1 of Barnet's Local Plan Core Strategy 2012 or Policy DM01 of Barnet's Local Plan Development Management Policies 2012. These policies outline a presumption in favour of sustainable development in accordance with the provisions of the National Planning Policy Framework (the Framework), and seek, amongst other things, housing growth in well located areas which creates a quality environment and development that protects Barnet's character and amenity.

Other Matters

22. I have noted representations by interested parties. The appeal would not alter the number of flats within the building or the levels of parking provided in comparison to the original permission. Although there would be a slight increase in the number of potential occupiers, there is no compelling evidence of existing parking pressure nearby which could be exacerbated by the development nor that the proposal would be detrimental to the safety or operation of the highway network. There would be revisions to the design of the dormers to the sides of the building. However, the extent and position of glazing within them would not be significantly altered so as to allow additional views or increased harmful overlooking.

Conditions

23. The Council has suggested conditions which reflect those attached to the original permission. I have considered these in light of paragraph 55 of the Framework as well as advice in the PPG, including that permission granted under Section 73 of the Act should restate conditions imposed on the earlier permission that continue to have effect, but not extend the time limit under which the original permission must be started⁷. I have amended the conditions where necessary for the sake of clarity and precision, and to avoid the use of pre-commencement conditions where this is not essential to achieve the purpose of the condition.
24. Carrying forward the numbering of conditions on the original permission, I have imposed a revised condition 1 to accord with the time limit of the original permission. For the avoidance of doubt and in the interests of certainty, I have substituted a replacement condition 2 with updated plan numbers. Details of external materials are necessary to ensure a satisfactory appearance, but I have re-imposed a modified form of condition 3 as these details are not necessary prior to the commencement of any development on the site.
25. Pre-commencement conditions regarding levels (4) construction management (8), tree protection (14) and a scheme of hard and soft landscaping (15) remain necessary in the interests of the character and appearance of the area and the living conditions of neighbouring occupiers. The appellant has agreed the wording of these pre-commencement conditions.
26. Details and implementation of boundary treatments (5), refuse and recycling storage (6), cycle storage (7) and electric vehicle charging (9) remain necessary in the interests of the character and appearance of the area and to ensure suitable provision. Conditions to require the use of obscure glazing to the sides of the building (10), provision for outdoor amenity space (11),

⁷ Paragraph: 014 Reference ID: 17a-014-20140306

internal layouts (12) and sound insulation (13) also remain necessary in the interests of the living conditions of neighbouring and future occupiers. I have therefore re-imposed these conditions, although to ensure they relate to the development permitted, I have imposed modified versions of conditions 7 and 11 to update the plan numbers in accordance with condition 2. I have also re-imposed conditions to secure carbon dioxide emission reductions (16), efficient use of water (17) and accessible and adaptable buildings (18) which remain necessary to ensure the sustainability of the development and to meet the needs of future occupiers.

Conclusion

27. For the reasons given above, and subject to the conditions listed, I conclude that the appeal should be allowed.

J Bowyer

INSPECTOR

Schedule of Conditions

- 1) The development hereby permitted shall begin not later than 1 May 2021.
- 2) The development hereby permitted shall be carried out in accordance with the following approved plans: 50SR-PP1-01; 50SR-PP1-02; 50SR-PP1-03; 50SR-PP1-04; 50SR-PP1-05; 50SR-PP1-06; 50SR-PP1-07; 50SR-PP1-08 and 50SR-PP1-09.
- 3) No development above finished ground level shall take place until details of materials to be used in the external surfaces of the proposed building and hard-surfaced areas have been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved details.
- 4) No development shall take place until details of the levels of the building and associated works in relation to the adjoining land and highway have been submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved details.
- 5) The development hereby approved shall not be brought into use or first occupied until details of the means of enclosure, including boundary treatments, have been submitted to and approved in writing by the Local Planning Authority. The measures shall be implemented as approved before the development is first occupied and retained in such use thereafter.
- 6) Before the development hereby permitted is first occupied, details of enclosures and screened facilities for the storage of recycling containers and wheeled refuse bins or other refuse storage containers where applicable, together with a satisfactory point of collection, shall be submitted to and approved in writing by the Local Planning Authority. The details shall be implemented as approved before the development is first occupied and retained in such use thereafter.
- 7) Before the development hereby permitted is first occupied, parking spaces, cycle parking and turning spaces shall be provided and marked out within

the site in accordance with Drawing no. 50SR-PP1-05. Thereafter, the parking spaces shall be used only as agreed and will not be used for any purpose other than the parking and turning of vehicles in connection with the approved development.

- 8) No development or site works shall take place on site until a 'Demolition and Construction Management and Logistics Plan' has been submitted to and approved in writing by the Local Planning Authority. The submitted plan shall include, but not be limited to, the following, and shall be implemented before the start of demolition or construction and be retained until completion:
 - i) details of the routing of construction vehicles to the site, hours of access, access and egress arrangements within the site and security procedures;
 - ii) site preparation and construction stages of the development;
 - iii) details of provisions for recycling of materials, the provision on site of a storage/delivery area for all plant, site huts, site facilities and materials;
 - iv) details showing how all vehicles associated with the construction works are properly washed and cleaned to prevent the carriage of mud and dirt onto the adjoining highway;
 - v) the methods to be used and the measures to be undertaken to control the emission of dust, noise and vibration arising from construction works;
 - vi) a suitable and efficient means of suppressing dust, including the adequate containment of stored or accumulated material so as to prevent it becoming airborne at any time and giving rise to nuisance;
 - vii) noise mitigation measures for all plant and processors;
 - viii) details of contractors compound and car parking arrangements;
 - ix) details of interim car parking management arrangements for the duration of construction;
 - x) details of a community liaison contact for the duration of all works associated with the development.
- 9) Before the development hereby permitted is occupied, full details of the electric vehicle charging points to be installed in the development shall have been submitted to the Local Planning Authority and approved in writing. These details shall include provision for not less than 1 electric charging point accessible by two parking bays. The installation shall be implemented in accordance with the approved details prior to first occupation and thereafter be maintained as such.
- 10) Before the development hereby permitted is first occupied the ground and first floor proposed windows in the side elevations facing no.56 Shakespeare Road and Shakespeare Court shall be glazed with obscure glass only and shall be permanently retained as such thereafter and shall be permanently fixed shut with only a fanlight opening.
- 11) Before the development hereby permitted is first occupied, the outdoor amenity space for each proposed dwelling shall be implemented in accordance with the details shown on drawing no. 50SR-PP1-05 and shall be retained as such thereafter.
- 12) The layout of the residential units as indicated on the plans hereby approved shall be implemented and retained as such thereafter.

- 13) Before the development hereby permitted is first occupied, details of sound insulation measures between flats shall be submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in accordance with the approved details, which shall be implemented before first occupation of the flats.
- 14) No site works (including any temporary enabling works, site clearance and demolition) or development shall take place until the temporary tree protection measures detailed in the submitted Arboricultural Impact Assessment, Method Statement and Tree Protection Plan have been erected around existing trees on site. This protection shall remain in position until after the development works are completed and no material or soil shall be stored within these fenced areas at any time. The development shall be fully implemented and strictly adhered to in accordance with the protection plan and method statement detailed in the document.
- 15) No development shall take place until a scheme of hard and soft landscaping, including details of existing trees to be retained and size, species, planting heights, densities and positions of any soft landscaping, has been submitted to and agreed in writing by the Local Planning Authority. All work comprised in the approved scheme of landscaping shall be carried out before the end of the first planting and seeding season following occupation of any part of the buildings or completion of the development, whichever is sooner. Any existing tree shown to be retained or trees or shrubs to be planted as part of the approved landscaping scheme which are removed, die, become severely damaged or diseased within five years of completion of the development shall be replaced with trees or shrubs of appropriate size and species in the next planting season.
- 16) Prior to the first occupation of the development hereby approved it shall be constructed incorporating carbon dioxide emission reduction measures which achieve an improvement of not less than 6% in carbon dioxide emissions when compared to a building constructed to comply with the minimum Target Emission Rate requirements of the 2010 Building Regulations. The development shall be maintained as such in perpetuity thereafter.
- 17) Prior to the first occupation of the development hereby approved it shall be constructed to have 100% of the water supplied to the dwellings by the mains water infrastructure provided through a water meter(s) and each new dwelling shall be constructed to include water saving and efficiency measures that comply with Regulation 36(2)(b) of Part G 2 of the Building Regulations to ensure that a maximum of 105 litres of water is consumed per person per day, with a fittings based approach used to determine the water consumption of the proposed development. The development shall be maintained as such in perpetuity thereafter.
- 18) Notwithstanding the details shown in the drawings submitted and otherwise hereby approved, prior to the first occupation of the new flats hereby permitted they shall all have been constructed to meet and achieve all the relevant criteria of Part M4(2) of Schedule 1 to the Building Regulations 2010 (or the equivalent standard in such measure of accessibility and adaptability for house design which may replace that scheme in future). The development shall be maintained as such in perpetuity thereafter.

End of Schedule