



Appeal Decision

Site visit made on 15 February 2021

by Kim Langford Tejrar LLB (Hons) BSc (Hons) PGDIP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 March 2021

Appeal Ref: APP/G5180/W/20/3260625

3 Beckenham Road, Beckenham, BR3 4ES

- 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 Joseph Samuel Corporation against the decision of London Borough of Bromley.
 - The application Ref DC/16/04145/RECON3, dated 09/07/2020, was refused by notice dated 04 September 2020.
 - The application sought planning permission for 'Construction of a part one and two storey upper level extension to provide an additional two storeys comprising 8 two bedroom flats with associated parking, refuse and recycling' without complying with a condition attached to planning permission Ref 16/04145/FULL1, dated 22 December 2016.
 - The condition in dispute is No 2 which states that: 'The development hereby permitted shall not be carried out otherwise than in complete accordance with the plans approved under this planning permission unless previously agreed in writing by the Local Planning Authority.
 - The reason given for the condition is: 'In order to comply with Policy BE1 of the Unitary Development Plan and in the interest of the visual and residential amenities of the area'.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. This appeal is against the refusal by the Council of an application for planning permission to carry out the development described above without complying with a condition imposed on the original planning permission (OPP). The relevant condition relates to the requirement to construct the development in accordance with the approved plans for that permission. The Appellant wishes, instead, to seek a new grant of planning permission with an amended condition including an amended list of plans, to enable an alternative roof design.
3. The parties agree that the OPP is extant, in that the planning permission had begun before the time limit (condition one of the OPP) had elapsed. The parties are thus in agreement that it is possible, in theory, to 'vary' or 'remove' the conditions of the OPP. The development has not progressed and the existing conditions have not been breached.

4. The Council amended the description of development to reflect that the proposal related to a condition of the OPP. The amended description is *"Application under Section 73 of the Town and Country Planning Act 1990 for the variation of condition 2 of permission 16/04145/FULL1 (granted for construction of a part one and two storey upper level extension to provide an additional two storeys comprising 6 two bedroom and 2 one bedroom flats with associated parking, refuse, and recycling) in order to vary the approved plans by altering the design of the roof from a flat roof to a lightweight pitched zinc roof"*. I have utilised the description from the application form (and OPP) for reasons addressed below.

Main Issues

5. The main issues for the appeal are:
- Whether condition two should be removed, and if not,
 - Whether amending condition two would result in a conflict between the condition as amended and the description of development; and,
 - Whether modifying condition two or attaching a new condition would materially alter the development.

Reasons

Removal of condition two

6. Planning conditions should be kept to a minimum and only imposed where they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind to the development.
7. Condition two seeks to ensure that the development permitted by the OPP is carried out in accordance with the approved plans for that planning permission. The OPP was a full planning permission and thus the Council's decision was based on the full and detailed design put forward in the application. The stated justification for condition two was to ensure the visual and residential amenities of the area.
8. The site has an extensive planning history and other proposals at the appeal site for similar schemes of different designs did not receive a grant of planning permission. It is thus clear that condition two was necessary to ensure the development was carried out in the form which it had been approved, as it was this form that had made the development acceptable in planning terms. The condition was not onerous and was both directly related to the development and fairly and reasonably related to it in scale and kind.
9. Good design is a key aspect of sustainable development and the imposition of such conditions is essential to securing that design. The removal of condition two would not serve the interests of securing good design and it should not be wholly removed.

Whether a conflict with the description of development would arise

10. The Council sought to amend the description of development to better reflect the nature of the section 73 application. However, when an application to vary or remove a condition is made, the OPP is not at risk; it remains intact and

unamended. This is because the effect of a successful application to vary or remove is to grant a new permission for the development without the disputed condition, or with an amended version of that condition 'reimposed'. As such, it is not necessary to amend the description of development and I have thus referred to the original description. In fact, if the effect of varying a condition would be to create a conflict between the condition as amended and the description of development, such an amendment should not be made¹.

11. The variation for condition two would be to refer to alternative approved plans, to allow the originally permitted flat roof to be amended to a light-weight pitched zinc roof. The description of development on the OPP does not make any specific reference to the type and appearance of the roof, and the amendment would not make any other changes to the development as described (for example, it would not change the quantum or type of accommodation as proposed). Consequently, the proposed variation of condition two would not alter the development as described in the original description of the OPP.

Whether the variation would materially alter the OPP

12. Section 73(2) is clear that decision makers shall only consider the question of the conditions subject to which planning permission should be granted and the NPPG further advises that decision makers should only consider the disputed conditions that are subject to the application, rather than reconsider the application as a whole².
13. To this point, the Appellant submits that the Council has gone beyond the condition in considering the impact of the proposed amended roof design on the character and appearance of the surrounding area. Both parties have referred to justifications for the variation or the effect of the variation on the character and appearance of the area (including effect on nearby listed buildings), which relate to the merits of the development as a whole.
14. However, as a successful application to vary or remove a condition would result in a grant of a new planning permission, that variation should not fundamentally alter the OPP. This ensures the resulting development is materially the same as the OPP; in the interests of openness and natural justice. As such, a variation of a condition can result in a 'minor material amendment' but not a more material amendment³. It is therefore correct to compare and contrast the OPP and proposed variation in order to determine whether the variation would fundamentally change the development.
15. There is no statutory definition of a 'minor material amendment', but the NPPG advises it is likely to include any amendment where its scale and/or nature results in a development which was not substantially different than the one which has been approved⁴. The description of development and overall type of development would remain unchanged by the variation of condition two. However, the replacement of the approved flat roof with a pitched zinc roof would increase the scale and prominence of the development, would create a significantly different external appearance, would result in a development constructed in starkly different materials to that of the OPP and a development

¹ Finney v Welsh Ministers & Others [2019] EWCA Civ 1868

² NPPG Paragraph Reference ID 21a-031-20180615.

³ Finney v Welsh Ministers & Others [2019] EWCA Civ 1868

⁴ NPPG Paragraph 017 Reference ID: 17a-017-20140306.

which may have different energy efficiency credentials. In this respect, amongst others, I concur with my fellow Inspector that "*the proposal would alter the form of the building considerably*". It is therefore also likely that different effects and planning considerations would arise from the variation. As such, the variation would go beyond a minor material amendment.

16. In this event, there is no reason why requiring a fresh planning application should be objectionable. Indeed, such an application would necessarily take into account the justifications and wider effects of the amended design. The Appellant has referred to its subsequent attempt to make such an application; this application was not considered valid by the Council and was subject to a separate appeal which I have not dealt with⁶. This remains a separate matter and cannot change the materiality of any variation or the outcome of this appeal.

Other Matters

17. Notably, the existing condition two does not list the existing approved plans within the condition itself; it merely refers to the list on another part of the decision notice. As such, it is not the condition which needs variation, but an approved plans list, which is not part of the condition. The National Planning Practice Guidance (NPPG) advises that section 73 cannot be used to make minor material amendments if there is no relevant condition in the permission listing the originally approved plans, though it is possible to seek the addition of a condition listing plans using an application under section 96A of the Town and Country Planning Act 1990⁷. This would then enable the use of a section 73 application to make minor material amendments⁸.
18. In this case, matters are somewhat complicated as condition two is an approved plans condition, but it does not list the approved plans. Given that a successful application would result in a new decision notice, that condition two is an approved plans condition and that the application seeks to vary that condition, it would be possible to incorporate a varied list of approved plans into that condition. However, such a variation would need to comply with other requirements, and for the reasons set out above, it would not comply.

Conclusion

19. For the reasons stated above, I find that the proposed variation of condition two would result in a material amendment to the OPP. The appeal is therefore dismissed.

Kim Langford Tejrar

INSPECTOR

⁵ Paragraph 10 Decision Letter APP/G5180/W/20/3252586.

⁶ APP/G5180/W/20/3252586.

⁷ Section 96A Town and Country Planning Act 1990- Power to make non-material changes to planning permission.

⁸ NPPG Paragraph 018 Reference ID:17a-018-20140306.