



Appeal Decision

Site Visit made on 14 September 2021

by David Wyborn BSc(Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 05 October 2021

Appeal Ref: APP/K5600/W/21/3270637

4 Campden Street, London W8 7EP

- 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 K O'Callaghan (Airspace UK Ltd) against the decision of the Royal Borough of Kensington and Chelsea.
 - The application Ref PP/20/06560, dated 24 November 2020, was refused by notice dated 11 February 2021.
 - The application sought planning permission for the partial change of use of lower-ground floor level ancillary shop floorspace (Use Class A1) to create a one bedroom home (Use Class C3) with integral rear outdoor amenity area while retaining storage space for ground floor retail unit at no.4 plus associated external alterations at rear lower ground floor level without complying with a condition attached to planning permission Ref PP/20/00083, dated 25 September 2020.
 - The condition in dispute is No 2 which states that: Except as required by condition 4, the development shall not be carried out except in complete accordance with the details shown on submitted plans A_PL_500; A_PL_550; A_PL_009; A_PL_010; A_PL_020; A_PL_021; A_PL_040; A_PL_050; A_PL_051; A_PL_099; A_PL_100; A_PL_200; A_PL_201 and; A_PL_400.
 - The reason given for the condition is: The details are material to the acceptability of the proposals, and to ensure accordance with the development plan.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. Planning permission was granted (Council reference PP/20/00083) for the provision of an independent residential unit within part of the basement of the appeal property. About a quarter of the basement floorspace was shown to be retained as retail storage space. The retention of this storage space was specifically referenced in the description of the development and shown on the approved plans.
3. Application reference PP/20/06560 was submitted to vary condition 2 of the earlier approval. This sought to replace the approved plans with alternative plans that would enable the ground floor area shown to be retained as retail storage space to be used as a home office/play room as part of the residential floorspace. The application was made under s73 of the Town and Country Planning Act 1990 (as amended) (the Act). The effect of an approval of an application made under s73 is to grant a new planning permission, but with the same description of the development as originally permitted.

4. I am conscious of the judgement in *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868, where the Court of Appeal held that an application under s73 may not be used to obtain a permission that would require a variation to the terms of the “operative” part of the planning permission i.e. the description of the development for which planning permission had originally been granted.
5. The views of the Council and the appellant have been sought regarding the implications of the *Finney* judgement to the present appeal.
6. The appellant has responded by explaining that, in summary, while the description of the development has referenced the retention of the storage area, this was already its lawful use and did not require planning permission. It, therefore, was not part of the operative elements of the development proposal and only included for information purposes. It is argued that the amendment to the approved drawings would not therefore result in a conflict with the development as sought in the original permission. Furthermore, the Council accepted the submission as a lawful proposal and determined it as a s73 application.
7. I accept that at the time of the original submission the retention of the storage area within the basement did not require planning permission. However, the retention of the retail storage use was referenced in the description of the development (and the accompanying legal agreement) and the planning permission was granted on that basis. Importantly in terms of these considerations, the extension of the permitted residential area to now incorporate the storage area requires planning permission in its own right as it would be a change to the lawful use of this section of the basement.
8. I have carefully considered the submissions from the appellant on this matter. However, as the description of the development specifically references the retention of retail storage space, if permission was to be granted to amend the plans as submitted, the effect of the proposal would be to create a conflict between the description of the development and the details of the scheme. The retail storage space would not be retained as described in the description of the original development. To grant such a permission would require the description of the development to be altered which, in accordance with the *Finney* judgement, is beyond the scope of an application under s73. In these circumstances, a fresh planning application would be required.
9. I appreciate that this is frustrating for the appellant who would wish me to examine the substantive merits of the proposal. However, this is not possible because I cannot consider the proposal as a s73 application. The fact that the Council did so does not alter my conclusion on this matter.

Conclusion

10. For the reasons explained above, I conclude that the submission to amend the original planning permission by the variation of a condition to allow the use of the retail storage space to be incorporated into the approved residential unit, is beyond the scope of a s73 application. This would require the submission of a fresh planning application. Consequently, I conclude that the appeal should be dismissed.

David Wyborn INSPECTOR