



Appeal Decision

Site Visit made on 28 September 2021

by Rachel Hall BSc MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 October 2021

Appeal Ref: APP/G3110/W/21/3276019

31 Glebelands, Oxford, Oxfordshire OX3 7EN

- 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 Damian Hegarty against the decision of Oxford City Council.
 - The application Ref 21/00526/VAR, dated 29 January 2021, was refused by notice dated 11 May 2021.
 - The application sought planning permission for erection of a two storey garden outbuilding from lower ground level to provide ancillary accommodation without complying with a condition attached to planning permission Ref 16/01322/FUL, dated 12 August 2016.
 - The condition in dispute is No 5 which states that: *The approved outbuilding shall only be used for garden room/storage and a family office or any other purpose incidental to the enjoyment of the dwellinghouse at 31 Glebelands. The outbuilding shall not be used for primary living accommodation or a business use and no cooking facilities shall be installed within the outbuilding unless agreed otherwise in writing by the Local Planning Authority.*
 - The reason given for the condition is: *To ensure that the level of activity in the outbuilding does not give rise to an unacceptable impact on the amenity of neighbouring occupiers through increased disturbance in a previously quiet plot as required by Policies CP1 and CP10 of the Oxford Local Plan 2001-2016 and Policy HP10 of the Sites and Housing Plan (2013).*
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Decision

1. The appeal is allowed and planning permission is granted for the erection of a two storey garden outbuilding from lower ground level to provide ancillary accommodation at 31 Glebelands, Oxford, Oxfordshire OX3 7EN in accordance with the application Ref 21/00526/VAR dated 29 January 2021, without compliance with condition numbers 1, 2, 3, and 5 previously imposed on planning permission Ref 16/01322/FUL, dated 12 August 2016, and subject to the following conditions:
 - 1) The approved outbuilding shall only be used for garden room/storage and a family office or any other purpose incidental to the enjoyment of the dwellinghouse at 31 Glebelands. The outbuilding shall not be used for primary living accommodation or a business use.
 - 2) Prior to commencement of development details of the proposed drainage scheme shall be submitted to the local planning authority for their approval. All extensions/developments which increase the size of hard areas must be drained using Sustainable Drainage measures, including porous pavements to decrease the run off to public surface water sewers and thus reduce flooding. Soakage tests shall be carried out to prove the

effectiveness of soakaways or filter trenches and demonstrate the surface water can be adequately treated prior to discharge to a sensitive receptor such as a SSSI. Where infiltration is not feasible surface water should be attenuated on site and discharged at a controlled discharge rate no greater than prior to development using appropriate on surface sustainable drainage measures.

- 3) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 1995 (or any order revoking or enacting that Order) no additional windows shall be constructed on any elevation of the outbuilding hereby approved.

Procedural Matter

2. Although the appeal is allowed, this relates only to a variation to condition 5 to remove the restriction on installation of cooking facilities. As such, the requirement for the appeal building to be for uses incidental to the enjoyment of the main house and not as primary living accommodation or for business use, remains as part of the condition allowed by this appeal decision.

Background and Main Issues

3. Planning permission was granted in 2016¹ for the erection of a two storey garden outbuilding, and its construction appears to have been completed. The dispute between the main parties relates to condition 5 of that planning permission, as opposed to other matters. Notwithstanding section 79(1)(b) of the Town and Country Planning Act 1990 as amended, there is nothing before me to lead me to approach the appeal other than assessing that condition alone (in line with the advice in the Planning Practice Guidance²).
4. The disputed condition restricts occupancy of the accommodation to that in connection with the existing dwelling, and prevents it being used as a separate independent unit. It also prevents the installation of cooking facilities. The reason for the condition set out on the original decision notice was to protect the living conditions of neighbouring occupants. The appeal seeks permission for the development without complying with the disputed condition.
5. The judgement handed down in *Finney v Welsh Ministers and Others* [2019] EWCA Civ 1868 (herein referred to as *Finney*) held that an application under section 73 of the Act could not be used to obtain planning permission that requires a variation to the terms of the 'operative' part of the planning permission. *Finney* established that amendments cannot be made to conditions such that a discrepancy would be created with the description of development. The Council has made reference to *Finney* in their submission and I am therefore satisfied that both parties have had the opportunity to comment on its implications for this appeal.
6. The Council contend that the proposal would fundamentally alter the development allowed under the original permission such that the permission that is now sought would be beyond the scope of section 73 of the Act. The appellant states that removal of the condition would not alter the original description of development. In addition, whilst the appellant's original section 73 application sought only to remove the disputed condition, it is clear from the

¹ Planning permission Ref 16/01322/FUL

² Reference ID: 21a-031-20180615

appeal submissions that they would accept an amendment to the condition to remove only the provision restricting installation of cooking equipment.

7. Accordingly, and notwithstanding the Council's first refusal reason, the main issues are:

- whether section 73 of the Act allows the development granted by the original permission without the disputed condition; and
- whether section 73 of the Act allows the development granted by the original permission with a variation to the disputed condition to remove the restriction on installing cooking facilities, and the effect of doing so on the living conditions of neighbours.

Reasons

Whether section 73 of the Act allows the development without the disputed condition

8. The 'operative' part of the original permission makes explicit reference to the approved development being ancillary accommodation rather than a separate independent dwelling. The original permission does not reference the creation of a new dwelling separate from 31 Glebelands, notwithstanding that the building is separate from the main dwelling with its own front door. Although the appeal is submitted on the basis that the building would be used as ancillary accommodation, removal of condition 5 would allow a fundamental change in the use of the building to a separate, independent dwelling to 31 Glebelands.
9. Notwithstanding whether the use of the accommodation as an independent dwelling would create acceptable living standards for its future occupants or harm to neighbouring occupants, the removal of this condition would create a discord between the operative part of the original planning permission which refers to the accommodation being ancillary, and that which would be permitted by the appeal. As such, and in light of the *Finney* judgement, I conclude that section 73 of the Act does not allow the development granted under the original planning permission without the disputed condition. It would instead be necessary for an application to be made seeking approval for the change of use of the building.

Whether section 73 of the Act allows a variation to the disputed condition, to remove the restriction on installing cooking facilities, and its effect on the living conditions of neighbours

10. I accept that the appeal building is not directly adjoining the main house, has a separate door for access, and could be said to contain the facilities necessary for day-to-day living, albeit on a small scale. Nevertheless, occupants of the appeal building would make use of the shared driveway with the main house for access and parking, and would also share its garden. The appellant states that all utilities and services for the outbuilding are also shared with the main house and there is no robust evidence before me to the contrary. I note also that the outbuilding is considerably smaller than the main house and located in close proximity to it, giving it the appearance of an ancillary building rather than an independent dwelling. In any event, variation of the condition as proposed would retain the requirement for use of the outbuilding to be limited to that which is incidental to the enjoyment of the main house.

11. For these reasons I am satisfied that a variation to remove the restriction on installation of cooking facilities in the outbuilding would not result in a discrepancy with the original description of development. Having regard to *Finney*, in the circumstances of this case, I conclude that such a variation to the disputed condition would be allowed under section 73 of the Act. Whilst reference has been made to an enforcement action in respect of use of the appeal building as a self-contained dwelling, that use is understood to have ceased. In any event, full details in respect of that matter are not before me and consequently it does not materially alter my assessment of this matter.
12. In respect of the effect of such variation on the living conditions of neighbours, I note that the appeal building adjoins an outbuilding in the adjacent garden, this providing an element of screening of the development for neighbouring occupants of that house. In addition, the land slopes steeply such that houses behind the appeal site are positioned lower than the appeal garden. Combined with its limited window openings, I am satisfied that the provision of domestic cooking facilities within the outbuilding would not unacceptably harm living conditions of neighbouring occupants. No robust evidence is before me to the contrary.
13. Therefore, I conclude that variation of the disputed condition to remove the restriction on installation of cooking facilities would not unacceptably harm the living conditions of neighbours. Consequently, it would accord with Policy RE7 of the Oxford Local Plan 2036 (June 2020) which, amongst other matters, seeks to ensure the amenity of neighbours is protected.

Conclusion and Conditions

14. Accordingly, I conclude that the appeal should be allowed and grant a new planning permission with revised wording for the disputed condition. The only change to the disputed condition is to remove the requirement that no cooking facilities be installed within the appeal building. I have retained those non-disputed conditions from the previous permission that appear still to be relevant, having regard to the Council's suggested conditions in the event that the appeal were to be allowed.
15. The Planning Practice Guidance further advises that, in granting permission under section 73, the local planning authority may also impose new conditions. That is provided that such conditions do not materially alter the development that was subject to the original permission and are conditions which could have been imposed on the earlier permission. There is no information before me about the status of the drainage condition applying to the original permission, and I shall therefore impose that condition. If in fact it has been discharged, that is a matter which can be addressed by the main parties. As the development has been completed conditions relating to the commencement of development, requiring compliance with the approved plans and relating to materials are not necessary.

Rachel Hall

INSPECTOR