



Appeal Decision

Site visit made on 5 April 2022

by Paul Cooper MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 May 2022

Appeal Ref: APP/P4605/W/21/3283206

5 Lime Avenue, Birmingham B29 7AJ

- 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 Babettas UK Ltd (Mr A Babettas) against the decision of Birmingham City Council.
 - The application Ref 2021/05895/PA, dated 30 June 2021, was refused by notice dated 2 September 2021.
 - The application sought planning permission for change of use from dwelling house (Use Class C3) to 3-bed HMO (Use Class C4) and installation of dormer window to front without complying with a condition attached to planning permission Ref 2020/09687/PA, dated 13 January 2021.
 - The condition in dispute is No 3 which states that: The HMO approved shall be occupied by a maximum of three persons.
 - The reason given for the condition is: In order to define the permission and ensure a suitable standard of individual and communal living space for the occupiers, in accordance with Policy PG3 and TP27 of the Birmingham Development Plan 2017 and the National Planning Policy Framework.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Babettas UK Ltd (Mr A Babettas) against Birmingham City Council. This application is the subject of a separate Decision.

Main Issues

3. The main issue in this appeal is whether the variation of the condition would fundamentally conflict with the description and extent of the original planning permission. If it does not then the second main issue is the effect of the development on the living conditions of new residents, in terms of access to meaningful private amenity space.

Reasons

4. The main judgement relevant to this appeal is *Finney v Welsh Ministers & Others [2019] EWCA Civ 1868* (Finney) in which the Court of Appeal judgement set out that a Section 73 application may not be used to obtain a permission that would require a variation to the "operative" part of the planning permission i.e. the description of development for which planning permission had already been granted.

5. Having regard to the principles in this judgement, the description of development was specific to a 3-bed HMO (House in Multiple Occupation) and from that, Condition 3 restricted the occupation to three persons.
6. The scheme subject to this appeal would see the property become a four-bedroom unit, and the appellant seeks to amend or delete Condition 3 restricting the occupation.
7. This would be a fundamental alteration of the development already approved and result in changes to the character and nature of the building. Setting aside any merits to the changes, the proposals would result in a discrepancy with the description of development, and I were to allow the appeal there would be a knock-on effect altering the original planning permission.
8. Therefore, I conclude that the changes proposed cannot be dealt with as a Section 73 application. The effect is to dismiss the appeal, though it is open to the appellant to apply for planning permission for a revised development. To permit the variation proposed under this appeal would fail to accord with the principles set out in *Finney*. The appeal must therefore be dismissed on that ground, and without any consideration of the substantive planning matters that arise

Conclusion

9. For the reasons set out above, I conclude that the Appeal should be dismissed, and planning permission refused.

Paul Cooper

INSPECTOR