



Appeal Decisions

Site visit made on 24 May 2022

by David Cross BA(Hons) PgDip(Dist) TechIOA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 22 Sep 2022

Appeal A: Appeal Ref: APP/T5150/W/21/3277253

6-10 Hallmark Trading Centre, Fourth Way, Wembley HA9 0LB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 (the Act) for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Dharmesh Amin of NHMD Properties LLP against the decision of the Council of the London Borough of Brent.
 - The application Ref 20/3547, dated 2 November 2020, was refused by notice dated 21 December 2020.
 - The application sought planning permission for installation of bike store to rear of building and replacement fenestration with timber cladding between first and second floor windows to both front and rear elevation of building (revised description) without complying with a condition attached to planning permission Ref 17/4671, dated 27 December 2017.
 - The condition in dispute is No 2 which states that: The development hereby permitted shall be carried out in accordance with the following approved drawing(s) and/or document(s): DA/BRENT/PLN-PRO/2017/16-I, DA/BRENT/PLN-EXI/2017/015, PL/01-I, Location Plan.
 - The reason given for the condition is: For the avoidance of doubt and in the interests of proper planning.
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Appeal B: Appeal Ref: APP/T5150/W/21/3283097

6-10 Hallmark Trading Centre, Fourth Way, Wembley HA9 0LB

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Mr Dharmesh Amin of NHMD Properties LLP against the Council of the London Borough of Brent.
 - The application Ref 20/4264, is dated 23 December 2021.
 - The development proposed is retrospective approval for changes to front and rear elevation fenestration and installation of cycle store to rear of the building.
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Decisions

Appeal A: Appeal Ref: APP/T5150/W/21/3277253

1. The appeal is dismissed.

Appeal B: Appeal Ref: APP/T5150/W/21/3283097

2. The appeal is allowed, and planning permission is granted for changes to front and rear elevation fenestration and installation of cycle store to rear of the

building at 6-10 Hallmark Trading Centre, Fourth Way, Wembley HA9 0LB in accordance with the terms of application Ref 20/4264, dated 23 December 2021 subject to the following conditions:

- 1) The development hereby permitted (except in respect of the roof projection for lift / stair shaft overrun) shall be carried out in accordance with the following approved plans and document:
Site & Location Plan (Ref: 1152 P-501);
Roof Plan (Ref: 1152 P-502);
Proposed Elevations (Ref: 1152 P-503); and
Preliminary Risk Assessment, RSK 29861-R01(00) - June 2018
- 2) The materials used in any exterior work must be of a similar appearance to those identified on the information submitted with the application.

Application for Costs

3. An application for costs was made by Mr Dharmesh Amin of NHMD Properties LLP against the Council of the London Borough of Brent. This application is the subject of a separate Decision.

Procedural Matters

4. There is some variation in the address of the appeal site as given in both appeals. However, I have taken the address from that given on the application forms as I consider that this accurately reflects the location of the site.
5. A plan titled 'Streetscene' was submitted in respect of both appeals. These plans had the same reference number¹, although the contents differed between each appeal submission. I queried this matter with the appellant, who has provided a document in respect of Appeal B with an amended reference². The Council has had the opportunity to comment on this. Other than the reference, the content of the plan in respect of Appeal B has not changed, and no party would therefore be prejudiced by my considering the plan on the basis of the amended reference. However, as the amended document only consists of photographs of the building I have not referred to this in my decision.
6. With regards to Appeal A, the description of development given on the application and appeal forms differs from that given on the Council's original decision notice. As applications under Section 73 of the Act relate to the development as originally permitted, I have used the description as given on the Council's decision notice ref. 17/4671.
7. In respect of Appeal B, the appellant has provided plans³ which show the internal layout of the building, including residential units. However, the internal layout of the building does not fall within the remit of this appeal, and the Appeal Form sets out that these plans did not form part of the original application. I have therefore not referred to these plans in my decision.
8. Further in respect of Appeal B, I have removed reference to the retrospective nature of the proposal in my decision as this is not an act of development.

¹ Plan Ref: 1152 P-504

² Plan Ref: 1152-P-505

³ Ground Floor GA (Ref: 1152 A-01 L); First Floor GA (Ref: 1152 A-02 T); and Second Floor GA (Ref: 1152 A-03 S).

Background and Main Issue

9. The appeal site has a complex planning history, including a prior approval⁴ granted for the change of use of the site from offices to residential use and a separate planning permission⁵ granted for development including the installation of a bike store, replacement fenestration and timber cladding. Both the prior approval and the planning permission were issued on 27 December 2017. The evidence suggests that it was intended to implement both schemes together. However, the appeal proposals before me are not dependant on the prior approval, and could be implemented separately. This reflects the Legal Opinion provided by the appellant.
10. The appeals before me relate to operational development consisting of external alterations at the site, and not a change of use. Appeal B refers to the retrospective nature of the proposal, and I saw that development had commenced on site which reflected the plans submitted in respect of both appeals.
11. Despite minor variations in the description of development, both of the appeals before me in effect relate to the same development; namely alterations to the front and rear elevations including fenestration and cladding, and the construction of a cycle store to the rear.
12. In respect of Appeal A, the Council considers that the proposal does not comply with Section 73 of the Act as changes to the building do not relate to the planning permission ref 17/4671. In particular, the Council refers to works including the removal of the facades and roof of the building as well as a projection to the roof for a lift shaft.
13. With regards to Appeal B, the Council submits that works undertaken do not comply with the prior approval or the planning permission, and go significantly beyond the retrospective works which form the basis of the appeal. It considers that large elements of the building are unlawful and the description of development does not accurately reflect the development for which retrospective consent is sought.
14. As set out above there are 2 appeals on this site, which differ primarily in the procedure used in respect of each application. I have considered each proposal on its individual merits. However, to avoid duplication I have dealt with the 2 schemes together, except where otherwise indicated.
15. Drawing the above together, I consider that the main issue in respect of both appeals is whether it would be lawful or reasonable to allow the proposals given the planning history of the site.

Reasons

16. Despite some variation in wording in the descriptions of development, in effect the proposals relate to operational development including changes to the elevations of the host building, as well as the construction of a cycle store. Whilst there may be other details shown on plans provided by the appellant, including the internal layout and use of the building, these are not matters which fall within the remit of the descriptions of the proposed developments.

⁴ Application Ref: 17/4679

⁵ Application Ref: 17/4671

Appeal A

17. The application which is the subject of Appeal A was made under Section 73 of the Planning Act for minor material amendments to a development originally approved. This type of application is possible as a condition was imposed on the original permission specifying the approved plans.
18. Reference has been made to the *Finney*⁶ judgment, which addresses the powers conferred by section 73 with regards to the nature of what was permitted and the description of development. The *Finney* case related to an appeal against a condition which limited the tip height of a wind turbine, and as a result the height would be increased from 100m to 125m. The 100m tip height was stated in the description of the development, and in allowing the appeal the Inspector changed the description to remove the reference to tip height. The Court of Appeal determined that that change was outside of the power conferred by section 73.
19. Mindful of *Finney*, the description of the approved development which forms the basis of Appeal A refers to "...replacement fenestration with timber cladding between first and second floor windows...". The amendments proposed go beyond the scope of that description, including the removal of windows and the introduction of rendered infill panels. Given the specific wording of the description of development, I am also mindful that *Finney* confirms that a condition altering the nature of what was permitted would be unlawful.
20. Therefore, in respect of Appeal A, I conclude that it would not be lawful or reasonable for me to proceed to consider this appeal as it would be beyond my powers to do so under section 73. On that basis, the appeal should be dismissed.

Appeal B

21. In respect of Appeal B, the Council contends that the application is invalid as it considers it likely that large elements of the building are unlawful and the description of development does not accurately reflect the development for which retrospective consent is sought. The Council submits that the description of the application does not reflect the entirety of the development as a whole. However, the scope of the works covered by the application is clear, in that the description relates to changes to the front and rear elevation fenestration and installation of a cycle store. Whilst other developments may have been carried out, these do not fall within the remit of the appeal before me.
22. The Council refers to the extent of works undertaken, including the removal of facades and the roof of the building, and it considers that large elements of the building are unlawful. The Council also submits that there has been no agreement to depart from the approved plans in respect of the prior approval for residential use, and that the change of use is therefore without approval. However, it is not within my remit in respect of this appeal to conclude on such matters, particularly as the proposal relates to external alterations rather than a change of use. There are other routes available to the Council and the appellant to address these issues, such as enforcement action, a certificate of lawful use or development, or a fresh planning application as appropriate.

⁶ *Finney v Welsh Ministers & Ors* - [2019] EWCA Civ 1868

23. The Council and other parties have not raised concerns in respect of other planning merits of Appeal B, however I will briefly address those I consider to be relevant. In respect of character and appearance, the proposal would be of an appropriate design for the area. Based on what I have seen and read, the proposal would provide suitable outlook and light levels for occupants of the building, be that for residential or commercial use. With regards to the cycle store, I have not been made aware of any issues in respect of vehicle parking provision and highway safety, and this element of the proposal would comply with the aims of promoting sustainable transport.
24. In respect of Appeal B, I conclude that it is lawful and reasonable to allow the proposal, and that there are no material considerations which indicate that the appeal should be dismissed. The Council has not referred to policies of the development plan, however I consider that the proposal would represent sustainable development within the terms of the National Planning Policy Framework.

Other Matter

25. The Council refers to an appeal and subsequent High Court judgment in respect of development elsewhere at Mercury House. However, that case related to whether a material change of use was lawful, rather than the operational development which forms the basis of Appeals A and B. The consideration of the Mercury House case was therefore within a different context to the appeals before me.

Conditions

26. In respect of Appeal B, the plans before me include a roof projection for a lift (and stair) shaft overrun which was not referred to in the description. Given the nature of the operational development which forms the basis of this appeal, the shaft overrun is clearly severable from the appeal proposal. This detail of the proposed plans should be excluded from the proposal before me in the interests of consistency and fairness, and this can be achieved by an appropriately worded condition regarding the approved plans.
27. On that basis, a condition specifying the approved plans, and the exclusion of some elements of development depicted on the plans, is necessary in the interests of certainty. A condition in respect of materials is appropriate in the interests of character and appearance.

Conclusion

28. For the reasons given above, I conclude that appeal A should be dismissed and Appeal B should be allowed.

David Cross

INSPECTOR