



Appeal Decisions

Site visit made on 1 September 2022

by J Bowyer BSc(Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 October 2022

Appeal A Ref: APP/X5990/W/20/3245557

9 Southwick Place, London W2 2TN

- 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 carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr M Singh against the decision of City of Westminster Council.
 - The application Ref 19/07678/FULL, dated 1 October 2019, was refused by notice dated 3 December 2019.
 - The application sought planning permission for formation of roof garden across existing roofs at second floor level without complying with a condition attached to planning permission Ref 17/07044/FULL, dated 10 May 2018.
 - The condition in dispute is No 2 which states that: 'the development hereby permitted shall be carried out in accordance with the following approved plans: Location Plan, 25517_EESURVEY, XX-071_001, Proposed Front and Rear Elevations, Proposed section drawing (front to rear), Proposed section drawing (side to side) and Roof Garden Design'.
 - 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 Ref: APP/X5990/W/20/3246031

9 Southwick Place, London W2 2TN

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against the failure of the local planning authority to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Mr M Singh against the City of Westminster Council.
 - The application Ref 19/09530/FULL is dated 6 December 2019.
 - The application sought planning permission for formation of roof garden across existing roofs at second floor level without complying with a condition attached to planning permission Ref 17/07044/FULL, dated 10 May 2018.
 - The condition in dispute is No 2 which states that: 'the development hereby permitted shall be carried out in accordance with the following approved plans: Location Plan, 25517_EESURVEY, XX-071_001, Proposed Front and Rear Elevations, Proposed section drawing (front to rear), Proposed section drawing (side to side) and Roof Garden Design'.
 - The reason given for the condition is: 'for the avoidance of doubt and in the interests of proper planning'.
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Decisions

Appeal A Ref: APP/X5990/W/20/3245557

1. The appeal is dismissed.

Appeal B Ref: APP/X5990/W/20/3246031

2. The appeal is allowed and planning permission is granted for formation of roof garden across existing roofs at second floor level at 9 Southwick Place, London W2 2TN in accordance with application ref 19/09530/FULL dated 6 December 2019 without compliance with condition 2 previously imposed on planning permission ref 17/07044/FULL dated 10 May 2018 but subject to the conditions in the attached Schedule 1: Appeal B Conditions.

Application for Costs

3. An application for costs was made by Mr M Singh against the City of Westminster Council in relation to Appeal B. This application is the subject of a separate Decision.

Preliminary Matters

4. As set out above, there are two appeals on this site. Both relate to applications made under section 73 of the Town and Country Planning Act 1990 ('the Act') seeking a minor material amendment to planning permission granted on appeal under application reference 17/07044/FULL ('the Original Permission')¹.
5. The evidence before me indicates that the Original Permission development has begun, but has not been fully implemented in accordance with the terms of the permission. In both appeals, the appellant is seeking to vary condition 2 of the Original Permission in order to substitute revised plans which would alter the permitted development, including through enlargement of the roof garden towards the front of the building, and changes to the layout, treatment and means of enclosure of the garden. There are some differences in the detail of the appeal schemes, but given the overall similarities of the proposals, I have dealt with them in a single decision letter to avoid duplication. I have however considered each proposal on its individual merits. For the avoidance of doubt, I have also considered each appeal on the basis of the development as it is shown on the plans submitted with the respective appeal.
6. In April 2021, after the appeals were submitted, the Council adopted the Westminster City Plan 2019-2040 ('the WCP'). As a consequence, policies of the Westminster City Plan 2016 and the Westminster Unitary Development Plan 2007 referred to within the Council's decision notice for Appeal A have been superseded. The Council has detailed the policies of the WCP that it considers would now be relevant to Appeal A, and which for the reasons below I consider would also be relevant to the Appeal B proposal, and the appellant has had the opportunity to address these policies. I have therefore considered the appeals in light of the policies of the WCP, and I make no further reference to the previous development plan.

Background and Main Issues

7. In the case of Appeal A, the Council refused planning permission on grounds that the proposal would fail to preserve or enhance the Bayswater Conservation Area ('the CA'). Notwithstanding that it determined the application, the Council included an 'informative' on the decision notice outlining its opinion that the planters and trellis to the front part of the roof would be materially different to the description of development granted on appeal, and that a fresh planning

¹ Appeal reference APP/X5990/D/18/3192708

application should be made. It has also argued as part of its appeal submissions that the proposal cannot be considered within the scope of an application under section 73 of the Act.

8. In the case of Appeal B, the Council did not validate or determine the application. It considers that the proposal cannot be considered within the scope of an application under section 73 of the Act, asserting, in essence, that it would amount to a material change to the Original Permission development and that it would require change to the development description. Given its view on the validity of the application, the Council has not given a further indication as to its position on the acceptability of the Appeal B proposal having regard to the development plan and other material considerations. However, from the evidence before me and in light of the similarities to the Appeal A scheme, I consider that the areas of concern would be likely to be similar to those identified by the Council in relation to Appeal A. For the same reasons and given that the roof garden in Appeal B would be of slightly reduced area, I have no reason to find that it would harm other interests that were not raised as concerns in relation to Appeal A.
9. The main issues in both Appeal A and Appeal B are therefore:
 - i) whether or not the proposal can be considered as a minor material amendment under section 73 of the Act having regard to the Original Permission development description and the changes proposed; and
 - ii) the effect of the proposal on the character and appearance of the host building and the Bayswater CA.

Reasons

Minor Material Amendment

10. There is no statutory definition of a 'minor material amendment' under section 73 of the Act, but the Planning Practice Guidance ('PPG') advises that it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which has been approved². Where modifications are fundamental or substantial, the PPG outlines that a new planning application will need to be submitted³. It further confirms that section 73 cannot be used to change the description of development⁴.
11. The Council has also referred to clarification provided by the Court of Appeal in the judgement on *Finney v Welsh Ministers* [2019] EWCA Civ 1868 dated 5 November 2019 ('Finney') on the scope of powers available under section 73. In *Finney*, it was held that section 73 may not be used to obtain a varied planning permission where the change sought would require a variation to the terms of the description of development as the 'operative' part of a permission.
12. The description of development for the Original Permission was stated as formation of roof garden across existing roofs at second floor level. Both appeal schemes would result in an increase in the scale of the roof garden, extending it closer to the front of the building. There would also be changes to the layout of the roof garden and features and rooflights within it, as well as to the treatment

² Paragraph: 017 Reference ID: 17a-017-20140306

³ Paragraph: 001 Reference ID: 17a-001-20140306

⁴ Paragraph: 014 Reference ID: 17a-014-20140306

around its boundaries. However, the development proposed in each case would remain a roof garden across the existing roofs at second floor level, and I see no reason that the changes would give rise to any inherent conflict or contradiction with the terms of the description of development approved by the Original Permission.

13. The additional features proposed within the roof garden including planters, trellis, countertop and cupboards would not be unexpected or remarkable features within a roof garden, and even taken together, I find that they would not fundamentally alter the use or nature of the development proposed. Moreover, the Original Permission development included several structures within the roof garden, including planters for an evergreen hedge and raised beds and decking that were specifically highlighted at paragraph 7 of the appeal decision. Neither these features, nor a built-in seat with storage and water feature which are also shown on the approved 'Roof Garden Design' plan, are referred to within the Original Permission description of development. In this context and given the similar nature of the additional roof garden features now proposed, I see no reason that direct reference to these features would now be necessary within the description of development.
14. The increased scale of the roof garden and changes to the layout and associated features would result in differences in the visual impact of the development which I consider further under the second main issue. Nevertheless, the development in both appeals would remain within the envelope of the appeal site roof and would be of similar width and with a set back from the front of the building. Given also that the revisions would not alter the nature of the development proposed, I find that the modifications would not be of a scale or substance that would result in development substantially or fundamentally different from that approved under the Original Permission.
15. For these reasons, I find that neither Appeal A nor Appeal B would require a variation to the terms of the operative part of the Original Permission development. In addition, neither appeal would materially change the nature of the proposal, or result in a conflict between what was permitted by the Original Permission and the development now proposed. Accordingly, and with regard to the PPG and the judgement in *Finney*, I conclude that both appeals may be considered as a minor material amendment under section 73 of the Act.

Character and Appearance

16. Within conservation areas, Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ('the LBCA Act') imposes a duty to pay special attention to the desirability of preserving or enhancing the character or appearance of that area.
17. The appeal site includes a mid-terrace property within the Bayswater CA. It is part of a run of neo-Georgian properties with mansard roof forms. As noted within the appeal decision for the Original Permission, television aerials and dishes and chimney stacks and pots can be seen above the line of the frontage parapet along the terrace. Nevertheless, the appeal decision also noted the smooth unbroken line formed by the front edge to the mansard roof as a feature of the terrace. Together with the generally similar scale, proportions and design of the buildings including a regular arrangement of fenestration, I saw that this roofline provides for an attractive uniformity and a distinctive

visual rhythm to the terrace which I consider makes a positive contribution to the character and appearance of the area, and to the significance of the CA.

Appeal A

18. Under Appeal A, the forward most line of planters enclosing the roof garden are shown to be broadly in line with the centre of the front chimney stack to the terrace. The planters would be of similar height to the chimney stacks to either side, but there would be a trellis above them to a height of around 2.3m from the finished floor level which would project significantly higher.
19. Given the height and proximity to the front of the building, and based on my observations at my visit, this part of the development would be clearly visible from Southwick Place as well as in views from Gloucester Square on the approach to Southwick Place. Other features that can currently be seen from these vantage points above the line of the parapet along the terrace are of generally modest overall scale which limits their prominence, and I found that they do not significantly draw the eye.
20. In contrast, the considerable height of the planters and trellis combined with the width across the majority of the host roof would result in a visual barrier of substantial scale. This would stand prominently above the appeal property's roofline, and the proximity to the front of the building would also limit visual distinction from the mansard roof. Seen closely juxtaposed in this relationship, I consider that the front of the roof garden would result in a distinct change to the appearance of the appeal property, and would significantly and harmfully disrupt the apparent uniformity of the roofline along the terrace. As a consequence, I find that it would be a conspicuous and visually intrusive feature in the area that would diminish the coherence of the terrace group.
21. The trellis and planters would not be substantially higher than the planters with hedging that the details before me indicate have been approved around the roof garden pursuant to condition 4 of the Original Permission. However, the position closer to the front of the building would significantly increase their visibility from the street. The Appeal A scheme can therefore be distinguished from the Original Permission where it was found that the roof garden's forward most line of planters would not be readily visible in long views along Southwick Place or from Gloucester Square and that there would be no discernible change to the appearance of the appeal buildings from public viewpoints.
22. I note commentary within the Original Permission appeal decision suggesting that even if that appeal were to be dismissed, the roof could be used lawfully as a garden incidental to the existing dwellinghouse and with associated domestic paraphernalia. I have no firm reason to take a different view. Be that as it may, it is not clear from the evidence before me that such use of the roof would be likely to result in features that would create a continuous expanse of development of similar height spanning the roof so near to the front of the building as is proposed within the appeal scheme. Even if paraphernalia were unscreened and trees of some height were present, I am not therefore persuaded that this fallback would result in a similar or worse visual impact to that which I have found would occur here. In my assessment, it is not therefore a compelling justification for the development.
23. For these reasons, I find that the Appeal A development would be incongruous and visually intrusive, causing significant harm to the character and the

appearance of the host building and the terraced group of which it is part. As a consequence, the proposal would undermine the contribution that the site makes to the CA, and would detract from the character and the appearance of the wider CA to the detriment of its significance.

24. Given the scale of the development and the localised nature of the effect, I find that the harm to the significance of the CA would be less than substantial in the terms of the National Planning Policy Framework which goes on to advise that such harm should be weighed against the public benefits of the proposal.
25. Although less than substantial harm would arise, considerable importance and weight must still be attached to it. Against this harm, the proposal would make effective use of the roof space, and would increase the area of the roof garden available for occupiers. Even so, these are mostly private benefits. Moreover, the Original Permission already provides for private outdoor space, and I have no substantive information to show that the space as permitted would result in a poor quality of life for occupiers of the property.
26. I have noted comments from interested parties supporting development on the site, referring to screening of the chimneys, air conditioning and other clutter at roof level in views from neighbouring properties. However, the typically modest scale and dispersed arrangement of other features at roof level reduces their visual impact. In my assessment, the height and overall scale of the planters and trellis to the front of the roof garden so close to the front of the building would be more obtrusive and prominent in views, and would be an unusual feature above only one property in this terrace. I find that these factors would offset any benefit of screening in views from neighbouring properties, and the greater screening offered by the proposal would not outweigh the adverse effect on the character and appearance of the host building and CA.
27. In my judgement, the public benefits of the proposal would not outweigh the less than substantial harm that would be caused to the significance of the CA. Accordingly, I conclude that the Appeal A development would cause unacceptable harm to the character and appearance of the host building and to the character and the appearance of the Bayswater CA. It would conflict with Policies 38 and 39 of the WCP which seek, broadly and amongst other things, high quality design and architecture and development that respects the character and appearance of the existing area and that conserves and enhances heritage assets including conservation areas. It would also conflict with Policy 40 of the WCP which includes a requirement that alterations and extensions respect the character of existing and adjoining buildings and avoid adverse visual impacts, and which specifies that roof extensions will be supported where they do not impact adversely on heritage assets.

Appeal B

28. Save for one planter closest to 8 Southwick Place, planters proposed along the front of the roof garden under Appeal B would be set back in comparison to the Appeal A development and would be aligned broadly with the rear of the chimney stacks. The planters themselves would be slightly higher than those proposed under Appeal A, but they would not be significantly higher than the chimney stacks, and there would be no trellis above them.
29. Based on my observations at my visit, the rear of the existing chimney stacks are not readily visible from public viewpoints along Southwick Place or

Gloucester Square. Although there may be some partial views of the planters, these would be very limited given their height and set back, even in the case of the set forward planter closest to No 8. In any views, they would also be seen together with the existing television aerials and dishes and chimney stacks and pots at roof level, and while of larger overall scale given their width, the modest height above most of these features would reduce their prominence and apparent height above the roof. Together with the set back from the front of the building, this would also help to differentiate the roof garden from the main mansard roof form, and the planters would not visually compete with it. I recognise that there would be other features and sections of trellis of greater height within, and to the sides and the rear of, the roof garden. However, their greater set back from the front of the building would reduce both opportunities for public views of them and their visual impact. There would also be similar potential views of planters and hedging of similar height and trees and other features further to the rear of the building as part of the roof garden approved under the Original Permission and associated details.

30. Given these factors, I am satisfied that the Appeal B proposal would not be conspicuous or unduly prominent from the street scene, and it would not harmfully change the appearance or architectural integrity of the host building. Nor would it disrupt the impression of the uniform roofscape of the wider terrace from public viewpoints.
31. That said, I am concerned that any planting of significant height or density within planters along the front of the roof garden, or close behind within the area of the enlarged garden, would be likely to be more distinct from the street scene, and could increase the visual impact of the development. However, it seems to me that details of planting could appropriately be the subject of a planning condition that would enable control over the placement and selection of species having regard to factors including their height and spread.
32. I appreciate that the enlarged roof garden and its features would be visible from private viewpoints, including uninterrupted views from within higher buildings on Hyde Park Square to the rear of the site, as well as potential views from the upper levels of buildings on Southwick Place and Gloucester Square to the front of the site. However, the approved roof garden would already be likely to be apparent in the majority of these views, and the development now proposed including the trellis sections would not be of significantly greater height than the planters and framed evergreen hedge that were approved as part of that scheme. Furthermore, the previous appeal decision noted several dwellings in Hyde Park Square and Hyde Park Street with roof gardens which are visible from adjacent properties. At my visit, I saw that some of these are also visible from Southwick Place and Gloucester Square, and that they are of varying scale and treatment. In this context, the development would not stand out as an incongruous feature in its surroundings, and while the roof garden now proposed would be larger than previously approved and would include additional features including planters, countertop and cupboards, it would not be uncharacteristic.
33. The Council's 'Roofs A Guide to Alterations and Extensions of Domestic Buildings' ('the Roofs Guide') includes guidance that roof level terraces may be visually disruptive, particularly on front elevations, and may only be considered favourably where there is a clear consistent pattern established within a terrace. The Development and Demolition in Conservation Areas Supplementary

Planning Guidance ('the DDCA Guidance') further advises that the creation of roof terraces or gardens will not be acceptable where there would be an adverse impact upon the architectural integrity of a building or the character and appearance of the area. In addition, it comments that the erection of features including trellises at roof level will usually have an adverse impact upon the appearance of a building and the conservation area.

34. However, for all of the reasons above, and having regard to the Original Permission development, I find that the development proposed under Appeal B would not in this case detract from the character or the appearance of the host building, nor undermine qualities or features which contribute to the CA's significance, and the development would not be obtrusive. I have paid special attention to the desirability of preserving or enhancing the character and appearance of the CA in accordance with Section 72(1) of the LBCA, but find that the character and the appearance of the CA would thus be preserved.
35. I therefore conclude that the Appeal B proposal would not harm the character or the appearance of the host building or the Bayswater CA, and I find that it would accord with Policies 38, 39 and 40 of the WCP as well as the objectives of the Roofs Guide and the DDCA Guidance.

Conditions

36. The PPG advises that permission granted under section 73 of the Act should restate conditions imposed on the earlier permission that continue to have effect, but not extend the time limit under which it must be started.
37. Given that the Original Permission development has commenced, it is not necessary to re-impose condition 1 which specified the time limit. However, in allowing Appeal B, I have imposed a replacement condition 2 with updated plan numbers for the avoidance of doubt and in the interests of certainty.
38. The information before me indicates that Conditions 3, 4 and 5 of the Original Permission which related to details of the green roof structure, planters and terrace surfacing have been discharged. Condition 3 is no longer relevant as there is no longer green roof proposed between the roof garden planters and the front of the mansard roof. I have however imposed a single updated condition in place of conditions 4 and 5 to require that development is carried out in accordance with the details approved which I consider is necessary to safeguard the character and appearance of the CA.
39. Given my findings above, I have also imposed an additional condition to require details of planting within the roof garden. Although this was not suggested by the Council, I consider it would now be necessary in the interests of the character and appearance of the host building and area given the extension of the roof garden closer to the front of the building. There is a strict timetable for compliance because it is not possible in this case to use a negatively-worded condition to secure the approval and implementation of these details before the development takes place. The condition will ensure that the development can be enforced against if the requirements are not met, and the appellant was consulted on its wording.

Conclusion

40. For the reasons given above, I conclude that Appeal A should be dismissed, but that Appeal B should be allowed.

J Bowyer

INSPECTOR

Schedule 1: Appeal B Conditions

- 1) Unless otherwise amended under the conditions below, the development hereby permitted shall be carried out in accordance with the following approved plans: Location Plan, 25517_EESURVEY, XX-071_001 and SWP-LAW-X-XXX-DDD-AR-600001 P01 (Roof Garden General Arrangement).
- 2) The materials used to face the planter structures and to cover the area of the terrace within the planters shall be in accordance with the details approved under application ref 18/04884/ADFULL to discharge conditions pursuant to planning permission ref 17/07044/FULL.
- 3) Unless within 2 months of the date of this decision a scheme for planting as part of the roof garden is submitted in writing to the Local Planning Authority for approval, and unless the relevant approved scheme is implemented within 4 months of the Local Planning Authority's approval, all equipment and materials brought onto the land for the purposes of the formation and use of a roof garden other than in accordance with the details of development approved under planning permission ref 17/07044/FULL shall be removed until such time as a scheme is approved and implemented.

The details of planting submitted shall include planting plans; written specifications; schedules of plants noting species, plant supply sizes and proposed numbers/densities.

If no scheme in accordance with this condition is approved within 6 months of the date of this decision, all equipment and materials brought onto the land for the purposes of the formation and use of a roof garden other than in accordance with the details of development approved under planning permission ref 17/07044/FULL shall be removed until such time as a scheme approved by the local planning authority is implemented.

Upon implementation of the approved scheme specified in this condition, that scheme shall thereafter be maintained in accordance with the approved details.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.