

# Appeal Decision

Site visit made on 21 March 2024

**by K E Down MA(Oxon) MSc MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 08 April 2024**

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**Appeal Ref: APP/N5090/D/23/3332398**

**23 Wickliffe Avenue, Finchley, Barnet, London, N3 3EL**

- 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 Mohammad Mashayekhi against the decision of the Council of the London Borough of Barnet.
  - The application Ref 23/3555/S73, dated 15 August 2023, was refused by notice dated 10 October 2023.
  - The application sought planning permission for "Part single, part two storey rear extension following demolition of existing two storey outrigger. Roof extension involving 2no rear dormers and 2no front facing rooflights. Changes to front and rear fenestrations" without complying with a condition attached to planning permission Ref 22/5735/HSE, dated 19 June 2023.
  - The condition in dispute is No 1 which states that: The development hereby permitted shall be carried out in accordance with the following approved plans: Existing Floor Plans Drawing Number 18/3189/7 Dated 30/04/2018, Proposed Floor Plans Drawing Number 18/3189/112 Dated 30/04/2018, Existing Elevations Drawing Number 18/3189/9 Dated 30/04/2018, Proposed Elevations Drawing Number 18/3189/110 Dated 30/04/2018, Existing Site Plan Drawing Number 18/3189/5 Dated 08/03/2018, Proposed Site Plan Drawing Number 18/3189/106 Dated 08/03/2018, Proposed Street Scene Drawing Number 18/3189/11 Dated 03/08/2018.
  - The reason given for the condition is: For the avoidance of doubt and in the interests of proper planning and so as to ensure that the development is carried out fully in accordance with the plans as assessed in accordance with Policies CS NPPF and CS1 of the Local Plan Core Strategy DPD (adopted September 2012) and Policy DM01 of the Local Plan Development Management Policies DPD (adopted September 2012).
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## Decision

1. The appeal is allowed and planning permission is granted for part single, part two storey rear extension following demolition of existing two storey outrigger. Roof extension involving 2no rear dormers and 2no front facing rooflights. Changes to front and rear fenestrations at 23 Wickliffe Avenue, Finchley, Barnet, London, N3 3EL in accordance with the application Ref 23/3555/S73 dated 15 August 2023, without compliance with condition number 1 previously imposed on planning permission Ref 22/5735/HSE dated 19 June 2023 and subject to the following conditions:
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- 1) The development hereby permitted shall be carried out in accordance with the following approved plans: 18/3189/1, 18/3189/5, 18/3189/7, 18/3189/9, 18/3189/106B, 18/3189/110B, 18/3189/112B, 18/3189/11B.
- 2) The materials to be used in the construction of the external surfaces of the building hereby permitted shall, except as shown otherwise on the approved plans, match those used in the existing building.
- 3) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 2015 (or any order revoking and re-enacting that Order with or without modification), no windows or doors other than those expressly authorised by this permission shall be constructed in the side elevations facing 21 and 25 Wickliffe Avenue.

### **Application for Costs**

2. An application for costs was made by Mr Mohammad Mashayekhi against the Council of the London Borough of Barnet. This application is the subject of a separate decision.

### **Background and procedural matters**

3. Planning permission was granted on 19 June 2023 for "Part single, part two storey rear extension following demolition of existing two storey outrigger. Roof extension involving 2no rear dormers and 2no front facing rooflight. Changes to front and rear fenestrations" under reference 22/5735/HSE.
4. The application which is the subject of this appeal was submitted under s73 of the Town and Country Planning Act, 1990 to vary condition 1 of the original planning permission by substituting a different set of plans to those approved. The differences proposed comprise roof extensions to the front elevation to add a gable above a first floor window and a hipped roof above an existing flat roofed two storey bay, and brick cladding to the lower part of the ground floor front elevation.
5. The Planning Practice Guidance (PPG) states in Paragraph: 013 Reference ID: 17a-013-20230726 that a s73 application "can be used to make a material amendment by varying or removing conditions associated with a planning permission. There is no statutory limit on the degree of change permissible to conditions under s73, but the change must only relate to conditions and not to the operative part of the permission." The operative part of the permission is the description of development. The PPG also states that s73 cannot be used to change the description of the development. This is supported by several court decisions including *Finney v Welsh Ministers & Ors* [2019] EWCA Civ 1868 dated 5 November 2019.
6. The appellant correctly used the original description of development on the application form submitted to the Council. This was changed by the Council but as this is clearly beyond the scope of a s73 application I have used the original description of development in the banner heading and decision above and in my consideration of the appeal.
7. The plans first submitted with the application showed three rooflights on the front elevation. However, following concerns raised by the Council on 5 October

2023 that the proposed changes would require an alteration to the description of development on the original permission and hence fell outside the scope of s73, the appellant submitted revised plans on 6 October 2023, deleting the third rooflight, and asked that these be substituted for the drawings previously submitted. The Council responded on 9 October 2023 stating that the proposed roof extensions would in any case necessitate a change to the description of development and hence the application would be refused. The appellant was invited to withdraw the application but responded the same day suggesting that the Council was unreasonable in not accepting that the changes fell within the scope of s73 and asking for the application to be determined. It was refused on 10 October 2023 under delegated powers.

8. The plans cited on the refusal notice are those first submitted with the s73 application and not the substituted plans sent to the Council. It is unclear why the Council failed to substitute the plans as requested. However, since the only alteration is a minor change to delete the additional front rooflight which would also remove any direct conflict with the description of development on the original planning permission, I am satisfied that accepting the substituted drawings would not be procedurally unfair to any parties. For the avoidance of doubt, my decision is therefore based on Drawing Nos 18/3189/1, 18/3189/5, 18/3189/7, 18/3189/9, 18/3189/106B, 18/3189/110B, 18/3189/112B, 18/3189/11B.
9. The Council raises no objection to the proposed development on any other grounds, finding specifically in its delegated report that there would be no detriment to character or appearance or living conditions. I agree with these conclusions.

### **Main issue**

10. There is one main issue which is whether the proposed development falls within the scope of a s73 application and specifically whether the proposed amendments to the scheme would conflict with or amount to a fundamental change to the description of development set out in the original permission ref 22/5735/HSE.

### **Reasons**

11. The appeal dwelling is a large two storey detached house on a generous plot. It is of traditional design with a hipped roof and two storey flat roofed bay to the front elevation. The street is characterised by other large traditional two storey detached and semi-detached houses as well as a number of more modern flatted developments.
12. There is no requirement for a description of development to include every aspect or detail of a proposal. In this case the original description of development includes "roof extension" and goes on to state "involving 2no rear dormers and 2no front facing rooflights". By use of the word "involving" this strongly suggests it is not necessarily a closed list. The description also does not, for example, state that the roof extension will create two loft rooms. Though I note the Council's views and its discussion of the Finney case, the Council provides no substantive justification or reasoning, or reference to other authority, that would lead me to an alternative view.

13. The main alterations applied for comprise a small gable over a front window and a hipped roof over the existing flat roofed two storey bay. Both join into and extend the original roof to a very limited degree, with a minor effect on bulk and massing. In my view this clearly falls within the original description of a "roof extension". I therefore find no change to the original description of development would be necessary and there would be no conflict from the appeal scheme with it. Imposing a revised plans condition reflecting the alterations sought would not fundamentally alter the approved development. In consequence, based on the substantive evidence before me in relation to the specific appeal scheme and the description of development, the proposed roof alterations fall within the scope of the s73 application.
14. The other proposed alteration is to install brick cladding to the ground floor front elevation. Other changes to the front elevation were included in the original scheme and this is a further minor change which would not need to be explicitly included in the description of development. Neither would it conflict with it. In consequence, the proposed cladding falls within the scope of the s73 application. Moreover, since the dwelling does not lie within a conservation area, is not covered by an Article 4 direction and has not had any permitted development rights withdrawn, it would be likely to amount to permitted development.
15. It is therefore concluded on the main issue that the proposed development falls within the scope of a s73 application and specifically the proposed amendments to the scheme would not conflict with, necessitate, or amount to a fundamental change to the description of development set out in the original permission ref 22/5735/HSE.
16. In view of my conclusion and the lack of any other material objection to the proposed alterations, the appeal should be allowed.

### **Conditions**

17. The Council suggests three conditions. I agree that the development should be carried out in accordance with the approved plans and in materials to match the existing building (except as shown otherwise on the approved plans) in order to provide certainty and to protect the character and appearance of the area. I saw at my site visit that the development has been implemented and so it is not necessary to re-state the statutory commencement condition. Finally, the original permission withdraws permitted development rights for additional doors and windows in the side elevations facing Nos 21 and 25 Wickliffe Avenue. I consider a similar condition should be imposed on the new permission in order to protect the living conditions, and in particular the privacy, of occupiers of neighbouring properties. I have adjusted the original wording for clarity and to reflect the wording of the standard conditions.

### **Other matters**

18. A third party has raised objections to the change of use of the dwelling to an HMO. However, the appeal before me relates only to minor external alterations and is not an application to materially change the use of the dwelling from that previously approved. Based on the substantive evidence before me, the changes sought would not lead to any material changes from the previously permitted scheme in respect of matters such as levels of activity or parking.

## **Conclusions**

19. For the reasons set out above and having regard to all other matters raised, I conclude that the appeal should be allowed.

*KE Down*

INSPECTOR