



Appeal Decision

Site visit made on 4 March 2024

by R Major BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 April 2024

Appeal Ref: APP/H5390/W/23/3330686

28 Lilyville Road, London SW6 5DW

- 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 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 Malcolm Alsop against the decision of the Council of the London Borough of Hammersmith and Fulham.
- The application Ref is 2022/03722/VAR.
- The application sought planning permission for: *"Excavation of the front and rear garden to form lightwells in connection with the enlargement of the existing basement; demolition and re-building of the ground floor back addition; installation of French doors with a Juliet balcony to replace the existing window to the rear elevation and new windows to replace the existing windows to the side of rear back addition at first floor level; installation of 12no solar panels above the main flat roof at roof level, installation of railings atop the existing front boundary wall and erection of a bike shed within the front garden (Amended description)"* without complying with a condition attached to planning permission Ref 2019/01179/FUL, dated 01 July 2019.
- The condition in dispute is No 5 which states that: *The roof of the single storey extension at ground floor level shall not be used as a roof terrace or other form of open amenity space. No alterations shall be carried out; nor planters or other chattels placed on the roofs in connection with its use as a roof terrace or other form of open amenity space. No railings or other means of enclosure shall be erected on the roofs, and no alterations shall be carried out to the rear elevation of the application property to form access onto these roofs.*
- The reason given for the condition is: *Such a use would be detrimental to the amenities of neighbouring properties by reason of overlooking and loss of privacy and potential noise and disturbance, contrary to Policies CC11, CC13, DC4 and HO11 of the Local Plan (2018) and Key Principle HS7 of the Planning Guidance SPD (2018).*

Decision

1. The appeal is allowed and planning permission is granted for excavation of the front and rear garden to form lightwells in connection with the enlargement of the existing basement; demolition and re-building of the ground floor back addition; installation of French doors with a Juliet balcony to replace the existing window to the rear elevation and new windows to replace the existing windows to the side of rear back addition at first floor level; installation of 12no solar panels above the main flat roof at roof level, installation of railings atop the existing front boundary wall and erection of a bike shed within the front garden (Amended description) at 28 Lilyville Road, London SW6 5DW in accordance with the terms of the application, Ref 2022/03722/VAR, subject to the conditions in the attached schedule.

Preliminary Matters

2. The description of the development in my formal decision is taken from the original planning permission¹ as required by the 'Finney' judgment². This judgment clarifies that the description of the development in the decision must be taken from the original planning permission.
3. Furthermore, the site address in the above banner heading, and within my formal decision, is taken from the site address as detailed on the original planning permission.
4. I observed on my site visit that potted plants have been installed atop of both the side walls around the flat roof of the single storey rear extension. Furthermore, I also observed a timber structure was also present on the roof of the single storey rear extension. I have however not been provided with the details of the purposes of this timber structure within the submissions, although note that an interested party has referred to this as an air conditioning unit.
5. Subsequent to the Council issuing its decision the revised National Planning Policy Framework (the Framework) was published on 19 December 2023 and updated on 20 December 2023. Both parties, within their respective submissions had an opportunity to comment on the revised Framework. Where reference is made to the Framework in this decision, the paragraph numbers are those that appear in the latest version.

Background

6. The original planning permission (2019/01179/FUL) was approved in July 2019 and included a condition (No. 5) which prevents the flat roof area above the single storey rear extension from being used as a roof terrace, or other form of amenity space. The condition also prevents any alterations being carried out, including any planters or chattels being placed on the roof in connection with its use as a roof terrace or other form of open space. Furthermore, the condition prevents any railings or other means of enclosure from being erected on the roof, and that no alterations be carried out to the rear elevation of the dwelling that would allow access to the roof.
7. The extensions and alterations approved under the aforementioned planning permission appear to have been constructed on site. However, as mentioned above, potted plants have been installed atop of both side walls around the flat roof of the single storey rear extension, and a wooden structure has also been installed on this roof.
8. An enforcement notice³ was issued by the Council on 16 September 2021, alleging that condition 5 had not been complied with on the basis that the erection of the potted plants on the roof of the single storey rear extension facilitates its use as a roof terrace. The enforcement notice also alleged a breach in relation to condition 13, relating to privacy film on the top panes of the first-floor windows in the side elevation. The notice required the removal of the potted plants and the installation of obscured glass to the top panes of the first-floor windows.

¹ LPA Ref: 2019/01179/FUL

² Finney v Welsh Ministers & Carmarthenshire County Council, Energiekontor (UK) Ltd [2019] EWCA 1868; [2020] JPL 524

³ LPA Ref: 2021/00268/COMPWK

9. The enforcement notice was appealed⁴ and dismissed on the grounds that a breach of both conditions (5 and 13) had occurred.
10. The appellant subsequently submitted a Section 73 (S73) application⁵ which was refused. This refused S73 application is the subject of this appeal and sought to vary the wording of condition 5 to read as follows:

"The roof of the single storey extension at ground floor level shall not be used as a balcony, roof terrace, sitting out area or for any purpose of a similar nature and, furthermore, no balustrades, railings or other means of enclosure or means of permanent access shall be erected on this area without the prior written consent of the local planning authority."

11. In view of all the above, this appeal relates to the proposed variation of condition 5. The proposed variation seeks to remove the element of the condition that prevents any planters or other chattels from being placed on the roof of the single storey rear extension in connection with its use as a roof terrace or other form of open amenity space.
12. Whilst the effect of the appeal proposal on levels of daylight and sunlight are not specifically mentioned in the Council's reasons for refusal, having regard to the issues highlighted in the delegated report and the views of interested parties, it is appropriate to consider these matters as main issues and no party would be prejudiced by this approach.

Main Issues

13. The Council's decision notice includes three reasons for refusal. However, two of these reasons both fundamentally relate to the effect of the appeal proposal on the living conditions of neighbouring occupiers.
14. As such, the main issues are the effect of the proposed variation of condition 5 on:
 - the character and appearance of the host property and surrounding area; and
 - the living conditions of neighbouring occupiers, with particular regard to outlook, daylight, sunlight, privacy, noise and disturbance.

Reasons

Character and appearance

15. The appeal property is a three-storey, with an additional basement level, mid-terraced dwelling at 28 Lilyville Road (No. 28). To the rear the appeal property shares a two-storey outrigger with the adjoining dwelling at number 26 Lilyville Road (No. 26), which is situated directly to the southeast of No. 28, and these outriggers are an original feature of the properties within this terrace row.
16. To the northwest the appeal property is adjoined by a dwelling at 30 Lilyville Road (No. 30). To the rear, beyond the yard area, are the rears of the residential terrace properties fronting onto Radipole Road, which also have original outriggers.

⁴ Appeal Ref: APP/H5390/C/21/3286006

⁵ LPA Ref: 2022/03722/VAR

17. A single storey extension has been constructed to the rear of the existing outrigger as part of the works to alter and extend the appeal dwelling. This single storey extension includes a flat roof area, upon which potted plants have been installed, as well as a timber structure referred to by an interested party as an air conditioning unit. The potted plants have been installed atop of both side walls which project above the flat roof of the single storey rear extension. The submitted application details that the potted plants are artificial and are not fixed to the wall. No details have been provided in respect of the timber structure I observed.
18. As presently worded, condition 5 prevents the installation of potted plants, or other chattels, on this flat roof area in connection with its use as a roof terrace or other form of open amenity space. The appeal proposal however seeks to vary this condition to allow these features to remain, and potentially other similar features to be installed.
19. I observed on site that a number of other properties within this terrace row have single storey rear extensions of varying designs. Additionally, in some cases, particularly to the rears of the properties fronting Radipole Road, a number of two storey outriggers have been extended and altered in design.
20. Moreover, I also observed examples of roof terraces at second and third floor levels, with associated railings and balustrades, within these properties directly to the rear of the appeal site. Overall, these various alterations and modifications create a somewhat varied pattern to the rear of the properties in the vicinity of the appeal site.
21. By varying the condition as sought, the provision of planters would result in limited changes to the bulk and massing of the previously approved projection and it would remain a subservient addition to the host property. As such, the prevailing character and appearance of the appeal property and surrounding area would not be harmed by the variation of this condition to allow planters and other features to be installed on the flat roof area above the single storey extension.
22. The installation of such features above the single storey extension would be visible from windows and outdoor areas situated to the rear of a number of nearby properties, where they would be viewed in a similar visual context. These features would not be visible from public vantage points such as public highways.
23. I am therefore satisfied that the variation of this condition would not result in an overly dominant, uncharacteristic and incongruous development to the rear of this dwelling. Additionally, the proposal would ensure the previously approved development remains a subservient addition and would not unduly add visual clutter to the rear of the property that would detract from the character and appearance of the host property or surrounding area.
24. As such, I find no conflict with Policies DC1 and DC4 of the Hammersmith & Fulham Local Plan (2018) (LP), insofar as they together seek to ensure, amongst other things, that developments respect and enhance townscape context; be compatible with the scale and character of existing development, neighbouring properties and their setting; and be subservient and not dominate the host building.

Living conditions

Outlook, daylight and sunlight

25. The surrounding 3-storey buildings, along with the existing projections, boundary treatments and vegetation, already have some influence upon the levels of daylight and outlook received by the rear spaces and ground floor windows at No 26 and 30. However, those receptors are currently afforded a satisfactory degree of daylight and outlook, and this is commensurate with the levels of other neighbouring properties I observed on site.
26. The variation of the condition to allow planters and other chattels to be placed on the roof of the single storey extension would have some limited further effect upon the outlook enjoyed from the ground floor windows, openings and yard areas of these adjoining properties. However, the resultant loss of daylight, outlook and overbearing impact arising from such features would be a relatively limited one. I am satisfied that the proposal would maintain a satisfactory degree of overall outlook, daylight and sunlight and that it would not result in harmful living conditions for neighbouring occupiers in this regard.
27. In terms of the first-floor windows in the rear elevations of these adjoining properties, given the relatively modest projection of this flat roof area beyond these windows, and the separation distance, the effect of any planters and chattels on the daylight and outlook from these first-floor windows would not be unduly detrimental.
28. With regard to loss of sunlight, No. 26 is situated to the southeast of the appeal site and thus would not experience any significant loss of sunlight. No. 30 is situated to the northwest and thus any planters and other chattels placed on the roof of the single storey extension has some potential to effect upon the levels of sunlight received to the rear of this property in the morning.
29. Nonetheless, given the modest projection of the single storey rear extension, and therefore the fairly limited area upon which such features could be placed, I conclude that the variation of the condition to allow planters and other chattels to be placed above the extension would maintain sufficient levels of sunlight to the rear of No. 30.

Overlooking, noise and disturbance

30. I observed on site that it is not physically possible to access the flat roof area of the extension as a result of a balustrade railing covering the patio doors at first floor level.
31. Furthermore, the proposed variation to the condition retains the element that prevents the roof of the single storey extension from being used as a balcony, roof terrace, sitting out area or for any purpose of a similar nature, as well as preventing any means of permanent access being provided to this area.
32. Based upon the specific evidence before me in relation to this appeal and what I observed on site, I am satisfied that by permitting this variation it is not inherent there would be an increased likelihood of this roofspace being used as an amenity space, and in any case, any such use would be in breach of the proposed varied condition. The varied condition would therefore maintain the planning objective of preventing the use, and function, of the roof space for

such amenity space purposes and is therefore consistent with its original objectives in this regard.

33. As such, the variation of this condition would not result in any greater levels of overlooking, or noise and disturbance for neighbouring occupiers, than that which could be experienced from the existing condition.
34. In view of the above, I conclude that the proposed variation of the condition would not result in harmful living conditions for neighbouring occupiers. I therefore find no conflict with Policies DC4, CC11, CC13 and HO11 of the LP, insofar as they together seek to ensure, amongst other things, that developments would not be unduly detrimental to the amenities enjoyed by surrounding occupiers by way of noise, loss of daylight, sunlight, privacy and outlook.
35. I note that the Council's reasons for refusal in relation to the impact of the appeal proposal on the living conditions of neighbouring occupiers makes reference to LP Policy DC1. This policy relates to design and conservation and does not specifically refer to the living conditions of neighbouring occupiers. Therefore, this policy is of less relevance than the other policies I have referred to above.

Other Matters

36. Whilst not included within the reasons for refusal, the Council's Officer Report states that the appeal proposal is also contrary to Key Principles HS6, HS7 and HS8 of the Hammersmith & Fulham Planning Guidance Supplementary Planning Document (2018) (SPD). However, the Council's submission does not detail which elements of these Key Principles the appeal proposal would conflict with.
37. Nevertheless, having reviewed the appeal proposal against these Key Principles, for similar reasons to those outlined above, I find no conflict. As such I conclude that the appeal proposal also accords with this SPD.
38. In the determination of this appeal, I have had due regard to the previous Inspector's decision at the appeal site. However, the appeals are not directly comparable because the previous Inspector sought to reach a finding upon breaches of imposed conditions as a matter of fact, and not to consider the specific variation of the condition as proposed in this appeal. Therefore, while I have had careful regard to the findings of the previous Inspector in my assessment of this proposal, I am not bound by the previous decision of the Inspector in respect of the breach of conditions.

Conditions

39. As a consequence of allowing this appeal I have varied condition 5⁶ as numbered on approved application 2019/01179/FUL. I have however amended the wording of this condition, as suggested by the appellant, to remove the words "*without the prior written consent of the local planning authority*" as this tailpiece wording introduces uncertainty by allowing scope for a potentially significant change outside of the statutory route to vary conditions, and potentially depriving interested parties of the opportunity to comment upon such matters. As the development has commenced on site it is not necessary to re-impose the standard time limit condition.

⁶ Condition No.4 on below schedule

40. The guidance in Planning Practice Guidance makes clear that decision notices for the grant of planning permission under S73 should also restate the conditions imposed on earlier permissions that continue to have effect. As I have no information before me about the status of the other conditions imposed on the previous planning permission, I have re-imposed them all as I consider them to be relevant, reasonable and necessary. In the event that some have in fact been discharged, that is a matter which can be addressed by the parties.

Conclusion

41. For the reasons given above, and having regard to all matters raised, varying condition 5 would not have a harmful impact upon the character and appearance of the host property and surrounding area, nor would it have an unduly detrimental impact upon the living conditions of neighbouring occupiers. The appeal proposal therefore accords with the development plan when taken as a whole and there are no material considerations that indicate it should be determined other than in accordance with it. I therefore conclude that the appeal should be allowed.

R Major

INSPECTOR

Schedule of Conditions

1. The development shall not be erected otherwise than in accordance with the detailed drawings which have been hereby approved (*Drawing Nos: 1249/01; 1249/02; 1249/00; 1249/10; 1249/20; 1249/30; and 1249/40*).
2. The replacement single storey extension to the side and rear of the back addition hereby approved shall be constructed and finished in bricks and render.
3. No water tanks, water tank enclosures or other structures shall be erected upon the roofs of the extension hereby permitted.
4. The roof of the single storey extension at ground floor level shall not be used as a balcony, roof terrace, sitting out area or for any purpose of a similar nature and, furthermore, no balustrades, railings or other means of enclosure or means of permanent access shall be erected on this area.
5. The basement floorspace hereby approved shall not be converted to use as a separate dwelling and shall only be used in connection with, and ancillary to, the use of the remainder of the application property as a single family dwellinghouse.
6. The windows in the front elevation at basement level hereby approved shall be timber frame construction to match the existing windows above.
7. No part of the extended basement shall be occupied or used until the proposed metal grille is installed over the approved front lightwell, and the grille shall be permanently retained in place. At no time shall railings or any other vertical element be constructed around the lightwell.
8. The form and dimensions of the front and rear lightwells, at basement and ground floor level, shall not exceed those shown on the approved drawings.
9. Prior to occupation of the development hereby permitted, flood mitigation/proofing measures shall have been implemented in accordance with the details contained within the approved Flood Risk Assessment. The measures shall thereafter be retained in perpetuity.
10. The extensions hereby approved shall only be used in connection with, and ancillary to, the use of the remainder of the application property as a residential unit. The resulting extended property shall not be used as housing in multiple occupation falling within Class C4 of the Town & Country Planning (Use Classes) Order 1987 (as amended) which is distinct from the use of the application property as a single residential unit.
11. The doors to the Juliet balcony at first floor level to the rear of the back addition hereby approved shall only open inward, and the metal balustrade shall be fixed flush to the rear elevation of the property.

12. The development hereby permitted shall not be occupied until the replacement windows to the side elevation of the back addition at first floor level have been installed with obscure glazing to a height of 1.7 metres above the internal floor level and are non-opening below the height of 1.7 metres. The windows shall thereafter be retained as such.
13. The new front boundary walls hereby approved shall be constructed in London stock brick to match the existing building and the railings shall be painted black and thereafter permanently retained as such.

***** END OF SCHEDULE*****