



Appeal Decision

Site visit made on 5 June 2024

by R Bartlett PGDip URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 13 June 2024

Appeal Ref: APP/B5480/W/23/3330149

91 Briscoe Road, Rainham, Havering, RM13 9QG

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 (as amended) for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mrs A Thompson against the decision of the Council of the London Borough of Havering.
 - The application Ref is P0682.23.
 - The application sought planning permission for rear two bed bungalow for the elderly with detached single garage without complying with conditions attached to planning permission Ref P1632.11, dated 19 December 2011.
 - The conditions in dispute are Nos 2 and 9, which state that:
 - Condition 2 – The development hereby permitted shall not be carried out other than in complete accordance with the approved plans, particulars and specifications.
 - The reason given for this condition is: The Local Planning Authority consider it essential that the whole of the development is carried out and that no departure whatsoever is made from the details approved, since the development would not necessarily be acceptable if partly carried out or carried out differently in any degree from the details submitted. Also, in order that the development accords with Development Control Policies Development Plan Document Policy DC61.
 - Condition 9 - Notwithstanding the provisions of Classes B and C to Part 1 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (as amended), no alterations shall be made to the roof of the dwelling hereby approved without the prior written approval of the Local Planning Authority.
 - The reason given for this condition is: To protect the amenity of neighbouring occupiers, in accordance with the Development Control Policies Development Plan Document Policy DC61.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. The description of development on the application form is "*Variation of condition Nos.2 (Accordance with Plans) and 9 (Alterations to roof) of Planning Permission P1632.11 dated 19/12/11 to permit alteration to roof design*". However, the forms for applications made under s73, are clear that the description of development should be that of the approved development as shown on the original decision letter. The description of the approved development on the original decision letter is "*Rear two bed bungalow for the elderly with detached single garage*". The description in the banner heading above has been amended to reflect this requirement.

3. The application sought to vary condition 2 by listing a revised set of approved drawing numbers and to remove condition 9 that removes permitted development rights for roof alterations to the approved development following its completion and occupation.
4. The revised drawings submitted show a detached dwelling with a detached single garage on the same footprint as those originally approved. However, whereas the original permission specifically describes a two-bedroom bungalow, the amended plans relate to a four-bedroom dormer bungalow.
5. As the revised plans would conflict with the original description of development, the main parties were invited to submit comments on whether the proposal could be dealt with under s73 of the Act¹. I have taken these comments into account in reaching my decision.

Main Issues

6. The main issues are i) whether condition 2 can be varied having regard to the Act and other material considerations, including the Finney² Judgement; and ii) if so whether the variation of condition 2 and the removal of condition 9 would be acceptable having regard to the character and appearance of the area and the effect on living conditions of occupiers of neighbouring dwellings.

Reasons

7. In the Finney judgement, the Courts established that an application under s73 may not be used to obtain a permission that would require a variation to the terms of the "operative" part of the planning permission, that is, the description of the development for which the original permission was granted.
8. The appellant and the council are of the view that the amended proposal is not substantially different to the originally approved development and that as such it could be dealt with as a minor material amendment under s73. I am also advised that a previous amendment has already been made to the originally approved plans under s73. However, I have not been provided with a copy of that and I have not been advised that the previously approved minor amendment was for a development that did not reflect that described on the decision notice of the original permission. Moreover, that application is not before me for consideration.
9. Whilst I acknowledge that the proposal still relates to a single dwelling, it unfortunately wasn't described as that on the original decision notice. As the appeal scheme seeks a four-bedroom dormer bungalow and not a two-bedroom bungalow as originally described, the variation of condition 2 that is sought by the amended plans would affect the operative part of the permission, as it would require a change to the description. Had the original permission not specifically mentioned the type of dwelling or number of bedrooms it is likely that the amendment could have been made under s73.
10. The appellant has suggested amending the description of development on the application form. Whilst I have amended the description of development in the banner heading above to reflect the requirements of s73, this does not help the

¹ The Town and Country Planning Act 1990 (as amended)

² John Leslie Finney v Welsh Ministers, Carmarthenshire County Council, Energiekontor (UK) Limited [2019] EWCA Civ 1868

appellant, as the proposed amended plans would still materially conflict with the description of development on the original planning permission, which I have no powers to amend. I also have no power to amend the application type, it was submitted, advertised and determined under s73 and I must consider the appeal on the same basis to avoid prejudicing third parties.

11. The Finney judgement relates to a case in which an Inspector allowed an appeal with an amended condition and removed the wording in the operative part of the description that had been changed by the amendment. This resulted in the grant of a new permission, which did not accord with the original description of the development. The appeal decision was subsequently quashed by the Courts as there are no powers under s73 to grant a new planning permission with a different operative part to that contained in the original permission. The same principle was reinforced by the Courts in the case of *Fiske v Test Valley BC & Woodington Solar Limited*.
12. It is clear from these court cases that the description of development for an existing planning permission cannot be amended at all. Only the condition can be varied. It therefore follows that the description of development in a s73 application must always be taken from the original planning permission and that if amending a condition would result in a conflict between it and the description of development, then that particular amendment is beyond the powers under s73 and a fresh planning application would be required.
13. As the variation sought would result in a discrepancy between the revised drawings and the original description of development, it is beyond the powers under s73 and cannot be made. I sympathise with the appellant and appreciate that there has been no intention to misrepresent the nature and extent of the proposals. It is not uncommon for mistakes still to be made in relation to this type of application despite the age of the Finney judgement. However, due to the incorrect procedure being followed, the appeal is technically invalid, and no further action can be taken on it. Consequently, the merits or otherwise of the proposed amended development will not be considered, as this could prejudice the outcome of a future full planning application.

Other Matters

14. Condition 9 removes permitted development rights for roof alterations. It should be noted that permitted development rights only come into effect once the approved dwelling has been completed and occupied. It would not be necessary to remove or vary this condition to allow amended roof plans to be listed at condition 2. Even if amended plans were to be approved for an amended roof design, it may still be reasonable and necessary to remove permitted development rights to prevent subsequent changes being made to it by future occupiers of the new dwelling.
15. Having regard to the originally approved plans and the proximity of surrounding residential dwellings and gardens, the removal of permitted development rights for roof alterations permitted under classes B and C of the General Permitted Development Order is in my opinion reasonable and necessary to protect the living conditions of occupiers of adjacent residential premises.
16. Whilst not shown on the submitted drawings, the submitted supporting statement also suggests that means of access to the development is now

proposed to be via Anthony Mews, a private gated driveway located between 93 and 95 Briscoe Road, and not via the existing driveway of No.91, following the demolition of its existing garage. Means of access to the site via Anthony Mews is not included within the red or blue line site boundaries, which cannot be amended under s73. Given that I am dismissing the appeal anyway I have not considered this additional material change to the approved development any further. However, any new full application should include the means of access to the new dwelling from the publicly maintained highway within the red line boundary.

Conclusion

17. For the reasons set out above, I conclude that the appeal should be dismissed.

R Bartlett

INSPECTOR