



Appeal Decision

Site visit made on 3 December 2024

by V Simpson BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 23 January 2025

Appeal Ref: APP/C5690/W/24/3348503

5 Mercy Terrace, Ladywell, Lewisham, London SE13 7UX

- 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 Rolling Properties Limited against the decision of the Council of the London Borough of Lewisham.
- The application Ref is DC/24/135178.
- The application sought planning permission for *the construction of a part two/part three storey building on the site of 1-5 Mercy Terrace SE13, comprising ground floor commercial floor space to be used as a farmers market/multi purpose hall for hire (sui generis), 2 one bedroom and 1 two bedroom self-contained flats incorporating roof terraces to the rear, together with the provision of refuse and bicycle stores and external refurbishment of the adjoining stable/garage* without complying with conditions attached to planning permission Ref DC/11/77223, dated 31 May 2012.
- The conditions in dispute are standard condition 2 and additional conditions 11 and 12 which state that:
 - [2] *Unless minor variations are otherwise approved in writing by the local planning authority, the development shall be carried out strictly in accordance with the application plans, drawings and documents hereby approved and as detailed in the Schedule overleaf.*
 - [11] *The ground floor premises shall not be used between the hours of 10.30 pm and 8 am on any day of the week.*
 - [12] *The ground floor premises shall not be used for religious worship.*
- The reasons given for the conditions are:
 - [2] *To ensure that the development is carried out in accordance with the approved documents, plans and drawings submitted with the application and is acceptable to the local planning authority.*
 - [11] *To ensure that the proposed development does not prejudice the enjoyment by neighbouring occupiers of their properties and to comply with Policies ENV.PRO 9 Potentially Polluting Uses, ENV.PRO 11 Noise Generating Development, HSG 4 Residential Amenity and STC 9 Restaurants, A3 Uses and Take Away Hot Food Shops in the adopted Unitary Development Plan (July 2004).*
 - [12] *To ensure that the proposed development does not prejudice the enjoyment by neighbouring occupiers of their properties and to comply with Policies ENV.PRO 9 Potentially Polluting Uses, ENV.PRO 11 Noise Generating Development, HSG 4 Residential Amenity and STC 9 Restaurants, A3 Uses and Take Away Hot Food Shops in the adopted Unitary Development Plan (July 2004).*

Decision

1. The appeal is allowed and planning permission is granted for the construction of a part two/part three storey building on the site of 1-5 Mercy Terrace SE13, comprising ground floor commercial floor space to be used as a farmers market/multi purpose hall for hire (sui generis), 2 one bedroom and 1 two bedroom self-contained flats incorporating roof terraces to the rear, together with the provision of refuse and bicycle stores and external refurbishment of the adjoining stable/garage, at 5 Mercy Terrace, Ladywell, Lewisham, London SE13 7UX, in accordance with the application Ref DC/24/135178, without compliance with additional conditions 11 and 12 which were previously imposed on planning permission Ref DC/11/77223 dated 31 May 2012 and subject to the conditions set out in the attached schedule.

Preliminary Matters

2. The application plans, drawings and documents identified within the schedule cited in condition 2 are; 09.06-E-1, 09.06-P-1B, 2B, 3B, 4B, 5B, 6A Design & Access Statement and Site Location Plan (revised 1 Dec 2011).
3. The appeal proposes revisions to the scheme subject of permission ref DC/11/77223 (the original permission). The revisions would omit the commercial floorspace, increase the number of residential flats, and alter the design of the scheme to accommodate these changes. It also proposes the removal of conditions that restrict the times of use of the ground floor premises, and which prevent the ground floor from being used for religious worship.

Main Issues

4. The main issues are;
 - whether or not each of the conditions could be varied/removed as proposed, having regard to the Town and Country Planning Act 1990 – as amended (the act) and any other material considerations, including the 'Finney' judgment¹; and if so;
 - whether such condition/s are necessary with particular regard to the effect of the development on the vitality of the town centre and flood risk.

Reasons

Procedural basis for the removal/variation of conditions

5. The Finney judgement sets out that a section 73 application may not be used to obtain planning permission that would require a variation to the 'operative' part of the planning permission, in other words, the description of development for which planning permission has already been granted.
6. It follows from Finney that where amending a condition would result in a conflict between the new condition and the description of development, then that particular amendment is beyond the powers under section 73 and cannot be made.

¹ *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868

7. Some previous applications to make amendments to the development permitted by the original permission have been refused. Even if the impacts of the Finney judgement did not form a reason for refusal of these applications, I must determine this appeal with due regard to case law.

Condition 2

8. The effect of the variation of standard condition 2 would be to allow a fundamental change to the original permission that would create a conflict with an operative part of the original permission which explicitly refers to 'ground floor commercial floor space to be used as a farmers market/multi purpose hall for hire (sui generis), 2 one bedroom and 1 two bedroom self-contained flats'.
9. If I were to authorise the approved plans, this would necessitate a change to the original description of development. Such a change would go beyond the scope of s.73 of the Act, as set out in the *Finney* judgment.
10. For these reasons, standard condition 2 cannot be varied as proposed, having regard to the Town and Country Planning Act 1990 – as amended (the act) and any other material considerations, including the '*Finney*' judgment.
11. As such, there is no further need to consider the effects of the proposed alterations to standard condition 2 within the scope of this appeal.

Conditions 11 and 12

12. The original permission permits the use of the ground floor commercial space as a farmers market/multi purpose hall for hire (sui generis). The removal of conditions 11 and 12 - which prevent the use of the ground-floor of the premises between the hours of 22:30 and 08:00, and prevent its use for religious worship, would not therefore conflict with an operative part of the original permission. That being the case, these conditions could be removed as proposed, having regard to the Town and Country Planning Act 1990 – as amended (the act) and any other material considerations, including the '*Finney*' judgment².

Need for conditions 11 and 12

Flood risk

13. Although the appeal site is within flood zone 3, the removal of conditions 11 and 12 would not change the permitted use of the ground floor spaces within the building. As such the removal of these conditions would not have a material effect on flood risk. Moreover, the Environment Agency has indicated that it has no comments on the removal of these conditions.
14. For these reasons, conditions 11 and 12 are not necessary with particular regard to the effect of the development on flood risk. Consequently, the omission of these conditions would not conflict with policies SI 12 of the London Plan³ or policy 10 of the Lewisham Core Strategy⁴. Collectively, and

² *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868

³ Mayor of London – The London Plan – The Spatial Strategy for Greater London – March 2021

⁴ Lewisham – Lewisham local development framework – Core Strategy Development plan document – adopted June 2011

amongst other things, these policies require development to manage, minimise and mitigate flood risk.

Vitality of the area

15. The appeal site is in a built-up urban area, and close to both a railway station and a collection of shops and businesses. During my midweek and late morning site visit, I observed this area to be busy and vibrant, and have no reason to conclude that it is ordinarily otherwise.
16. It is reasonable to expect that the use of part of the building as a farmers market/multi purpose hall for hire, would generate activity and make a positive contribution to the vitality of the area. The removal of conditions 11 and 12 would not change the authorised use of the ground floor spaces within the building. Nevertheless, their removal would widen the pool of potential users of this space, and it would remove restrictions limiting the hours that it could be used. This would facilitate further enrichment of the vitality and vibrancy of the area.
17. For these reasons, the removal of conditions 11 and 12 would not be harmful to the vitality of the area. Consequently, and in so far as they relate to this main issue, the removal of conditions 11 and 12 would comply with policies GG2, SD6 and E9 of the London Plan, policy CS6 of the Core Strategy and DM policy 16 of the Lewisham Local Plan⁵. Collectively, and amongst other things, these policies provide general support for development which would promote and enhance the vitality and viability of town centres and high streets, and result in the retention of shopping facilities, as well as that which would create successful sustainable mixed-use places.

Other Matters

18. The removal of conditions 11 and 12 would have no effect on the supply of housing within the Borough.
19. The appeal site is located within an area where there is a significant amount of noise and activity. This is partly due to the uses and proximity of roads and a railway line, as well as from the uses of nearby commercial and residential properties. Even if the commercial use of part of the building would result in greater levels of noise and activity than its residential use would, from the evidence before me, and given the general levels of noise and activity in the area, the removal of condition 11, would not generate levels of noise or activity which would be harmful to the living conditions of the occupiers of nearby properties.
20. The appeal site is within the Ladywell Conservation Area (CA), close to a collection of commercial properties and a railway station which are also within the CA. The significance of this part of the CA stems in part, from its historic use as the commercial core of the area. It is also from the presence of the railway station – which delivered a good means of access to more central London locations, and which provided an impetus for later suburban development within the area. As such, it is reasonable to conclude that the area has historically been relatively vibrant and busy, and that the ambiance created by this contributes to the significance of the CA. Given my previous

⁵ Lewisham - Lewisham local development framework – Development Management Local Plan – adopted 26 November 2014

findings in respect of the effect of the removal of conditions 11 and 12 on the vitality of the area, the removal of these conditions would result in a form of development which would preserve the quality and significance of the CA.

Conditions

21. The guidance in the Planning Practice Guidance makes clear that decision notices for the grant of planning permission under section 73 should also restate the conditions imposed on earlier permissions that continue to have effect. The status of some conditions on the original permission are unclear, and/or I have insufficient evidence to establish whether they remain relevant. I therefore re-impose these conditions, albeit some are modified to reflect details previously agreed by the Council. In the event that some have been discharged, that is a matter which can be addressed by the parties. Standard condition 2 is also modified to specifically reference the plans to which the permission relates.
22. On the basis that the development subject of the original permission has been commenced, there is no need to impose an implementation condition. Nor is it necessary to impose additional condition 2, as the details required by this have already been agreed in writing by the Council.
23. For clarity, the number attributed to each condition in this decision letter reflects that of the associated condition on the original permission.

Conclusion

24. For the reasons given above I conclude that the appeal should partly succeed. I will grant a new planning permission without 2 of the disputed conditions and restating those parts of the other conditions that are still subsisting and capable of taking effect.

V Simpson

INSPECTOR

Schedule of conditions

Standard Condition

- 2) Unless minor variations are otherwise approved in writing by the local planning authority, the development shall be carried out strictly in accordance with drawing nos 09.06-E-1, 09.06-P-1B, 2B, 3B, 4B, 5B, 6A, Design & Access Statement and Site Location Plan (revised 1 Dec 2011).

Additional Conditions

- 1) The windows, exterior doors, cills, reveals, external facing materials and finishes, roof coverings, eaves details, balcony balustrades and screens used in the development, shall accord with the details submitted to and agreed to in writing by the local planning authority pursuant to application DC/11/77223. That is unless the local planning authority agrees in writing to any variation.
- 3) No plumbing or pipes, other than rainwater pipes, shall be fixed on the external faces of the building(s).
- 4) No deliveries in connection with construction works shall be taken at or despatched from the site and no work shall take place on the site other than between the hours of 8 am and 6 pm on Mondays to Fridays and 8 am and 1pm on Saturdays and not at all on Sundays or Public Holidays.
- 5) Those parts of the site not occupied by buildings and the treatment thereof (including planting, paving, walls and fences) shall accord with the details submitted to and agreed to in writing by the local planning authority pursuant to application DC/11/77223. All works which form part of the scheme shall be completed in the first planting season following the completion of the development, unless the local planning authority has given written consent to any variation. Any trees or plants which within a period of 5 years from the completion of the development die, are removed or become seriously damaged or diseased, shall be replaced in the next planting season with others of similar size and species, unless the local planning authority has given written approval to any variation.
- 6) The development hereby approved shall not be occupied until the restoration of the external envelope of the existing stable/coach house building adjoining the new structure has been implemented in accordance with plans hereby approved and Condition (1) & (3) of this permission.
- 7) No music, amplified sound system or other form of loud noise (such as singing or chanting) shall be used or generated on the ground floor of the building which is audible outside the premises or within adjoining residential buildings.
- 8)
 - (i) The development hereby approved shall achieve a Code for Sustainable Homes rating of minimum Code Level 4.
 - (ii) Within 3 months of the building being occupied, evidence shall be submitted to demonstrate full compliance with the requirements of this condition, which shall include a Post Construction Certificate issued by a suitably qualified Assessor.
- 9) Screening to the first floor roof terrace adjoining the rear yard of no 259 Algernon Road shall be installed before any of the flats are occupied and shall be retained in perpetuity. The design of this screening shall accord with the details submitted to and agreed to in writing by the local planning authority pursuant to application DC/11/77223.

- 10) Before the occupation of the premises, a grey water recycling system shall be installed. The specifications for which should accord with the details that were submitted to and agreed in writing by the local planning authority pursuant to application DC/11/77223. This system shall thereafter be retained in perpetuity unless the Council gives its consent in writing to any variation.
- 13) The use of the premises shall not commence until soundproofing works have been implemented in accordance with the details submitted to and agreed in writing by the local planning authority pursuant to application DC/11/77223. The soundproofing shall thereafter be retained permanently in accordance with the approved details.
- 14) The dwellings hereby approved shall be constructed to Lifetime Homes standards. No dwelling shall be occupied until an independently verified statement confirming compliance with Lifetime Homes standards has been submitted to and approved in writing by the local planning authority.
- 15) Refuse storage facilities, management and collection arrangements shall be provided in accordance with the details submitted to and agreed in writing by the local planning authority pursuant to application DC/11/77223 before any of the flats hereby approved are occupied. Thereafter they shall be retained permanently for the occupiers and users of the building. Refuse, including refuse storage bins, shall be stored in the designated refuse storage areas at all times, apart from on refuse collection days, which shall be taken to mean such day or days which the Council or other waste collection authority has designated for the collection of refuse, when bins may be temporarily stored outside the refuse storage area pending collection.

End of conditions.