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## Appeal Decision

Site visit made on 18 August 2014

**by JP Roberts BSc(Hons), LLB(Hons), MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 12 September 2014**

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**Appeal Ref: APP/X5210/A/14/2219830**

**62-63 Tottenham Court Road and 1-7 Goodge Street, London W1T 2EP**

- 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 Goodge St (Tottenham Court Road) LLP against the decision of the Council of the London Borough of Camden.
  - The application Ref 2014/0831/P, dated 31 January 2014, was refused by notice dated 1 May 2014.
  - The application sought planning permission for the erection of a five storey building plus basement at 5-7 Goodge Street and rebuilding to five storeys plus basement at 62-63 Tottenham Court Road and 1-3 Goodge Street (including mansard roof), following part/complete demolition of existing buildings, all in association with the provision of retail space at ground floor level and 8 additional residential units (9 in total) to upper floors (Classes A1/C3) without complying with a condition attached to planning permission Ref 2011/1821/P, dated 6 December 2012, granted on appeal under Ref: APP/X5210/A/12/2177819.
  - The condition in dispute is No 2 which states that:  
The development hereby permitted shall be carried out in accordance with the drawings numbered 4840/T(10) E01 A; E02 A; E04 A; E05 A; P00 A; P0-1 A; P01 A; P02 A; P03 A; P04 A; S02 A; 4840/T(20) E01 E; E02 F; E03 C; E04 D; E05 C; D01 B; D02 B; P-1 D; P00 F; P01 E; P02 E; P03 E; P04 F; P05 E; P101 B; S02 A; 4840/T(11) P0-1 A; P00 A; P01 A; P02 A and P03 A.
  - The reason given for the condition is to define the details of the permission.
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### Decision

1. The appeal is allowed and planning permission is granted for the erection of a five storey building plus basement at 5-7 Goodge Street and rebuilding to five storeys plus basement at 62-63 Tottenham Court Road and 1-3 Goodge Street (including mansard roof), following part/complete demolition of existing buildings, all in association with the provision of retail space at ground floor level and 8 additional residential units (9 in total) to upper floors (Classes A1/C3) at 62-63 Tottenham Court Road and 1-7 Goodge Street, London W1T 2EP in accordance with the application Ref 2014/0831/P, dated 31 January 2014, without compliance with condition number 2 previously imposed on planning permission Ref 2011/1821/P, dated 6 December 2012, granted on appeal under Ref: APP/X5210/A/12/2177819 but subject to the other conditions imposed therein, so far as the same are still subsisting and capable of taking effect and subject to the following new conditions:

- 1) The development hereby permitted shall be carried out in accordance with the following approved plans: 4848/ T(20)D01 rev C; 4840/ T(20) D02 rev C; 4840/ T(20)D03; 4840/ T(20) D04; 5315 T(20) D05; 4840/ T(20) E01 rev G; 4840/ (T20) E02 Rev H; 4840/T(20) E03 rev E; 4840/T(20) E04 rev F; 4840 / T(20) E05 rev D; 5315/T (20) P00 rev H; 5315 /(T20) P01 rev G; 5315 /(T20) P02 rev G; 5315 /(T20) P03 rev F; 5315 /(T20) P04 rev G; 5315 /(T20) P05 rev G; 4840/ T(20) P-1 rev G and 4840/T(20) S02 rev B.
- 2) A sample panel comprising the proposed brick, arrangement of brick courses, mortar jointing and pointing shall be erected on site and approved in writing by the Council before the erection of the front façade wall of 1-3 Goodge Street is begun and the development shall be carried out in accordance with the approved details.

### **Procedural matter**

2. A deed of variation to an obligation under s.106 of the Town and Country Planning Act 1990 has been submitted which deals with car free development, construction management and contributions towards various services and facilities. I shall refer to this below.

### **Background**

3. Planning permission for the re-development of a large block on the corner of Tottenham Court Road and Goodge Street was granted on appeal in 2012. The approved plans showed that the façade of 1-3 Goodge Street was to be retained and refurbished. Conservation Area Consent was in the same appeal for demolition of 63 Tottenham Court Road and 5-7 Goodge Street and the substantial demolition of 1-3 Goodge Street behind a retained façade.
4. However, after demolition work commenced, the developers informed the Council's Planning Department on 16 December 2013 that it was intended to demolish the façade as it was found to be dangerous, and that its instability could lead to its collapse. The Council did not challenge the appellants' claim and did not carry out its own investigation into the condition of the façade. The demolition of the façade followed, commencing on 20 December 2013.
5. The application subject of this appeal sought to substitute amended plans for those approved under permission Ref: Ref 2011/1821/P. These included the rebuilding of a façade to 1-3 Goodge Street, in a design similar to that which was demolished. Whilst the amended plans subject of the appeal application also varied some other aspects of the development, the only matter in dispute between the parties is the acceptability of the alterations to 1-3 Goodge Street, and I shall confine my consideration to this matter.

### **Main Issues**

6. The Council's reason for refusal does not address the planning merits of the proposed variation of the condition. Instead the refusal is based on the Council's view that the proposal could not be considered as a minor variation of the planning permission. The decision notice contains an informative which addresses the planning merits of the proposal.
7. Accordingly, the main issues are:

- i) whether the proposal can be considered under s.73 of the Town and Country Planning 1990, and
- ii) whether the proposed variation would preserve or enhance the character or appearance of the Charlotte Street Conservation Area.

## Reasons

### *The validity of the s.73 application*

8. S.73 of the Act provides the power to make an application to develop land without compliance with conditions previously attached, and in this case the condition in question requires the development to be carried out in accordance with specified plans. It is proposed to replace the plans which show the retention of the façade of 1-3 Goodge Street, with one showing its reconstruction in a manner similar, but not identical to the original.
9. The Act does not contain any restriction as to the scope of such applications. I have been provided by counsels' opinions on this matter on behalf of both of the principal parties. Judicial findings have provided clarification on the scope of conditions. The issue was considered in *Wheatcroft v Secretary of State for the Environment* [1982] JPL 37], where it was held that conditions could not be imposed on a planning application that had the effect of allowing development that was different in substance from that which was applied for.
10. In *Pye v Coventry City Council ex parte Arrowcroft Plc* [2001] PLCR 113, Sullivan J (as he then was) adopted as a starting point that a condition may have the effect of modifying the development proposed by the application provided that it does not constitute a fundamental alteration in the proposal.
11. An application under s.73 involves the same considerations as would the imposition of conditions in the first instance. So, would the demolition and rebuilding of the façade of 1-3 Goodge Street as part of the overall development amount to a development substantially different to that applied for? The description of the development permitted (which adopted that used by the Council, although not that shown on the application) does not specifically refer to the retention of the façade. Neither was a condition imposed specifically to seek its retention, consistent with the advice in paragraph 18 of the Annex to Circular 11/95 which was then in force at the time; as the Inspector does not mention it being suggested, I assume that the Council did not canvass it.
12. The permission specifically refers to rebuilding at 1-3 Goodge Street, and whilst it is clear from the plans that the façade of 1-3 Goodge Street was to be retained, a variation to permit the rebuilding of the façade, would not as a matter of fact and degree, bring the variation outside of the scope of the planning permission.
13. Planning Practice Guidance provides advice on s.73 applications, and says that one of the uses of a section 73 application is to seek a minor material amendment, where there is a relevant condition that can be varied. The application was submitted on the basis that it sought a "minor material amendment". The guidance says that there is no statutory definition of a 'minor material amendment' but 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 approved.

14. The Council points out that the façade in question has an area of some 99 sq.m., and that it would be unreasonable to treat the rebuilding of such an expanse as “minor”. However, I consider that this is not the correct approach; the test should not be whether the variation sought is “minor”, but whether it would result in a substantially different development from that approved. The use of the word “minor” is not meant to restrict the applicability of s.73 applications to those which involve only minor variations in the development. Rather, it is a helpful shorthand to distinguish “non-material amendments”, which this is not, and those material amendments which would result in a substantially different development from that originally approved.
15. The Council also argues that it would be unreasonable to accept the proposal as a minor material amendment because it would authorise what it describes as a breach of planning control and demolition which appears to be a criminal offence. Irrespective of whether there has been a breach of planning control, there is nothing in either statute or guidance which precludes the use of applications under s.73 of the Act in the case of development already carried out. I consider that this has no bearing on whether the proposal can be dealt with under s.73.
16. I recognise that the Council attached importance to the retention of the façade, having regard to the great weight that should be attached to the conservation of heritage assets. However, I am of the view that the proposed variation, when looked at in the terms of the permission granted and in the context of the development as a whole, does not fundamentally change either the scale or the nature of the permitted scheme, and it is not substantially different from what was approved. I therefore consider that there is no impediment to the proposed variation being considered on its merits.

#### *Character and appearance*

17. The appeal site lies within a central part of the Charlotte Street Conservation Area. The former building on the site was identified in the Council’s Charlotte Street Conservation Area Appraisal and Management Plan as being a positive contributor to the conservation area. The proposal is to rebuild the front elevation to the same height, width and general arrangement as that which was demolished.
18. The current position is that the original façade has gone, and despite the Council’s allegation that the demolition was unlawful, no enforcement action has been taken to require the original façade to be re-instated. I do not agree with the Council that the demolition prevents the lawful implementation of the planning permission; however, there is now no authorised scheme for the 1-3 Goodge Street façade.
19. I agree with the Council that what is now proposed would not be an identical reproduction of the original facade. A comparison of the approved and proposed 1:100 scale drawings, which do not show the elevation in fine detail, indicate that the window glazing arrangement, the size of dormer windows and chimney details are not exactly the same. However, it is evident from photographs submitted with the Rolfe Judd report which accompanied the current appeal application that the approved plans did not faithfully replicate what was there.

20. Notwithstanding this, the Council has not taken issue with any of the specific differences between what was approved and what is now proposed. From what I saw on my visit, I consider that the resulting development would fit in well with the appearance of other traditional buildings within the conservation area.
21. In particular, the proposal would aim to reproduce the Victorian shopfront, with angled glazed returns to a recessed door, as well other features such as pilasters and console brackets. The shopfront was specifically identified by the Inspector who granted the original planning permission as adding merit to the façade. The Council suggested that an assessment of the original proposal found that the proposal would harm the significance of the conservation area, but this was not the finding of the Inspector, who found that there would be no harm caused.
22. The Council's sole criticism of the proposed replacement is that it would not embody the traditional local building techniques and materials employed in the original building, and that only a facsimile of the original would be acceptable. However, the Council has not explained how the proposed modern building techniques and materials would result in harm, or otherwise lead to a material difference to the character or appearance of the building. The Charlotte Street Association has referred to significant changes to the original proportions of the brick facade and the details of the windows, but has not explained what those details are, or how they would detract from the significance of the conservation area.
23. The building is not listed, and there is no part of the façade, other than the shopfront to which I have referred above, which has been identified as having particular architectural merit. Moreover, it is clear from the Rolfe Judd report that the façade suffered from deformities, poor maintenance, and some non-traditional windows, pipework and vents, which the proposed scheme would remedy.
24. The proposal would use Imperial brick sizes, laid in a Flemish bond to replicate the original bond and a traditional lime mortar. Timber windows would be used in a consistent, traditional pattern throughout. In the absence of substantive evidence to show why this detailed treatment would be harmful, I consider that it would be satisfactory.
25. I therefore conclude that the proposed variation would at least preserve the character and appearance of the conservation area, and would result in no harm. Nor would it conflict with Camden Core Strategy Policies CS5 or CS14 or Camden Development Policies DP24 and 25, which deal with, amongst other things, high quality design and the protection of the borough's heritage. Neither would it conflict with the Council's Supplementary Planning Document on Design or the conservation area appraisal to which I have referred above.

### **Conditions and obligation**

26. The Council has suggested a number of conditions, which I have assessed in the light of national guidance. I consider that the details set out in the Rolfe Judd report are sufficient to show how the development would be carried out, but I agree that samples of materials and the proposed courses, jointing and bonding should be provided, in the interests of appearance. A condition to replace the one detailing the approved plans is necessary in the interests of good planning and for the avoidance of doubt.

27. A deed of variation of the obligation previously entered into in respect of the development has been submitted with the appeal. It aims to incorporate any permission arising from this appeal into its terms, and I consider that it is necessary and otherwise meets the tests of the Regulation 122 of the Community Infrastructure Regulations 2010. I attach considerable weight to it, although this is tempered by my sharing the previous Inspector's reservations that the construction management provisions could have been the subject of a condition.

**Conclusion**

28. For the reasons given above, I conclude that the appeal should be allowed.

*JP Roberts*

INSPECTOR