

Report for: Strategic Planning Committee 17 October 2024

Title: Response to Ombudsman Complaint Reference 23 016 137 (Haringey Reference LBH/14192823) in relation to planning application HGY/2022/4537

Report authorised by: Rob Krzyszowski, Assistant Director, Planning, Building Standards & Sustainability

Lead Officer: Robbie McNaugher Head of Development Management and Planning Enforcement

Ward(s) affected: Crouch End

**Report for Key/
Non Key Decision:** For information

1. Describe the issue under consideration

Response to Ombudsman Complaint 23 016 137 (Haringey Reference LBH/14192823) in relation to the determination of planning application HGY/2022/4537 in Crouch End Ward.

2. Recommendations

The Committee is asked to note this report.

3. Reasons for decision

One of the Ombudsman’s recommendations in relation to this case was to “report the findings of this review to its relevant oversight and scrutiny committee”. This report was reported to the Housing, Planning & Development Scrutiny Panel on 26 September 2024. The report is relevant to the terms of reference of the Strategic Planning Committee regarding performance of the service so is being reported to this Committee also.

4. Alternative options considered

N/A

5. Ombudsman Complaint 23 016 137 (Haringey Reference LBH/14192823)

Background

5.1 The Council received a ‘Section 73’ (S.73) planning application on 23/12/2022 (reference HGY/2022/4537) in Crouch End Ward for:

Variation of condition 2 (approved drawings) pursuant to planning permission ref. HGY/2021/0583 granted on 7th May 2021 for the extension by excavation to

existing basement with lightwell in association with existing ground floor flat; namely to excavate a front lightwell and insert windows to the front elevation basement level

- 5.2 The application was approved on 11/04/2023
- 5.3 This application followed two previous decisions on the site one to refuse permission (the proposed front lightwell was unacceptable) and one to approve permission (the revised proposal omitting the front light well was acceptable):

HGY/2019/0035 Excavation of existing cellar to create new basement with light wells to front and rear to create one additional studio flat – Permission refused 07/02/19

HGY/2021/0583 Extension by excavation to existing basement with lightwell in association with existing ground floor flat. Approved 07/05/2021

Relevant Legislation

- 5.4 An application can be made under S.73 of the Town and Country Planning Act 1990 to vary or remove conditions associated with a planning permission, in the words of the Act “for the development of land without complying with conditions subject to which a previous planning permission was granted”. It has become practice for applicants to utilise a S.73 application to make what are considered minor amendments to an existing permission by varying the condition which sets out the approved plans that the development should accord with. There are, however, limitations and that issue is addressed below.
- 5.5 In the application in question the application sought to vary the approved drawings set out in Condition 2 of the permission to include a front lightwell and insert windows to the front elevation basement level.
- 5.6 The use of S.73 has been subject to a number of court decisions namely *Finney v Welsh Minsters* [2019] EWCA Civ 1868 (the *Finney* case) and more recently *Armstrong v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 176 (Admin) (the *Armstrong* case). *Finney* decided that an application under S73 could not change the description of the development, but *Armstrong* determined that there is in fact no requirement in the Planning Acts for amendments sought through S73 to be minor, as long as the principle in *Finney* was respected.

Stage 1 Complaint

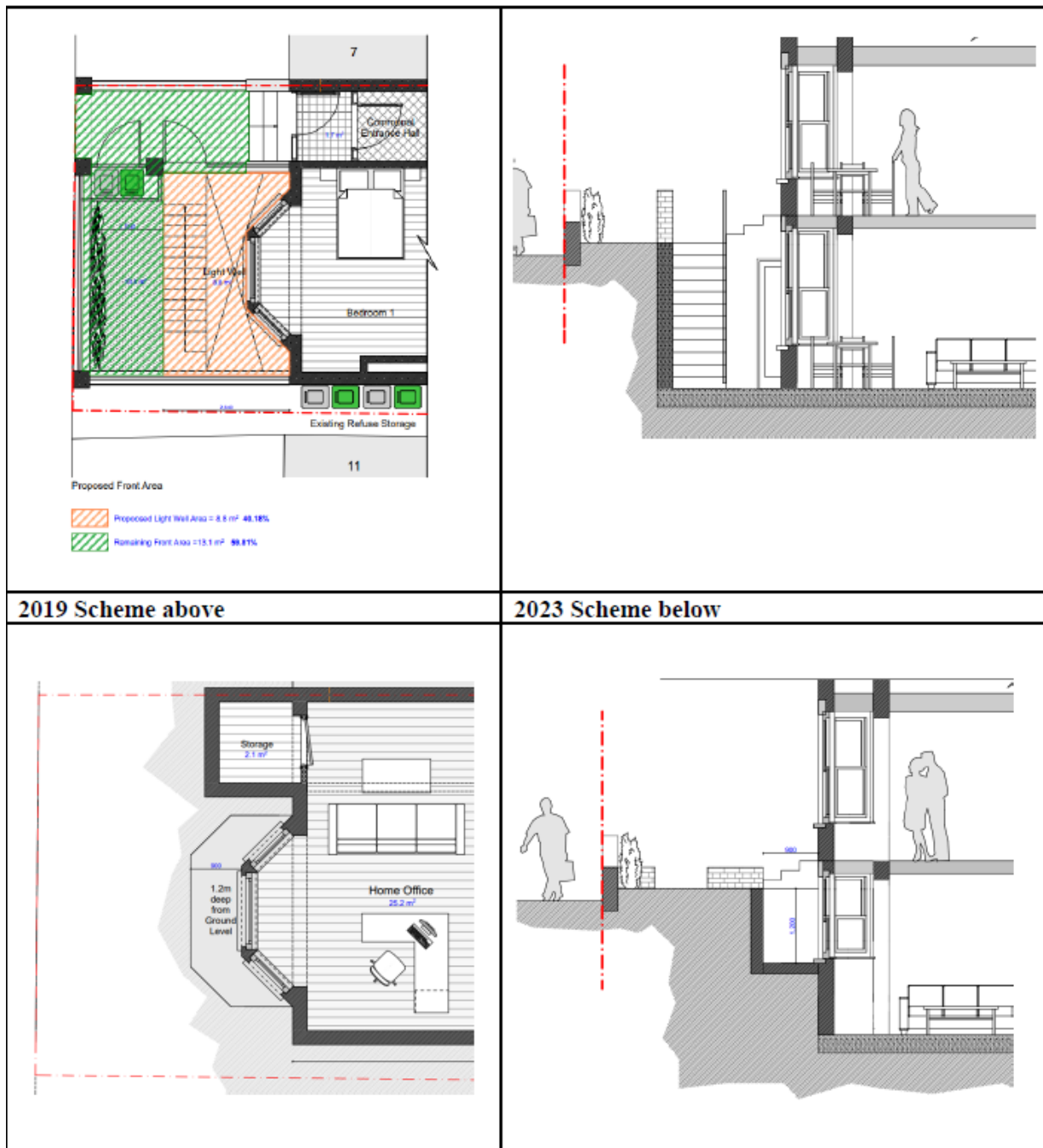
- 5.7 On 2/7/2023 the Council received a complaint raising several concerns that the Council had:

1. failed to understand what constituted the proposed 'amendment' to planning due to a fundamental misunderstanding of what planning permission was originally granted for.
 2. failed to acknowledge objections raised by 3 local councillors
 3. failed to address concerns from local residents about the legality of the use of s.73 to apply for an amendment that is changing the nature of the planning permission
 4. failed to address or adhere to Haringey's policy DM18 of the Haringey DM DPD 2017 (Residential Basement Development and Light Wells)
 5. gave Inadequate and time poor responses to concerns raised by us following the published decision
- 5.8 The Council provided a Stage 1 complaint response on 17/07/23 which accepted that the assessment of the application did not specifically address two points raised by the complainant and local Councillors. Namely that the proposal included aspects of the proposal previously refused and a failure to address concerns about the legality of the use of S.73 to apply for the changes proposed.
- 5.9 The response accepted that these points should have been included in the decision report's list of points raised and some narrative provided in the report to provide clarity that this was a consideration in the officer's assessment.
- 5.10 The response concluded that despite this, the assessment of the application was correct. The complaint referred to a key piece of case law namely the Finney case, and the Council's response asserted that the decision was consistent with the Finney case, and more recent case law.
- 5.11 These court decisions found that provided a variation to the plans is not inconsistent with the operative part of the original permission then a S.73 application is appropriate.
- 5.12 The Council's response asserted that introducing a front light well under the description for HGY/2021/0583 is not inconsistent with the operative part of the permission which refers to basement excavation and lightwell.
- 5.13 It noted that the more recent Armstrong case found that there was nothing in the wording of section 73 that limited its scope to "minor material amendments".
- 5.14 The response asserted that adequate consideration has been given to Policy DM18 and apologised for delays in responding to emails.

Stage 2 Complaint

- 5.15 The Council received a Stage 2 complaint on 24/07/23
- 5.16 Requesting an independent review complaining that the Stage 1 response had not:
- explained an error on the planning officer's report and therefore failed to reassure that this error does not bely a fundamental misunderstanding by the planning officer
 - demonstrated or given evidence in his answer that appropriate procedures were followed and council policies adhered to by the planning officer while assessing the amendment
- 5.17 The Stage 2 response was issued on 15/09/23 and accepted and apologised for the drafting error in the report noting the wording crossed out below should not have been included:
- Planning permission was granted under reference: HGY/2021/0583 for the extension by excavation to existing basement with lightwell in association with existing ground floor flat; ~~namely to excavate a front lightwell and insert windows to the front elevation basement level.~~*
- 5.18 It notes that in the same paragraph of the report it is expressly made clear what is applied for and correct as set out below:
- The changes are to amend the approved scheme by adding a front lightwell with the dimensions 0.9m (width) and 1.2m (depth) to the front of the dwelling house to allow natural light into the new basement bedroom.*
- 5.19 The Stage 2 response notes that in this part of the report the position of the proposed lightwell is made clear and its dimensions expressed. It also noted that further on in the officer's report, the reasons why this lightwell was acceptable are clearly set out.
- 5.20 In this respect the Stage 2 response noted that whilst the complainant argued that officers only assessed the impact of the lightwell and not the window contained within the structure of this lightwell, the drawings submitted clearly show that there is a window. Considering the interpretation of what a lightwell is, namely an architectural feature used to take natural light into the interior space of a building, it must be expected that there would also be a window.
- 5.21 The Stage 2 response noted that as shown in the extract from the drawings below the lightwell approved (with associated window within) is smaller/ more discrete

than that refused under HG/2019/0035 and is materially different in terms of dimensions and how it would have appeared in the street.



2019 Scheme above

2023 Scheme below

5.22 The Stage 2 response concluded that in the officer's report the relevant planning material considerations were identified and discussed, in the context of the relevant policies and the substance of the objections received, with a planning judgement made to approve permission subject to conditions. The report here was concise and focused on the change in question, which is a proportionate approach.

5.23 With regard to concerns raised that the making of an amendment via the route of S73, the Stage 2 response accepted that the description of the previous approval

(ref: HGY/2021/0583) referred to 'lightwell' in the singular as opposed to the plural form. However, it asserted that this does not preclude the addition of a lightwell to the front and to the rear, specifically as it does not lead to a material change from the operative description of the development permitted. Rather, the description of the permitted development can remain intact, in that there isn't conflict between what was specified in the description and what subsequently shown in the approved drawings.

5.24 The Stage 2 response concluded that whilst accepting (and apologising for) the drafting error, due process was followed in considering the application and no fault was found.

Ombudsman Decision

5.25 The complaint was escalated to the ombudsman who contacted the Council on 22/02/24. Following discussions with the Council the Ombudsman decision was issued on 28/06/24.

5.26 The Ombudsman's Decision was as follows:

X complained about the Council's failure to take account of relevant case law before it granted permission for an application to vary plans it had already approved. We found fault because there was no evidence to show the Council considered an objection about a key planning issue. The Council agreed to remedy the injustice caused by the fault and to carry out a review that might help avoid the same fault happening again.

To remedy the injustice caused by the fault they found and to avoid recurrence, the Council agreed to the following remedy:

- a) apologise to X for the frustration, disappointment and unnecessary time and trouble it has caused within one month of this decision.*
- b) review what has happened and decide whether any changes to practice and procedure or additional training are necessary. The review will include consideration of the Finney case and its application to variation applications within three months of this decision.*
- c) report the findings of this review to its relevant oversight and scrutiny committee. This will happen within one month from date the Council completes the service review agreed in the above paragraph.*

5.27 On 24/07/24 the Council issued a formal apology to the complainant which has remedied point a).

5.28 With regard to point b) the Council has reviewed the case and found the following errors:

- Omission of 3 Councilors' representations
- Omission of a direct assessment of the proposal in light of the Finney and Armstrong cases
- The body of the report contained a drafting error in the description of the proposal
- The assessment should have directly compared the proposal to the previous refusal as this decision was a key material consideration

5.29 Regarding point c) this report was reported to the Housing, Planning & Development Scrutiny Panel on 26 September 2024.

5.30 The Ombudsman finds fault because of technical issues in the way the application was determined and expressly says that when representations were made over the process (para 36) these were key issues and not referred to in the reasoning behind the decision (para 37). However the Ombudsman also notes that the Ombudsman Service is not an appeal body, so makes no finding as to whether the decision itself was lawful or correct in planning terms.

5.31 A plain reading of the description of development would be that a lightwell means one lightwell rather than two or more. However it is arguable that as a lightwell was already in the description the S73 amendment was not inconsistent with the operative part of the development.

5.32 However it is accepted that the assessment should have considered whether the introduction of a front lightwell did modify the operative part of the development particularly in direct response to the representations raised that were not acknowledged.

5.33 Officers consider that whilst the decision was correct, with regard to the Finney Case, there were clearly errors and omissions in the report and ultimately the Council cannot evidence that the assessment was robust.

Remedy

- 5.34 The Council has taken steps to ensure this is not repeated. Firstly all relevant officers are reminded to ensure all representations are noted and addressed in planning application reports, this took place at a team meeting on 05/09/24. Secondly all officers and managers reviewing reports and issuing decisions under delegated powers were reminded to check all representations were noted and addressed as part of their review. Finally as part of the induction of new staff the importance of noting and addressing all representations will be noted.
- 5.35 Training will be provided by to all relevant officers on recent case law around S73 on 12/09/24 to broaden the understanding within the team on how to consider such applications. This will ensure officers are fully aware of the key legal tests to be considered.
- 5.36 These actions are considered sufficient to remedy the issues that have arisen in this application.

6. Contribution to strategic outcomes

- 6.1 A key element of the Haringey Deal is “Getting the Basics Right”, to ensure everyday interactions with the Council have to be as easy, effective and supportive as possible.

7. Use of Appendices

Appendix 1 - Ombudsman decision

8. Background Documents

None

9. Local Government (Access to Information) Act 1985

N/A