
Appeal Decision

Site visit made on 14 July 2016

by Lynne Evans BA MA MRTPI MRICS

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

Decision date: 21 September 2016

Appeal Ref: APP/P1425/W/16/3143965

High Elms Filling Station, Brighton Road, Lewes BN7 3JR

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant of planning permission subject to conditions.
- The appeal is made by Pricewatch Limited against the decision of Lewes District Council.
- The application Ref: SDNP/15/02508/FUL dated 10 May 2015, was approved on 6 August 2015, and planning permission was granted subject to conditions.
- The development permitted is decommission 6 single skin underground fuel tanks totalling 130kL capacity, replace with 4 above ground double skin bunded fuel tanks totalling 62kL capacity.
- The conditions in dispute are Nos 1, 2, 3, 5 and 6 which state that:
 - Condition 1: No development shall commence until a scheme to manage the pollution risks associated with the operations of the proposed petrol filling station have been submitted to and approved, in writing, by the local planning authority. The scheme shall include and address the following components:
 1. Design and Method Statement for decommissioning of under ground storage tanks
 2. Design and Method Statement for installation of above ground tanks and fuel lines.Any changes to these components require the express consent of the local planning authority. The scheme shall be implemented as approved.

Condition 2: No development approved by this permission shall take place until a remediation strategy that includes the following components to deal with the risks associated with contamination of the site shall each be submitted to an approved, in writing, by the local planning authority:

1. A preliminary risk assessment which has identified:
 - all previous uses,
 - potential contaminants associated with the uses
 - a conceptual model of the site indicating sources, pathways and receptors
 - potentially unacceptable risks arising from contamination at the site.
2. A site investigation scheme based on (1) to provide information for a detailed assessment of the risk to all receptors that may be affected, including those off site.
3. The results of the site investigation and the detailed risk assessment referred to in (2) and, based on these, an options appraisal and remediation strategy giving full details of the remediation measures required and how they are to be undertaken.
4. A verification plan providing details of the data that will be collected in order to demonstrate that the works set out in the remediation strategy in (3) are complete and identifying any requirements for longer-term monitoring of pollutant linkages, maintenance and arrangements for contingency action.

Any changes to these components require the express written consent of the local planning authority. The scheme shall be implemented as approved.

Condition 3: No occupation of any part of the permitted development shall take place until a verification report demonstrating completion of works set out in the approved remediation strategy and the effectiveness of the remediation shall be submitted to and approved, in writing, by the local planning authority. The report shall include samples of and monitoring carried out in accordance with the approved verification plan to demonstrate that the site remediation criteria have been met. It shall also include any plan ('a long term monitoring and maintenance plan') for longer term monitoring of pollutant linkages, maintenance and arrangements for contingency action, as identified in the verification plan. The long term monitoring and maintenance plan shall be implemented as approved.

Condition 5: No infiltration of surface water drainage into the ground is permitted other than with the express consent of the local planning authority, which may be given for those parts of the site where it has been demonstrated that there is no resultant unacceptable risk to controlled waters. The development shall be carried out in accordance with the approved details.

Condition 6: No development shall commence until an Environment Management System (EMS) for the proposed petrol filling station has been submitted to and approved by the Local Planning Authority. The operator shall manage and operate the activities in accordance with the submitted EMS that identifies and minimises the risks of pollution, including those arising from operations, maintenance, accidents, incidents, closure and decommissioning and those drawn to the operator as a result of complaints.

- The reasons given for the conditions are:
Condition 1: The site lies on Seaford and Newhaven Chalk, which is classified as a principle aquifer and is located in Source Protection Zone 1. Adequate details need to be provided to ensure that any design and method statement does not cause any pollution in accordance with the National Planning Policy Framework.

Condition 2: The site lies above Seaford and Newhaven Chalk which is designated as a Principal Aquifer. Contamination may be present at the site as a result of its historical uses(s). Any contamination present may pose a risk to groundwater underlying the site in accordance with the National Planning Policy Framework.

Condition 3: To ensure that any remediation, if deemed necessary, is satisfactorily completed in accordance with the National Planning Policy Framework.

Condition 5: To ensure that surface water drainage from the proposed development does not result in a deterioration of groundwater quality.

Note: At present the proposed drainage from the forecourt is to surface water ditch. We wish to seek improvements to this current design as it currently present a risk to groundwater. We wish the developer to seek connection to the sewer. If this is not possible, we require enhanced pollution prevention measures prior to any discharge to soakaway. It should also be noted that as the site lies in a Source Protection Zone 1, if the discharge is to ground this will require an Environmental Permit under the Environmental Permitting Regulations 2010 in accordance with the National Planning Policy Framework.

Condition 6: The site lies on Seaford and Newhaven Chalk, which is classified as a principle aquifer and is located in Source Protection Zone 1. Adequate details need to be provided to ensure that Environmental Management Systems are in place to operate the site and not cause any pollution in accordance with the National Planning Policy Framework.

Costs application

1. An application for costs was made by Pricewatch Ltd against Lewes District Council. This application is the subject of a separate decision.

Decision

2. The appeal is allowed and planning permission Ref: Ref SDNP/15/02508/FUL to decommission 6 single skin underground fuel tanks totalling 130kL capacity, replace with 4 above ground double skin bunded fuel tanks totalling 62kL capacity at High Elms Filling Station, Brighton Road, Lewes BN7 3JR granted on 6 August 2015 by Lewes District Council is varied by deleting conditions numbers 1 (managing pollution risks), 2, 3, 5 and 6 and substituting for them the following conditions, as set out on the attached schedule.

Preliminary Matters

3. Planning permission has been granted subject to conditions as set out above. The Appellant has appealed within six months of the decision being issued against 5 of the 7 conditions imposed on the basis that the Company considers that they render the permission worthless as they place unfair, unnecessary and unworkable burdens upon it.
4. There are two conditions numbered 1 on the decision notice, the first requiring the development to be carried out in accordance with the approved plans, and the second relating to a scheme to manage pollution risks at the site. From the information before me it is clear that it is the second of the two conditions numbered 1 which is being appealed against.
5. The Council has contended that the permission has now commenced as the four tanks have been brought onto the site and three of the four tanks have been installed in accordance with the siting shown on the approved drawings. As the relevant conditions on the permission are pre-commencement conditions, the Council has contended that the conditions cannot therefore now be complied with and the appeal should be dismissed on this basis.
6. At the time of my site visit, three of the four above ground tanks were on the site and appeared to be in the general position shown on the approved plans and appeared to be sitting on concrete bases. The fourth tank was also on the appeal site, but in a temporary position in the rear corner of the forecourt. Although the tanks were not connected and were not in operation, it is my view that the bringing of the tanks onto the site and siting three of them in what I understand to be their final and approved position constitutes a commencement of development in accordance with Section 56 of The Town and Country Planning Act 1990. However, I take no view on whether the development is in accord with any of the relevant conditions.
7. However, and whilst I agree that as worded, the conditions imposed are pre-commencement conditions, I do not consider that the fact that development has taken place necessarily prevents me from considering the appeal before me, which seeks to vary or remove those conditions in dispute, including the timing requirements. The two conditions which are not in dispute are not pre-commencement conditions.

8. The Appellant has made several references to Circular 11/95 but that Circular is no longer in force and has been replaced by the National Planning Policy Framework (Framework) and National Planning Guidance (Guidance).
9. The Appellant has contended that the decommissioning of the existing underground tanks is not development and does not therefore require planning permission. It is my understanding that the favoured method of decommissioning to be employed at the site would be to drain any residual content and then to pump in and fill with an inert substance. Section 55 of the Town and Country Planning Act 1990 defines development as *the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land*. On the basis of the information before me I consider that the process of decommissioning as set out above would fall to be considered as an engineering or other operation; it is therefore, in my view, development. Furthermore, it is also my understanding that the decommissioning of the existing tanks is an integral part of the overall scheme involving the replacement with the new above ground tanks and I do not consider it reasonable to try to subdivide the constituent elements from the overall development proposal. It is noteworthy in this context that the application itself referred to both the decommissioning of the existing tanks and their replacement with above ground tanks in the description of proposed development which seemed to recognise the interlinked nature of the development elements.
10. During the appeal process, further documentation was received from the Appellant and has been copied to the Council. This includes technical information, including an environmental management system, relating to the decommissioning of the underground tanks and installing and operating the new above ground tanks. The date of the document is not shown although one of the documents is dated 19 February 2016, and therefore appears to be after the date of the permission. Whilst this material may satisfy some of the matters the subject of the conditions, the appeal before me relates to whether or not the conditions are reasonable and necessary. It will be for the Council in the process of discharging any conditions, to consider and be satisfied that the submission of any further detailed and technical information meets the requirements of individual conditions.
11. The Lewes District Local Plan Part 1; Joint Core Strategy (2016) (JCS) was adopted by the Council in May 2016. However, as the reasons for the imposed conditions specifically refer to the Framework rather than any development plan policies, I do not consider that the adoption of the Plan affects my consideration of this appeal.

Main Issue

12. The main issue in this appeal is whether the requirements of each of the conditions is reasonable and necessary to safeguard against contamination and pollution of the surrounding environment.

Reasons

13. The appeal site is an existing and operational petrol filling station on the north side of the A27 dual-carriageway and accessed from the east bound

carriageway only. The Appellant indicates that a petrol filling station has been operating from this site for some 50 years.

14. The appeal site is in a very sensitive area, being within the South Downs National Park and located above the Seaford and Newhaven Chalk designated principal aquifer. I understand the objectives of the Environment Agency and of the Council to ensure that the development would not give rise to pollution or contamination risks. These objectives accord with policies in the Framework, including at paragraph 109 and in particular the fourth bullet point. I further agree that in order to secure such objectives, it would be reasonable and appropriate to impose relevant conditions on the permitted development, given the nature of the use and the operations proposed.
15. However, any condition imposed must meet the tests set out at paragraph 206 of the Framework and be necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. The Guidance provides further guidance in respect of imposing conditions which is relevant to this appeal. It is my view that the conditions, as imposed, are defective in a number of ways.
16. First, the conditions should be specific to the development proposed and the wording of some of the imposed conditions suggests that they are to be applied to the petrol filling station taken as a whole. At the very least the wording is ambiguous. In condition 1 for example the wording refers to *the operations of the proposed petrol filling station*. Conditions 2, 3, 5 and 6 similarly are not precise in terms of the extent of development and site being addressed. The Planning Practice Guidance under Use of Conditions (Paragraph: 004 Reference ID: 21a-004-20140306) is clear that a condition cannot be imposed in order to remedy a pre-existing problem or issue not created by the proposed development. Following that guidance, it is my view that the wording of the conditions should be clear and precise in terms of only relating to the development now proposed and permitted, that is, the decommissioning of the underground tanks and the replacement with above ground tanks. If there are other contamination and pollution issues to be addressed over the wider petrol filling station site, but which are not directly related to this permitted development, then remedial steps, as available under other legislation, should be considered and instigated.
17. However, providing the wording is amended to be specific to the development the subject of this permission, then the areas to be addressed by the conditions are in my view necessary and relevant to planning in order to ensure that the permitted development is carried out in a manner which would safeguard against contamination and pollution risks. This is because of the very sensitive environmental nature of the site and the risks in particular to the aquifer from contamination and pollution.
18. The requirements of conditions 1, 2 and 6 are set out to be approved prior to the commencement of development. In this case, it is my understanding that the contamination and pollution risks which the conditions seek to address relate primarily to the decommissioning of the tanks and the operation of the new tanks rather than the physical presence of the new tanks on the site. However, given the sensitivity of the site in terms of its relationship with the principal aquifer, I also consider that the manner in which the specific area of

the site would be prepared to accommodate the over ground tanks should be the subject of further detailed information. The information submitted with the application, including the plans is in my view limited in this regard.

19. The Guidance under Use of Planning Conditions (Paragraph: 007 Reference ID: 21a-007-20140306) sets out that pre-commencement conditions should only be used where it is considered that their requirements are so fundamental to the development permitted that it would have been otherwise necessary to refuse the whole permission. The environmental constraints of the site are such and the information with the application so limited that in my view the further details required under Conditions 1, 2, 5 and 6 are essential to be provided and approved prior to the development proceeding.
20. There are a number of further issues which I have addressed in respect of individual conditions, and I have reworded conditions 2 and 3 to make sure that the processes required are again specific to the permitted development with clear timescales for when the various stages of the exercise are to be completed and rephrased in accordance with best practice.
21. Condition 5 relates to surface water but as worded it fails the tests of the Framework and the Guidance in that it is not precise and is ambiguous in its requirements. However, the management of any surface water drainage relating to the overground tanks is in my view a necessary matter to address to protect groundwater quality but the condition requires to be reworded to overcome its current defects.
22. It is therefore my conclusion that the objectives and requirements of the conditions in so far as they seek to control any pollution or contamination from the permitted development within this environmentally sensitive site are relevant to planning and are necessary to accord with the requirements of the Framework and in particular Paragraph 109. However the current wording is defective and does not meet the tests set out under the Framework and as further set out under the Guidance. I therefore intend to delete Conditions 1 (relating to managing pollution risks), 2, 3, 5 and 6 as imposed and substitute with reworded conditions.
23. The Appellant has raised concerns that the consultation response from the Environment Agency was received very late in the application process and that it had no prior notice of the imposed conditions. I agree that the timing of the Environment Agency's response was unfortunate but this would not constitute any reason for the Council to disregard its advice. Moreover, there is no requirement for a local planning authority to discuss with an applicant any conditions it might propose to impose on a permission; it is for the local planning authority to determine an application and where it intends to grant permission to impose such conditions as it considers reasonable and necessary in accordance with paragraph 206 of the Framework.

24. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should be allowed. I shall delete Conditions 1, 2, 3, 5 and 6 as imposed and in respect of each of these conditions, I shall substitute conditions with amended wording, particularly to ensure that the conditions are specific to the permitted development.

L J Evans

INSPECTOR

Schedule of Conditions:

- 1) No development shall take place until a scheme to manage the pollution risks associated with the development hereby permitted have been submitted to and approved, in writing, by the local planning authority. The scheme shall provide a design and method statement both for the decommissioning of the underground storage tanks and for the installation of the above ground tanks and their fuel lines. The scheme shall be implemented as approved.
- 2) No development shall take place until:
 - a) an assessment of the risks posed by any contamination in respect of the development hereby permitted shall have been submitted to and approved in writing by the local planning authority. This assessment must be undertaken by a suitably qualified contaminated land practitioner, in accordance with British Standard BS 101075: Investigation of potentially contaminated sites – Code of Practice and Environment Agency's Model procedures for the Management of Land Contamination (CLR11) (or equivalent British Standard and Model Procedures if replaced). The assessment shall focus in particular on the:
 - The potential contaminants associated with the permitted development;
 - potential risks to ground waters and surface water
 - b) A detailed remediation scheme including a timescale and programme of works shall have been submitted to and approved in writing by the local planning authority in respect of any contamination risks identified in the risk assessment under a) above.
- 3) The approved remediation scheme shall be carried out in accordance with the approved timescale and programme of works and upon completion a verification report by a suitably qualified contaminated land practitioner shall be submitted to and approved in writing by the local planning authority, prior to the above ground tanks being brought into use. The verification report shall also include, if required by the local planning authority, a long term monitoring and maintenance plan for longer term monitoring of pollutant linkages, maintenance and arrangements for contingency action. The long term monitoring and maintenance plan shall be implemented as approved.

- 4) No change from the original permission
- 5) No development shall take place until full details of the surface water drainage relating to the above ground tanks and their operation has been submitted to and approved in writing by the local planning authority. The development shall be implemented in accordance with the approved details.
- 6) No development shall take place until an Environment Management System (EMS) for the development hereby permitted has been submitted to and approved by the Local Planning Authority. The operator shall manage and operate the development in accordance with the submitted EMS that identifies and minimises the risks of pollution, including those arising from operations, maintenance, accidents, incidents, closure and decommissioning and those drawn to the operator as a result of complaints.