
Appeal Decision

Site visit made on 23 May 2017

by R J Marshall LLB DipTP MRTPI

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

Decision date: 7 August 2017

Appeal Ref: APP/B1740/W/17/3169648
2, Bridge Road, Lymington SO41 9BY

- 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 Ms Michele deVito against the decision of New Forest District Council.
 - The application Ref 16/11349, dated 29 September 2016, was approved on 3 February 2017 and planning permission was granted subject to conditions.
 - The development permitted is two-storey side extension; first floor rear extension.
 - The conditions in dispute are Nos. 3-7 inclusive. They are set out along with the reasons given for them on the attached sheet.
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Decision

1. The appeal is allowed and the planning permission Ref 16/11349 for two-storey side extension; first floor rear extension at 2, Bridge Road, Lymington SO41 9BY granted on 3 February 2017 by New Forest District Council is varied by deleting condition Nos 3-7 inclusive and substituting for them the following condition:

By no later than 20 October 2017 a programme/timetable for:

(i) the submission of and approval by the LPA of a written report by a competent person on the nature and extent of any contamination on the site, whether or not it originates on the site, and the methodology to be used for that report;

(ii) the submission to and approval by the LPA of a written report, if contamination is found, on a remediation scheme to be undertaken, and a timetable for its implementation, to remove any unacceptable risks to human health, buildings and other property and the natural and historic environment arising from development in accordance with this application;

(iii) the submission to and approval by the LPA of a written report verifying the effectiveness of the remediation and any further work required;

shall have been submitted to and approved by the LPA.

The submission of the written reports referred to above, and the implementation of the approved remediation and any further works referred to above, shall be undertaken in accordance with the timetable(s) agreed in writing by the LPA.

Main Issue

2. The disputed conditions have been imposed to ensure that risks from potential land contamination on future users of the land and neighbouring occupiers are minimised and development is undertaken without unacceptable risk to human health.
3. In light of this, and all I have read, the main issue in this appeal is whether the disputed conditions meet the tests on the imposition of conditions in the National Planning Policy Framework (the Framework) and whether they may be removed, in the absence of a substituted condition, without potential harm to human health.

Reasons

4. The development on which the disputed conditions are attached is for a 2 storey side extension and a second floor rear extension over an existing single storey rear extension. At the time of my visit the rear extension had largely, if not completely, been built, and the side extension had been built up to first floor level.
5. The Council imposed the disputed conditions on the advice of its Environmental Protection Department. The appeal site backs onto an industrial site that until the 1960's held the gasometers for a gas works. It has been identified as being within an area of "high risk" of contamination from the former gas works site.
6. Although the development is small-scale it would have resulted in disturbance to the ground that could potentially release contaminants. In one respect this could have arisen from the foundations for the side extension. Ground disturbance could also have arisen from works for the proposed first-floor rear extension. This is because the application plans note that the existing single-storey extension is to be underpinned in accordance with structural engineer's details.
7. Whether or not the land is in fact contaminated, and whether or not development of this scale would in fact give rise to harm to health beyond that which would arise if development was not undertaken, is unknown at present. However, the past use of the adjoining land and the identification of the site as at high risk of contamination justified a precautionary approach and the imposition of conditions to assess whether contamination exists and the action to be taken in that event.
8. In arriving at this view I appreciate that extensions could potentially be added to the appeal property as permitted development. However, that does not mean that the potential risk to human health should be ignored when permission is required, thereby allowing conditions of the kind imposed to be applied. An assessment of the ground conditions to comply with the disputed conditions would be likely to involve some disturbance to the soil. However, there is no substantial evidence to suggest that this would be to an extent that would result in the same level of risk that would arise from the proposed development.
9. Government guidance is aimed primarily in ensuring that a site is suitable for a proposed use having regard to potential land contamination issues and possible remediation. However, this does not mean that in cases such as this where an

existing residential use is on potentially contaminated land that consideration should not be given to the potential implications of operational development.

10. That said conditions in such circumstances should be worded to be relevant to the scale and nature of the operational development proposed. Two of the proposed conditions fail to do this. Condition 4 sets out a list of findings to be included in the report that would seem, in the absence of evidence to the contrary, likely to include more than would be required in this case. Condition 5 refers to bringing the site to a condition suitable for the intended use, but no change of use is sought. Moreover, taken as a whole the disputed conditions seem over-wordy. I appreciate that in technical matters such as this a degree of precision is required. However, the detailed and lengthy wording used seems more appropriate to larger scale development.
11. For all the reasons given above I consider that it was necessary at application stage to consider the effects of the proposed development should the site be contaminated and to ensure that any potential harm would be remedied. Preventing harm from development on contaminated land is also clearly a planning consideration. However, for the reasons given above these conditions were not sufficiently precise and relevant to the permission sought. This means that not all the tests on the imposition of planning conditions in the Framework were met.
12. In the circumstances it seems open to me to allow the appeal but in so doing impose conditions that would meet the Framework tests. An added complication is that the development has already been undertaken. It therefore needs to be considered whether conditions to assess land contamination and ensure that no harm arises from the development still serve a purpose. In my view they do. For there is no technical evidence to show that harm has not arisen and that if it has that it may not be ameliorated. The wording of the conditions must clearly have regard to the fact that the development has been undertaken.
13. Accordingly I informed both parties of my intention to allow the appeal and set out the conditions which, in that event, I would substitute for the disputed conditions. In response the Council suggested some minor revisions to the wording which I do not consider to be required. However, in sub paragraph (ii) of the condition there should be added the need for a timetable for the implementation of any works required by the findings of the report. This is to ensure that the required works would be undertaken. The Council also stated that retrospectively imposing contaminated land conditions is inappropriate as to prevent risks the conditions need to be imposed prior to construction and the resultant disturbance of the soil. I am in no doubt that it would have been better all round had the Council imposed a more appropriate set of conditions and that the appellant had complied with them. However, as things now stand it seems appropriate to ensure that if any harm has arisen it is ameliorated.
14. The appellant says that my suggested conditions go beyond the scope of the permission granted because the site already has a residential use. However, as I have already outlined it is appropriate to have regard to the effect of operational development. The suggested conditions require a land contamination survey of the site, but only so that any potential risks arising from the development applied for and undertaken are removed. It is thus limited

solely to the impacts of the development on which the disputed conditions were attached.

15. It is concluded that the disputed conditions do not meet all the tests on the imposition of conditions in the Framework. However, their removal without the imposition of a substitute condition, would be of potential detriment to human health. This would be contrary to Policy CS5 of the Local Plan for the New Forest District outside the National Park (Core Strategy) and Policy DM5 of the Local Plan of the New Forest District Council outside the National Park (Part 2: Sites and Development Management) which seek to ensure that new development is not prejudicial to human health and that where ground contamination is found appropriate remediation is provided.

Conclusion

16. The appeal is allowed with the disputed conditions deleted and substituted by a new condition.

R J Marshall

INSPECTOR

Schedule of conditions appealed against

3. Unless otherwise agreed by the Local Planning Authority, development other than required to be carried out as part of an approved scheme of remediation must not commence until conditions relating to contamination no 4, 5 & 6 have been complied with.

If unexpected contamination is found after development has begun, development must be halted on that part of the site affected by the unexpected contamination to the extent specified by the Local Planning Authority in writing until condition 7 relating to the reporting of unexpected contamination has been complied with in relation to that contamination.

Reason To ensure that risks from land contamination to the future users of the controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors in accordance with policy CS5 of the Local Plan for the New Forest District outside the National Park (Core Strategy) and Policy DM5 of the Local Plan For the New Forest District outside the National Park. (Part 2: Sites and Development Management).

4. An investigation and risk assessment, in addition to any assessment provided with the planning application, must be completed in accordance with a scheme to assess the nature and extent of any contamination on the site, whether or not it originates on the site. The contents of the scheme are subject to the approval in writing of the Local Planning Authority. The investigation and risk assessment must be undertaken by competent persons and a written report of the findings must be produced. The written report is subject to the approval in writing of the Local Planning Authority. The report of the findings must include:

(i) a survey of the extent, scale and nature of contamination;

(ii) an assessment of the potential risks to:

- human health,
- property (existing or proposed) including buildings, crops, livestock, pets, woodland and service lines and pipes,
- adjoining land,
- groundwaters and surface waters,
- ecological systems,
- archaeological sites and ancient monuments;

(iii) an appraisal of remedial options, and proposal of the preferred option(s).

This must be conducted in accordance with DEFRA and the Environment Agency's Model Procedures for the Management of Land Contamination, CLR 11'.

Reason: To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development

can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors in accordance with policy CS5 of the Local Plan for the New Forest District outside the National Park (Core Strategy) and Policy DM5 of the Local Plan for the New Forest District outside the National Park. (Part 2: Sites and Development Management).

5. A detailed remediation scheme to bring the site to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historical environment must be prepared, and is subject to the approval in writing of the Local Planning Authority. The scheme must ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation.

Reason: To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors in accordance with Policy CS5 of the Local Plan for the New Forest District outside the National Park (Core Strategy) and Policy DM5 of the Local Plan for the New Forest District outside the National Park. (Part 2: Sites and Development Management).

6. The approved remediation scheme must be carried out in accordance with its terms prior to the commencement of development other than that required to carry out remediation, unless otherwise agreed in writing by the Local Planning Authority. The Local Planning Authority must be given two weeks written notification of commencement of the remediation scheme works. Following completion of measures identified in the approved remediation scheme, a verification report that demonstrates the effectiveness of the remediation carried out must be produced, and is subject to the approval in writing of the Local Planning Authority.

Reason: To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors in accordance with Policy CS5 of the Local Plan for the New Forest District outside the National Park (Core Strategy) and Policy DM5 of the Local Plan for the New Forest District outside the National Park. (Part 2: Sites and Development Management).

7. In the event that contamination is found at any time when carrying out the approved development that was not previously identified it must be reported in writing immediately to the Local Planning Authority. An investigation and risk assessment must be undertaken in accordance with the requirements of condition 4, and where remediation is necessary a remediation scheme must be prepared in accordance with the requirements of condition 5, which is subject to the approval in writing of the Local Planning Authority. Following completion of measures identified in the approved remediation scheme a verification report must be prepared, which is subject to the approval in writing of the Local Planning Authority in accordance with condition 6.

Reason: To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled

waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors in accordance with Policy CS5 of the Local Plan for the New Forest District outside the National Park (Core Strategy) and Policy DM5 of the Local Plan for the New Forest District outside the National Park. (Part 2: Sites and Development Management).
