



Appeal Decision

Site visit made on 13 August 2019

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 25 September 2019

Appeal Ref: APP/C5690/W/19/3226795 125-131 Kirkdale, London SE26 4QJ

- 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 Mr M Bernard of Bernard Construction UK LLP against the decision of the Council of the London Borough of Lewisham.
 - The application Ref DC/18/108840, dated 4 September 2018, was refused by notice dated 21 November 2018.
 - The application sought planning permission for *Demolition of the existing Windmill Public House at 125-131 Kirkdale SE26 and the construction of a part three/part four storey building comprising 2 one bedroom and 7 two bedroom self-contained residential units (Class C3), and a public house (Class A4) with ancillary floorspace at ground floor, together with associated cycle parking, landscaping, and amenity space', in order to vary condition 2 (approved plans) to amend the external wall layout, internal layout, and alter the height and elevations of the approved building, together with excavation works to the rear without complying with a condition attached to planning permission Ref DC/16/099356, dated 1 August 2017.*
 - The condition in dispute is No 2 which states that: *The development shall be carried out strictly in accordance with the application plans, drawings and documents hereby approved and as detailed below:*
615-SE26-20-1_SLP01; 16-1211-01H; 16-1211-02E; 16-1211-03D; 16-1211-04; 16-1211-05; 16-1211-06; 16-1211-07, WP3213, Design and Access Statement, BREEAM Pre-Assessment Report, Noise Assessment, Planning Statement, Transport Statement, Ventilation and Extraction Statement, Construction Management Plan Received 5 December 2016;
16-1211-01L Received 1 June 2017;
201 Rev C Received 3 July 2017.
 - The reason given for the condition is: *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.*
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Decision

1. The appeal is dismissed.

Main Issue

2. The appeal proposal seeks to substitute the originally-approved plans with a different set, and the Council's first reason for refusing permission referred to the resultant building being 'substantially different' from that previously approved. The first and only main issue is whether the proposed plans substantially or fundamentally depart from the scope of the original permission.

3. Encompassed in that issue is also whether, having regard to the extent of the proposed amendments to the plans approved under the existing permission, adequate public consultation on the appeal proposal has taken place.

Reasons

4. The permission granted under reference DC/16/099356 was for the construction of a part three/part four storey building comprising 2 one bedroom and 7 two bedroom self-contained residential units (Class C3), and a public house (Class A4). This does not accurately describe the plans that have been submitted for consideration here. The A4 element of the proposal has been substantially enlarged, with associated amendments to the footprint and elevations of the building. Significantly, this enlargement has the effect of removing one of the C3 residential units from the proposal. As a result, the appeal proposal is now for 2 one-bedroomed and 6 two-bedroomed units, rather than the 2 one-bedroomed and 7 two-bedroomed units that are described by the permission.
5. A permission granted under section 73 of the Town and Country Planning Act 1990 ('the 1990 Act') allows for changes to the conditions attaching to a planning permission, but the statute does not expressly permit of a change to the description of the development for which permission is conferred. No such course is urged upon me in this case. The application plans here are not consistent with the description of the permitted development, and they would remove a substantial part of the benefit of the permission by reducing the number of apartments from 9 to 8. The number of apartments forming the subject of the original permission is a benefit not only to the developer but also to the public interest of significantly boosting the supply of housing in accordance with Government policy as set out in the National Planning Policy Framework. As a result of this change, which is in my view a substantial one, it is not appropriate to consider the amended plans under the vehicle of section 73. Any resulting permission would be most uncertain. I consider that the appeal plans depart from the scope of the permission granted under reference DC/16/099356 to such an extent that they are not described by it, and substantially and fundamentally depart from it.
6. The Government's 'Flexible options for planning permission' guidance¹ sets out that one of the uses of section 73 of the 1990 Act is to seek a minor material amendment to a planning permission, where there is a relevant condition that can be varied. The 'plans' condition allows for such a variation to be sought, but the guidance goes on to say that a 'minor material amendment' 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.
7. As well as reducing the number of residential units, the application proposes considerable changes to all elevations and floors of the proposal. The changes are set out in a 3-page document submitted by the appellant, and over 2 pages in the Council's officer's report. The overall site width has been reduced, the rearward projection has increased by up to 2 metres, the A4 element has been significantly enlarged, and there are changes to the fenestrations and layouts throughout. Taken together I do not consider that the changes amount to a 'minor' amendment to the original plans. The changes were however described as a 'minor material amendment' in the Council's public consultation exercise.

¹ Planning Practice Guidance Paragraph 013 Reference ID: 17a-013-20140306 et seq.

8. The application was made on a prospective and not a retrospective basis, but at my site visit I observed that a considerable amount of construction has taken place, and a building appeared to be nearing substantial completion. In such circumstances it may sometimes be appropriate to consider an application such as the present one as amounting to a retrospective application for planning permission under section 73A of the 1990 Act. In this case, however, the appellant seeks a prospective permission for a building that appears to be somewhat different from what has been constructed on the site. I refer particularly to the plan numbered 1627 P3-02 that has been submitted in the course of the appeal, which proposes additional changes to the building. Consequently, the provisions of section 73A do not apply.
9. As to whether the appeal proposal can or ought to be considered by way of a free-standing application for planning permission, of an amended description that accurately states what is being sought here, I do not consider that it is appropriate to do so (whether retrospectively or otherwise). As objectors point out, the application has been publicised for consultation on the basis that the proposal constitutes a 'minor material amendment' to development of the same description as the 2017 permission. As that is not an accurate description, and the amendments are not minor, I cannot be satisfied that the interests of third parties would not be prejudiced by a detailed consideration of the appeal proposal.

Conclusion

10. The proposed development, which I consider is not a 'minor material amendment' to the existing permission, is not accurately described by the permission granted under reference DC/16/099356. Any permission granted under section 73 for development of the same description, but to include a requirement to comply with the proposed plans, would lack certainty and would take away a substantial part of the benefit of the original permission. The interests of third parties preclude me from considering the appeal on any other basis. For these reasons, the appeal is dismissed.

Laura Renaudon

INSPECTOR