



Appeal Decision

by John Felgate BA(Hons) MA MRTPI

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

Decision date: 2 January 2020

Appeal Ref: APP/K3605/W/18/3216994

Land at 514 Molesey Road, Walton-on-Thames, Surrey KT12 3PW

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for 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 Hubert Vincent against Elmbridge Borough Council.
 - The application Ref 2018/0978 is dated 28 March 2018.
 - The application sought planning permission for *"the use of the land for the stationing of two caravans for residential purposes"*, without complying with a Condition attached to planning permission Ref APP/K3605/W/3147815, dated 23 March 2017.
 - The Condition in dispute is No 1 which states that: *"No more than two caravans, as defined in the Caravan Sites and Control of Development Act 1960 and the Caravans Act 1968 as amended shall be stationed on the site at any time"*.
 - The reason given for the Condition is: *"to safeguard the character and appearance of the site and surroundings, and the living conditions of neighbours and site occupants"*.
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Decision

1. The appeal is invalid, and no further action will therefore be taken on it.

Procedural matters

2. The application which gives rise to this appeal was originally submitted on 28 March 2018. The application was made under Section 73 of the 1990 Act, for a variation of an existing planning condition. It was initially acknowledged and registered by the Council on 11 April 2018. On 1 May 2018 the Council wrote to the applicant to say that the registration could not be completed, because the proposal should be treated as a full planning application rather than as a variation of a condition. No other decision was issued by the Council, and an appeal was submitted to the Planning Inspectorate by the appellant on 23 November 2018.
3. The appeal was registered by the Inspectorate, but a start letter was not issued until 23 August 2019. On 27 August 2019, the Council confirmed to the Inspectorate that it had made no decision on the original application, because in the Council's view, the application was invalid. On 9 October, the Inspectorate advised both parties that the question of the appeal's validity would need to be resolved before proceeding to consider any other aspects. Further comments on the matter of validity were invited at that time.
4. Subsequently, a full exchange of submissions and counter-submissions took place, on the issue of validity only, with the appellant having the last word, in an email dated 26 November 2019. On 20 December 2019, the Inspectorate notified the parties that in this case the appointed Inspector would take a

preliminary view on the matter of validity, based on whether the appeal falls within the scope of S.73.

5. Having reviewed all of these submissions, I have concluded that the appeal is invalid, as set out above. The appeal therefore cannot proceed to a determination based on the planning merits. In the circumstances, I have not carried out any site visit, nor given consideration to any other aspects of the appeal other than those set out in this decision.

Reasons for finding of invalidity

6. Section 73 of the Act allows for applications for the development of land without complying with the conditions imposed on an existing planning permission. In the case of such applications, Subsection 73(2) makes it clear that the only question that may be considered is that of the conditions subject to which planning permission should be granted. Further clarification as to the scope provided by S.73 is contained in a very recent judgement of the Court of Appeal (CoA), in the case known as *Finney v Welsh Ministers and Others*¹.
7. In the present case, as set out above, the existing planning permission grants permission for the use of the land for the stationing of two caravans. In addition, the number of caravans on the site is also controlled by Condition 1, which limits the number to no more than two. The present appeal seeks to vary this Condition by replacing the word "two" with "three".
8. If Condition 1 were to be varied as now proposed by the appellant, there would be a clear conflict between the terms of the Condition and the description of the development which appears on the face of the planning permission. That conflict would arise because the Condition would purport to allow up to three caravans, whereas the operative provisions of the notice only specify that permission is granted for two. The use of the land for stationing three caravans would therefore not fall within the terms of the planning permission, and would not be authorised by it, irrespective of any conditions to the contrary. A similar conflict lay at the heart of the *Finney* case, and it is evident from the judgement in that case that the Court did not accept that such a conflict or inconsistency within the terms of a single permission could be allowed to stand.
9. This conflict between the proposed new condition and the permission itself might have been resolvable, if only S.73 allowed for consideration of consequential changes to the description of the development. But the *Finney* judgement confirms that such an approach is outside the powers conferred by S.73. In the absence of such a power, it seems to me that the conflict that arises in this case, between the variation which is sought to Condition 1, and the terms of the permission itself, is irreconcilable.
10. Alternatively, the appellant appears to suggest that the reference to two caravans in the description should be disregarded, and the permission treated as simply permitting the use of the land for the stationing of caravans, of an unspecified number. But the wording of the permission follows precisely the form of wording that was proposed in the original planning application. In that context, it seems to me that the word 'two' forms an integral part of the permission. That is not to disagree with the appellant's view as to the effect of

¹ [2019] EWCA Civ 1868: *John Finney v Welsh Ministers and Carmarthenshire County Council and Energiekontor (UK) Ltd*; judgement dated 5 November 2019

any implied limitation contained only in the description, having regard to the judgement in the case known as *I'm Your Man*², but this seems to me an entirely separate point. None of the appellant's arguments overcome the fundamental incompatibility between the wording now sought for Condition 1 and that which defines the permission itself.

11. There is no doubt that the approach taken by the CoA in *Finney* marks a departure from the approach taken by the Courts in some earlier S.73 cases, and in particular that known as *Wet Finishing Works*³. However, the *Finney* judgement makes it clear that that particular case is no longer to be relied upon. It is also true that *Finney* was concerned with operational development, whereas the present appeal relates to a use of land. But I am not aware of any reason why the legal principles involved should be different.
12. I acknowledge that had the present application and appeal moved forward more quickly, a decision on one or other might well have preceded the *Finney* judgement. But be that as it may, *Finney* is now the leading case on the application of S.73, and it is clear to me that it is this judgement that must guide the outcome of the present appeal. Although the CoA judgement was handed down only on 5 November 2019, both the Council and the appellant have commented on it in some detail, in their submissions dated 12 and 26 November 2019 respectively. I am therefore satisfied that all parties have had an adequate opportunity to consider the issues arising from it.
13. I note the appellant's contention that an increase from two caravans to three would not amount to a material change of use, and would not constitute development. Indeed, it seems only right to acknowledge that the submissions made on this point make up by far the major part of the case advanced on the appellant's behalf. But establishing whether permission would be required is not the role of a S.73 application; other procedures exist for that purpose. In the present case, I find that none of these arguments has any bearing on my decision.
14. Having regard to all the facts of the case, it is evident that Condition 1 cannot be amended in the way now proposed by the appellant, without giving rise to an untenable conflict within the terms of the planning permission. The application to vary Condition 1 in that way was therefore invalid. It follows that the present appeal, against the Council's failure to determine that application, is also invalid. The appeal therefore fails.

J Felgate

INSPECTOR

² [1998] 4 PLR 107: *I'm Your Man v Secretary of State for the Environment*

³ [2017] EWHC 1837 (Admin): *R (Wet Finishing Works Ltd) v Taunton & Deane Borough Council*; 20 July 2017