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## Appeal Decision

Site visit made on 18 March 2020

**by Mike Hayden BSc DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 09 April 2020**

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**Appeal Ref: APP/K2420/W/19/3229530**

**Land off Paddock Way, Hinckley LE10 3ED**

- 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 Centre Estates Ltd against Hinckley & Bosworth Borough Council.
  - The application Ref 19/00213/CONDIT is dated 8 February 2019.
  - The application sought planning permission for development comprising the erection of 63 no. one, two and three bedroom residential units (Class C3) over 5 no. detached buildings; provision of a new access; landscaping works and improvements; creation of 72 no. on-site parking spaces and associated works without complying with a condition attached to the planning permission granted by appeal decision APP/K2420/W/17/3189810, dated 13 September 2018.
  - The condition in dispute is No 2 which states that: *The development hereby permitted shall be carried out in accordance with the following approved plans: Site Location Plan Drawing Ref. 40455/001A, Site Layout Plan Drawing Ref. 40455/004Q, Building A Elevations Drawing Ref. 40455/007E, Building A Plans Drawing Ref. 40455/018E, Building B Elevations Drawing Ref. 40455/008G, Building B Plans Drawing Ref. 40455/019E, Building C Elevations Drawing Ref. 40455/009F, Building C Plans Drawing Ref. 40455/020E, Building D Elevations Drawing Ref. 40455/ 010F, Building D Plans Drawing Ref. 40455/021G, Building E Elevations Drawing Ref. 40455/011F, Building E Plans Drawing Ref. 40455/022E, Building Elevations Drawing Ref. 40455/014B, Side Elevations Drawing Ref. 40455/012F, Site Sections Drawing Ref. 40455/006E, Surrounding Building Heights Drawing Ref. 40455/017A except in respect of the access gate to the west of the site shown on the approved drawings at Drawing Refs 40455/004Q, 40455/012F and 40455/ 014B.*
  - The reason given for the condition is: *To provide certainty.*
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### Decision

1. The appeal is dismissed and planning permission for development comprising the erection of 63 no. one, two and three bedroom residential units (Class C3) over 5 no. detached buildings; provision of a new access; landscaping works and improvements; creation of 72 no. on-site parking spaces and associated works is refused.

### Application for Costs

2. An application for costs was made by Centre Estates Limited against Hinckley & Bosworth Borough Council, which is the subject of a separate Decision.

## Procedural Matters and Main Issue

3. The appeal is against the non-determination of an application which seeks to amend a planning permission for 5 blocks of residential development previously approved on the appeal site. The changes proposed are to the internal layouts and elevations of the blocks shown on the plans previously approved, to enable a change in the mix of the dwelling sizes and an overall increase in the number of units from 55 to 63 flats. The application, under section 73 of the Act, seeks to do this by revising condition 2 of the previous permission to substitute the approved floor layout and elevation plans with amended plans showing 63 units and changing the description of development to that effect.
4. The Council determined that the proposed amendments to the approved development are fundamental, raising issues with the housing mix, affordable housing and infrastructure requirements, parking provision, traffic flows and effects on residential amenity. As such it considers the amended scheme requires a new planning application under section 70 of the Act, rather than an application under section 73. Accordingly, the Council issued a notice of non-validation of the application, which the appellant disputes.
5. Therefore, the main issue to resolve in this appeal, before considering any other issues, is whether or not the proposed amendments to the approved development can be dealt with through an application under section 73 of the Act.
6. Although the application the subject of this appeal was not subject to statutory and public consultation because it was not validated, all interested parties, including statutory consultees, neighbouring occupiers and ward councillors, were notified of the appeal and given the opportunity to make representations. Therefore, I am satisfied that the Wheatcroft Principles have been applied in this case and that those who should have been consulted on the proposed changes to the development have not been deprived of the opportunity of such consultation.

## Reasons

7. The Planning Practice Guidance (PPG) states that where changes to a permission are fundamental or substantial, a new planning application under section 70 of the Act should be made<sup>1</sup>. However, where less substantial changes are proposed, it advises that section 73 can be used to seek a minor material amendment, if there is a relevant condition listing the originally approved plans that can be varied<sup>2</sup>.
8. There is no statutory definition of a 'minor material amendment', but the PPG advises that it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from that which has been approved<sup>3</sup>. I acknowledge that the proposed changes to the development would not increase the overall height, width or length of the approved blocks and, therefore, would not alter the scale of the development, as the term 'scale' is defined in the Development Management Procedure Order<sup>4</sup>. I also recognise that the nature of the development, in terms of its Class C3 Residential Use, would remain unchanged.

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<sup>1</sup> Paragraph: 001 Reference ID: 17a-001-20140306

<sup>2</sup> Paragraphs: 013 Reference ID: 17a-013-20140306 and 018 Reference ID: 17a-018-20140306

<sup>3</sup> Paragraph: 017 Reference ID: 17a-017-20140306

<sup>4</sup> In Article 2 of The Town and Country Planning (Development Management Procedure) (England) Order 2015

9. However, the amendments would increase the number of units from 55 to 63 and thereby result in a change to the description of the development. The appellant's covering letter submitted in support of the appeal<sup>5</sup> confirms that the application was made for development comprising 63 residential units. But, the PPG is clear that section 73 cannot be used to change the description of the development<sup>6</sup>. Case law supports this guidance.
10. The appellant has referred to the High Court judgement, *Finney v Welsh Ministers [2018] EWHC 3073 (Admin)*, in support of its case that a S73 application can be used to vary the terms of a planning permission, including an increase in dwelling numbers, provided the change is not a fundamental alteration. However, that judgement was challenged in the Court of Appeal, in *Finney v Welsh Ministers & Ors [2019] EWCA Civ 1868*. The subsequent judgement, issued on 5 November 2019, ruled that changing the description of a development is outside the power conferred by section 73. It states:  
*'On receipt of such an application section 73 (2) says that the planning authority must "consider only the question of conditions". It must not, therefore, consider the description of the development to which the conditions are attached. The natural inference from that imperative is that the planning authority cannot use section 73 to change the description of the development'*<sup>7</sup>.
11. This judgement was not referred to by either the Council or the appellant in their statements, comments or supporting evidence. I acknowledge that it had not been published by the time final comments were due on the appeal and there have been delays in the determination of the appeal. However, the Court of Appeal judgement was published in November 2019 and I am obliged to take it into account as a relevant material consideration. Therefore, I provided the opportunity for both parties to comment on its relevance to this case and have taken their responses into account in reaching my decision.
12. It is clear from the PPG and the Court of Appeal judgement that section 73 of the Act cannot be used to consider the amendments sought in this appeal, as they would involve changing the description of the development from 55 to 63 one, two and three bedroom residential units. Therefore, I conclude that the application is not valid and an application for full planning permission under section 70 would need to be made.
13. My finding on this main issue is determinative and, therefore, it is not necessary for me to consider the merits of any other issues raised in this case.

## Conclusion

14. For the reasons given above I conclude that the appeal should be dismissed.

*M Hayden*

INSPECTOR

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<sup>5</sup> Letter from Shakespeare Martineau to The Planning Inspectorate, dated 22 May 2019

<sup>6</sup> Paragraph: 014 Reference ID: 17a-014-20140306

<sup>7</sup> Paragraph 42 of *Finney v Welsh Ministers & Ors [2019] EWCA Civ 1868*