The Planning Inspectorate

Appeal Decision

Site visit made on 15 June 2020

by Robert Parker BSc (Hons) Dip TP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 8 July 2020

Appeal Ref: APP/D3640/W/20/3247132
Bovingdon Cottage, Bracknell Road, Bagshot GU19 5HX

- 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 Ms Jolene Wilson of Ex-Army Builders Ltd against the decision of Surrey Heath Borough Council.
- The application Ref 19/2130/PMR, dated 29 October 2019, was refused by notice dated 23 December 2019.
- The application sought planning permission for Erection of 2 x 3 bedroom and 1 x 2 bedroom dwellings with associated parking and garden areas, following demolition of existing dwelling and cattery buildings without complying with a condition attached to planning permission Ref 17/0733, dated 25 October 2017.
- The condition in dispute is No 3 which states that:

  The proposed development shall be built in accordance with the following approved plans: - House 1 Proposed Ground Floor Plan BC-03-020-R Rev P1 received 07.08.17 - House 1 Proposed Roof Plan BC-03-020 Rev P1 received 07.08.17 - House 1 Proposed Elevations BC-05-010 Rev P1 received 07.08.17 - House 2 Proposed Ground Floor Plan BC-03-030-R Rev P1 received 07.08.17 - House 2 Proposed Roof Plan BC-03-031 Rev P1 received 07.08.17 - House 2 Proposed Elevations BC-05-012 Rev P1 received 07.08.17 - House 3 Proposed Ground Floor Plan BC-03-040-R Rev P1 received 07.08.17 - House 3 Proposed Roof Plan BC-03-041 Rev P4 received 07.08.17 - House 3 Proposed Elevations BC-05-014 Rev P1 received 07.08.17 - Proposed Site Plan BC-02-020-R Rev P1 received 07.08.17 - Site Plan Proposed Ground Floor Plan BC-03-010-R Rev P1 received 07.08.17.

- The reason given for the condition is: For the avoidance of doubt and in the interest of proper planning and as advised in ID.17a of the Planning Practice Guidance.

Decision

1. The appeal is invalid and therefore I am unable to proceed to consider the planning merits of the case.

Main Issue

2. The main issue is whether, as a matter of law, the proposal can be considered as a minor material amendment under section 73 of the Act and if so, whether the scheme complies with Green Belt policy set out in the development plan and national policy.

Reasons

3. Planning permission was granted under reference 17/0733 for a scheme of development comprising the 'erection of 2 x 3 bedroom and 1 x 2 bedroom dwellings with associated parking and garden areas, following demolition of existing dwelling and cattery buildings'. This permission has been implemented with one of the approved dwellings being substantially complete. The application which is the subject of this appeal sought to vary the design of the houses on the remaining two plots. Neither dwelling has yet been commenced.

4. The application was submitted under section 73 of the Act, to vary the plans condition in order to substitute new plans. Those new plans show an increase in the ridge height of two dwellings to provide first floor accommodation. The submitted plans demonstrate that the proposal would create a pair of dwellings with 4 and 5 bedrooms, instead of the 3 bedroom homes originally permitted.

5. Relevant advice is set out in the Planning Practice Guidance. This explains[1] that there is no statutory definition of a 'minor material amendment' but it 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. The guidance makes explicit[2] that section 73 cannot be used to change the description of the development.

6. The officer's delegated report cites *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868. In that case, the Court of Appeal held that an application under section 73 may not be used to obtain a permission that would require a variation to the terms of the 'operative' part of the planning permission, in other words the description of the development for which planning permission was originally granted.

7. It follows from *Finney* that where amending a condition would result in a conflict between the new condition and the description of development, that particular amendment is beyond the powers under section 73 and cannot be made (a fresh planning application would be required). The corollary to this is that an amendment can only be made provided the new condition does not fundamentally alter the original planning proposal for which permission had been granted.

8. Applying these principles to the current appeal, the original permission was for a specific dwelling mix comprising 2 and 3 bed units. Based on the submitted plans, and as a matter of fact, the proposal would amend this to incorporate a pair of 4 and 5 bed units. This is incompatible with the description of development on the original decision notice – which cannot be varied using the mechanism of section 73.

9. Even had the number of bedrooms not been different, a comparison between the approved plans and the proposed plans reveals significant differences in the scale and massing of the dwellings which are the result of the increase in ridge height (1.85m for Plot 1 and 1.45m for Plot 2) over the entire length of the dwelling, the change from roof hips to full gables and the incorporation of projecting gable features. In my judgement, this would result in a development which is substantially different from the one that has been approved.

[1] Reference ID: 17a-017-20140306
[2] Reference ID: 17a-014-20140306

10. Notwithstanding its argument that the proposal falls outside the scope of a section 73 application, the Council proceeded to consider the scheme. Given that the application is invalid in law, I do not consider it appropriate for me to consider the substantive planning merits.

11. For the reasons given above I conclude that the appeal should not continue.

Robert Parker

INSPECTOR