



Appeal Decision

Site visit made on 16 July 2020

by David Reed BSc DipTP DMS MRTPI

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

Decision date: 3 August 2020

Appeal Ref: APP/P1560/W/19/3242087

Land South of Long Road and West of Clacton Road, Mistley CO11 2HN

- 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 Tendring Farms Ltd against the decision of Tendring District Council.
 - The application Ref 19/00336/OUT, dated 28 February 2019, was refused by notice dated 21 November 2019.
 - The application sought outline planning permission with all matters reserved, other than strategic access points onto the public highway, for the erection of up to 300 dwellings, up to 2 hectares of employment land (A2/A3/B1/D1 uses), with associated public open space and infrastructure without complying with a condition attached to planning permission Ref 17/01537/OUT, dated 14 June 2018.
 - The condition in dispute is No 4 which states that: The reserved matters shall be in general conformity with the following indicative drawings/parameter plans: Drawing Ref: 001 Building Heights Plan; Drawing Ref: PL17006/04 Illustrative Masterplan; and Drawing Ref: 003 Landscape Plan.
 - The reason given for the condition is: To establish reasonable limits to the layout of the development in the interests of good design, layout, appearance and residential amenity.
-

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by Tendring Farms Ltd against Tendring District Council. This application is the subject of a separate Decision.

Main Issue

3. The main issue is whether the application falls within the scope of an application to vary a condition under Section 73 of the Town and Country Planning Act 1990.

Reasons

4. The application seeks to vary condition No 4 of an outline planning permission for up to 300 dwellings and up to 2 hectares of employment land (specified as A2/A3/B1/D1 uses) on a site in Mistley to incorporate an alternative illustrative masterplan, building heights plan and landscape plan. The permission in question, Ref 17/01537/OUT, in turn resulted from an application under

Section 73 to incorporate alternative illustrative plans from those listed in condition No 4 of the original permission for the development, Ref. 15/00761/OUT, granted on 18 July 2016. Reserved matters approval has subsequently been granted for phase 1 (96 dwellings on the northern part of the site) and phase 2 (204 dwellings and four commercial buildings on the southern part of the site)¹.

5. The effect of the application would be to provide a new medical centre/GP surgery in the north east part of the site served by a new access onto Long Road, separate from the main access already approved to serve the housing and employment land². The medical centre/GP surgery would occupy about 0.5 hectares and an indicative site plan shows how it might be laid out.
6. Comparison of the proposed illustrative masterplan, drawing PL-006/04A, with the illustrative masterplan relating to the latest permission, PL-006/04, shows them to be identical apart from the addition of the new medical centre/GP surgery on the Long Road frontage adjacent to three detached houses and Mistley Manor residential care home, on land previously shown as open space. The same area of employment land is shown on both drawings in the south east corner of the site adjacent to Dead Lane. The other proposed drawings, the landscape plan and the building heights plan, are also identical except for the addition of the new medical centre/GP surgery.
7. The appellant claims that the proposal is for the relocation of the permitted D1 use rather than an increase in the amount of employment land on the site. However, this would require a decrease of about 0.5 hectares of employment land in the south east corner of the site and a similar increase in open space, but this is not shown on the indicative plans submitted with the application, not mentioned in any of the appellant's documentation, nor in the officer report. The belated explanation when queried, that the Council will ensure that the maximum 2 hectares limit is not exceeded at reserved matters stage, lacks credibility when reserved matters for phase 2, including four commercial buildings in the south east corner of the site, have already been approved.
8. In the absence of a clear explanation that the displaced open space would be relocated, and where this would be, the application amounts to a proposal for an additional 0.5 hectares of D1 development in excess of the up to 2 hectares of employment land (A2/A3/B1/D1 uses) in the south east corner of the site.
9. Section 73 allows an application to vary or remove conditions attached to a planning permission and one of the uses of such an application is to seek a minor material amendment where there is a relevant condition such as a plans condition as in this case. There is no statutory definition of a minor material amendment, but Planning Practice Guidance advises that the result would be a development not substantially different from the approved scheme.
10. In this case the proposal would result in a significantly different quantum of development on the site – in effect up to 2.5 hectares of employment land (A2/A3/B1/D1 uses) rather than up to 2 hectares as approved in the outline planning permission. This would be a substantial difference from the approved

¹ Application references 17/00535/DETAIL and 19/00539/DETAIL.

² Right at the end of the appeal process, the appellant suggested that access could also be gained from the internal road layout of phase 1. However, this possibility was not mentioned in the application documentation and has not therefore been considered by the Council, local highway authority or other interested parties. The appeal process should not be used to evolve a scheme and this possibility therefore cannot be taken into account.

scheme and also conflict with the description of the development which has been held to be beyond the scope of a Section 73 application.

11. *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868 establishes that an application under Section 73 cannot be used to obtain a permission that would require a variation to the description of the development. In that case a decision to vary a condition to increase the height of two wind turbines and to change the description of the development was found to be outside the power conferred by Section 73; a new permission should be sought instead. This judgement is directly comparable to the current case which in effect seeks to increase the amount of development beyond the outline permission.
12. Furthermore, the proposal would involve a second access onto Long Road, in itself a substantial difference from the approved scheme. Importantly, access was not a reserved matter at outline permission stage, albeit approval of the details of the access from Clacton Road were deferred and determined later. The comments of ECC Highways Dept as set out in the officer report on the application are ambiguous and may reflect the lack of clarity surrounding the proposal. They cannot be taken as approval of a second access from Long Road and this unsatisfactory position is a further reason why the current appeal cannot be entertained.

Conclusion

13. For these reasons the proposal would result in a development substantially different from the approved scheme and thus cannot be considered as a minor material amendment. The proposal accordingly falls outside the scope of an application to vary a condition under Section 73 of the Town and Country Planning Act 1990 and the appeal must therefore be dismissed.

David Reed

INSPECTOR