



Appeal Decision

Hearing Held on 23 March 2021

Site visit made on 24 March 2021

by Rachael Pipkin BA (Hons) MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4th May 2021

Appeal Ref: APP/U1620/W/20/3249133

Eastern Avenue Retail Park, Eastern Avenue, Gloucester GL4 3EA

- 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 Drum Property Group against the decision of Gloucester City Council.
 - The application Ref 18/01330/FUL, dated 2 November 2018, was refused by notice dated 16 September 2019.
 - The application sought planning permission for erection of building to provide 2 No Class A1 non-food retail units together with associated service area and parking without complying with a condition attached to planning permission Ref 98/00119/FUL, dated 14 July 1998.
 - The condition in dispute is unnumbered condition (nominally condition 9) which states that: *The retail units hereby permitted shall be used only for the sale of carpets, furnishings, electrical goods, pets and pet supplies, office equipment, DIY products for the maintenance and improvement of the home, garden and motor vehicles, and any goods ancillary to these permitted uses and for no other purpose without the prior permission of the City Council.*
 - The reason given for the condition is: *To define the terms of the application and to retain control over the future use of the units to ensure that there is no adverse effect on the Local Plan retail policies.*
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Decision

1. The appeal is dismissed.

Procedural Matters

2. Section 73 of the Town and Country Planning Act 1990 (the Act) allows for a grant of permission for the development of land without compliance with conditions subject to which a previous permission was granted. In *Finney v Welsh Ministers & Others*¹, 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, that is the description of the development for which planning permission had originally been granted.

¹ *Finney v Welsh Ministers & Others* [2019] EWCA 1868

3. Although not raised in either of the parties' submissions, at the Hearing I raised the question of whether or not such a proposal would be acceptable in terms of Section 73 in light of the judgment in *Finney*. I invited both parties to provide written submissions in respect of this. These were provided to me after the hearing and both parties were given the opportunity to provide a rebuttal.

Background and Main Issue

4. Planning permission was granted for two Class A1 non-food units in 1998 subject to a number of conditions, one of which restricted the goods that could be sold. The reason for the condition was to enable the Council to retain control over the future use of the units and to ensure they did not harm the Council's retail policies. These units were contained within a single building. At a later date, the units were granted permission to be subdivided to create an additional unit. These became known as Units 1, 2a and 2b. The appeal relates to Unit 1.
5. The appeal proposal seeks to vary an unnumbered condition (positioned number 9 in the original decision) in respect of Unit 1 to enable the sale of four core ranges of goods from a maximum amount of gross floorspace. This would include the sale of food and drink.
6. The main issue is therefore whether amending the condition would result in a conflict between it and the description of development and therefore whether or not the appeal is valid under Section 73 of the Act.

Reasons

7. Unit 1 is indicated to be 1,858 square metres. The appeal proposal seeks to vary the disputed condition in respect of Unit 1 to enable the sale of food and drink up to 550 square metres of gross floorspace; and pharmaceutical goods, perfume goods and toiletries; non-durable household goods; and toys, each of which would be up to 180 square metres of gross floorspace. This would enable a maximum of 1,090 square metres of gross floorspace to be used for the sale of these goods.
8. The appellant considers that the original condition can be lawfully amended given it does not fundamentally alter the condition's or description's nature and meets the tests set out in the National Planning Policy Framework for a condition. The modification, in seeking only a minority of food and drink sales, up to 30 per cent, would be ancillary. In the appellant's view, the meaning of the description of development in respect of it providing non-food retail units would still be accurate.
9. The Council's position is that since the original permission was for non-food retail, this is the only use that can be permitted and the condition cannot be amended in the manner proposed through a Section 73 application.
10. The argument hinges on whether or not the use of up to 550 square metres of the gross floorspace for food and drink retail purposes would be ancillary to the non-food retail use or whether it would create a substantive use in its own right, thereby resulting in a mixed use retail unit.
11. Unit 1 is a sizeable retail unit. The use of just under a third of the gross floorspace for the sale of food and drink would make these goods a dominant part of the retail offer when viewed in the context of the range of non-food

retail goods that could be sold. This would change the character of the retail unit.

12. Furthermore, 550 square metres is not an insignificant or modest amount of floorspace. Due to its size, a wide range of food and drink goods could be offered. It seems to me that this could encourage shoppers to visit the retail unit solely for the purpose of purchasing food and drink items and that this element of the retail offer would be of at least equal importance to the non-food retail element. As such, I consider the food retail use would not be ancillary.
13. The appellant has referred to both the Finney judgment and *R v Coventry CC x p Arrowcroft Group plc*² drawing a distinction between the inconsistencies between the description of development and the condition that arose in both these cases. Finney in respect of the length of a wind turbine blade and Arrowcroft in respect of the number of variety stores permitted. However, whilst these inconsistencies may be more immediately apparent, this does not reduce the inconsistency, which may be potentially less obvious, that arises in the appeal scheme.
14. I find that the amount of floorspace proposed for the sale of food and drink would amount to a substantive use in its own right that would sit alongside the non-food retail offer, thereby creating a mixed use retail unit. Consequently, I conclude that amending the condition would result in a conflict between the amended condition and the description of development. For this reason, I find the appeal would not be valid under Section 73 of the Act.

Other Matters

15. I appreciate that this decision is not helpful to the parties. However, I am unable to express a view on the acceptability of the proposal, which would now need to be subject to a separate planning application, as to do so could fetter a future decision maker.

Conclusion

16. For the reasons set out above, I conclude the appeal should be dismissed.

Rachael Pipkin

INSPECTOR

² *R v Coventry CC x p Arrowcroft Group plc* [2001] PLCR 7

APPEARANCES

FOR THE APPELLANT:

Tim Rainbird	Quod
David Manley QC	Of Counsel
Jamie Mattock	Cotswold Transport Planning
David Comb	Letting Agent

FOR THE COUNCIL:

Shane Burgess	Planning Officer
Adam Gooch	Planning Policy Team Leader
Matthew Morrison	Avison Young

Post-Hearing Documents

Document 1	Decision Notice 1600005/OUT and Cinema Retail Conversion Extension – Plan C
Document 2	Gloucester City Council – Response to Finney Judgment, dated 30 March 2021
Document 3	Eastern Avenue Retail Park – Advice – 29-03-21 (Appellant)
Document 4	Email dated 7 April 2021 from Tim Rainbird (Appellant) to Planning Inspectorate regarding Decision Notice 1600005/OUT
Document 5	Email dated 19 April 2021 from appellant providing a rebuttal to Gloucester City Council's response to Finney judgment