



Appeal Decision

Site visit made on 18 October 2021

by J Woolcock BNatRes MURP DipLaw MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd December 2021

Appeal Ref: APP/V1505/W/20/3263032

Outwood Farm, Outwood Farm Road, Billericay, CM11 2TX

- 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 P&T Global Renewable Energy Limited c/o Wirsol Energy Ltd against the decision of Basildon Borough Council (BBC).
- The application No:20/00376/VAR, dated 25 March 2020, was refused by notice dated 9 July 2020.
- The application sought planning permission for the "Installation of a series of ground mounted solar photovoltaic (PV) arrays, together with control / transformation enclosures, underground cabling, security fencing, CCTV poles and cameras, and other associated development such as additional hedge planting, for the purpose of producing renewable electricity. Proposed 26 year operation and subsequent decommissioning" without complying with conditions attached to planning permission application No:18/00946/VAR, dated 29 August 2018.

- The conditions in dispute are:

No.1 which states that: "The planning permission hereby granted is for a period of 30 years from the date of first export of electricity after completion of the development or 3 years from the date of this decision (whichever the earlier), when the use shall cease and the solar panels and all ancillary equipment shall be removed from the site in accordance with the Decommissioning Method Statement approved pursuant to Condition 2 of 17/01168/VAR" and

No.2 which states that: "If the equipment (or part thereof) stops generating electricity for a period in excess of six months from 11 December 2040 the equipment (or relevant part thereof) is to be fully removed and the relevant part of the site should be returned to its condition prior to the granting of planning permission".

- The reasons given for the conditions are:

No.1 "In order to accord with the terms of the submitted planning application and to ensure the satisfactory restoration of the site".

No.2 "Permission for a temporary period only is appropriate in the circumstances and retention of the use for more than a temporary period would fail to comply with the National Planning Policy Framework".

Decision

1. The appeal is dismissed.

Reasons

2. Planning permission was granted in 2014 for the "Installation of a series of ground mounted solar photovoltaic (PV) arrays, together with control/transformation enclosures, underground cabling, security fencing, CCTV poles and cameras, and other associated development such as additional hedge planting, for the purpose of producing renewable electricity. Proposed 26 year operation and subsequent decommissioning".¹ Condition 3 of 14/00948/FULL states "The planning permission hereby granted is for period from the date of this decision until the date occurring 26 years after the date the development commences, when the use shall cease and the solar panels and all ancillary equipment shall be removed from the site in accordance with the Decommissioning Method Statement approved pursuant to Condition 4".
3. Part of the permitted scheme was installed and began generating renewable energy on 4 March 2016. This is cited in the current appeal as Phase 1. Installation of panels and associated work for the remainder of the site (cited in the current appeal as Phase 2) was under construction at the time of my site visit. Permission 14/00948/FULL makes no reference to any phased development.
4. In 2017 BBC issued a decision notice purporting to grant permission for the following development: "Application to seek to extend the temporary planning permission term referenced within condition 3 of planning consent ref: 14/00948/FULL until 12th December 2046 (currently 26 years from the date of the original decision on 11 December 2014)".² This notice cited three conditions. Condition 1 of 17/01168/VAR states: "The planning permission hereby granted is for a period from the date of this decision until 11 December 2046, when the use shall cease and the solar panels and all ancillary equipment shall be removed from the site in accordance with the Decommissioning Method Statement approved pursuant to Condition 4 of 14/00948/FULL". Condition 2 states: "If the equipment stops generating electricity for a period in excess of six months from 11 December 2040 the equipment is to be fully removed and the site should be returned to its condition prior to the granting of planning permission". Condition 3 states: "In all other respects the development is subject to the conditions imposed on the application 14/00948/FULL".
5. In 2018 BBC issued a decision notice purporting to grant permission for the following development: "Vary conditions 1 and 2 of planning permission 17/01168/VAR".³ This notice cited three conditions. Conditions 1 and 2 are as set out in the above bullet points. Condition 3 states: "In all other respects the development is subject to the conditions imposed on the application 14/00948/FULL".
6. In 2021 BBC issued a decision notice purporting to grant permission for the following development: "Variation of Condition 2 of planning permission 14/00948/FULL (approved plans) and pursuant to application 18/01239/NMABAS to allow for alterations to the approved access road, substation and modules, increase in the number of solar photovoltaic (PV) panels, alterations to fencing, installation of pole mounted CCTV cameras,

¹ Application No:14/00948/FULL. (The 2014 permission)

² Application No:17/01168/VAR. (The 2017 permission)

³ Application No:18/00946/VAR. (The 2018 permission)

relocation of container”.⁴ This notice cited 21 conditions. Condition 1 states that; “The development hereby permitted shall cease on 29th August 2051, or within 6 months of the cessation of the use of the solar farm for the generation of electricity, whichever is the sooner. Upon cessation, the equipment is to be fully removed and the site should be returned to its condition prior to the granting of planning permission.” Condition 2 lists approved plans and drawings for the part of the site now referred to as Phase 2. Condition 3 provides for the submission of a Decommissioning Method Statement for approval no later than three months before cessation of power production on the site.

7. The appellant’s covering letter with the appeal application provides that the proposal seeks to vary Conditions 1 and 2 to allow the development to take place in two phases with an extended lifetime for Phase 2 of the development approved under 18/00946/VAR. It adds that planning permission is now sought to extend the operational lifetime of Phase 2 to 35 years, and states that there is no proposed change to Phase 1 of the development, which will expire after 30 years of operation (2046).
8. The appellant’s letter with the application proposes that Condition 1 should state: “This permission is for a temporary period only. Phase 1 is for a period of 30 years, from the 4 March 2016. Phase 2 shall expire 35 years from i) the date of first export or ii) 3 years from the date of this decision (whichever the earlier). At the end of each of these periods the development hereby permitted within each phase shall cease and all buildings, materials and equipment brought on to the land in connection with the development shall be removed in accordance with an approved Decommissioning Method Statement.” The appellant considers that Condition 2 should be amended to state: “If the development hereby permitted stops generating electricity for a period in excess of six months from 11 December 2040 the equipment (or relevant part thereof) is to be fully removed from the phase to which it relates and returned to its condition prior to the granting of planning permission.”
9. I requested that the appellant and BBC submit written statements indicating how the judgment in *Finney v Welsh Ministers* [2019] EWCA Civ 1868 applies to the current appeal and have taken these submissions into account. It seems to me that *Finney* establishes that in s73 applications; the description of development in an existing planning permission cannot be amended and only the conditions can be varied; the description of development specified in the decision is that taken from the original planning permission and not from any subsequent applications to vary any of the conditions; and if amending a condition would result in a conflict between it and the description of development, then that particular amendment is beyond the powers under s73 and cannot be made.
10. The appellant disputes that *Finney* requires the description of development specified in the decision to be taken from the original planning permission and not from the subsequent application to vary any of the conditions. In the appellant’s submission the ‘original permission’ for the purposes of this appeal is the 2018 permission and not the 2014 permission. I disagree because the purported 2018 permission refers to the purported 2017 permission, which cites the 2014 permission. The description of the development throughout

⁴ Application No:21/00657/VAR dated 9 September 2021.

such a succession of applications would remain as set out in the original 2014 permission.

11. The appeal application is made pursuant to s73. As such, if the appeal were to succeed, a new permission would be granted for the development that was permitted by 14/00948/FULL, but with different conditions. The description of the development for that original permission includes "Proposed 26 year operation and subsequent decommissioning". The appellant argues that the word 'proposed' was only a suggested time limit. I consider that 'proposed' here has its ordinary meaning of 'intended'. Therefore, the development originally permitted incorporated an intention to operate for 26 years, and that express purpose was given effect in Condition 3 of the original permission.
12. The appeal application seeks a new planning permission that would have the same description of development as 14/00948/FULL but would impose a new condition that would permit operation of Phase 1 for a period of 30 years, and Phase 2 for 35 years. That would result in a conflict between the new condition and the description of the development, and so such an 'amendment' would be beyond the powers of s73. In the absence of any statutory authority to allow the appeal and grant a new planning permission to extend the operation beyond 26 years, I have no alternative but to dismiss the appeal. In doing so I make no comment on the planning merits of the proposal.

J Woolcock

INSPECTOR