



Appeal Decision

Site visit made on 15 February 2022

by S Leonard BA (Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 March 2022

Appeal Ref: APP/W1715/W/21/3277581

The Malthouse, Church Lane, Botley SO30 2EJ

- 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 a condition subject to which a previous planning permission was granted.
 - The appeal is made by Mr Stuart Mitchell against the decision of Eastleigh Borough Council.
 - The application Ref X/21/89679, dated 22 January 2021, was refused by notice dated 5 May 2021.
 - The application sought planning permission for change of use from warehouse to 3no.dwellings with single storey rear extension, rear dormer windows, elevational alterations, car parking and amenity space following part demolition of existing building without complying with a condition attached to planning permission Ref F/20/87233, dated 12 June 2020.
 - The condition in dispute is number 12, which states that: The development hereby permitted shall not be occupied until the parking spaces have been provided in accordance with the approved plan site plan (D-111 Rev H) and thereafter permanently retained and used only for the purpose of accommodating private motor vehicles incidental to the enjoyment of the dwelling houses as a residence.
 - The reason given for the condition is: To make provision for off street parking for the purpose of highway safety.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. The Planning Practice Guidance states that Section 73 of the Town and Country Planning Act 1990 (the Act) cannot be used to change the description of the development. This reflects the *Finney*¹ judgement, whereby 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. It must not, therefore, consider the description of the development to which the conditions are attached.
3. Although the Court of Appeal’s judgement had not been raised by the main parties, I regard it to be relevant to this appeal. Consequently, the main parties were provided the opportunity to submit their views during the course of the

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

appeal, as to whether or not the Section 73 appeal would be acceptable, in light of the *Finney* case.

Background and main issue

4. Planning permission was granted in June 2020 for the change of use of a bathroom retail/warehouse to 3no. dwellings. In addition to the change of use, the description of the approved development includes single storey rear extension, rear dormer windows, elevational alterations, car parking and amenity space following part demolition of the existing building.
5. The appeal seeks permission to carry out the development without complying with condition 12. This requires the parking spaces shown on approved drawing Ref D-111 Rev H to be provided prior to the first occupation of the development and to be thereafter permanently retained for the parking of motor vehicles in connection with the residential use of the approved dwellings.
6. An earlier application, Ref F/19/85617, for a similar proposal did not include any on-site parking. The appellant has confirmed that this application was withdrawn in response to Council concerns over the lack of on-site parking, prompting the appellant to subsequently acquire the site of the approved parking from the Council, and make it available for on-site parking as part of the approved scheme.
7. The parking required by condition 12 comprises 3 parking spaces arranged in a tandem layout adjacent to the northern side wall, patio and rear garden of the dwelling on plot 1. These parking spaces comprise the sole approved car parking for the development.
8. The appellant has stated that, whilst it is intended to provide the approved on-site car parking, its use as such may not be possible in perpetuity. This is because, as long as the current one-way road system is in place to the north of the appeal site, access over a nearby third-party owned car park is necessary to enable users of the parking spaces to exit the appeal site. As such, any future denial of these access rights could potentially prevent the use of the parking spaces, as there would be no exit route.
9. Notwithstanding the appellant's stated intention to provide the approved parking initially, the practical effect of the appeal scheme, as supported by drawing Ref D-111 Rev J submitted with the Section 73 application, would be that there would be no requirement to provide any on-site car parking in perpetuity as part of the proposal.
10. The main issue is therefore the effect of removing the disputed condition, in the context of an appeal made under Section 73 of the Act, having regard to the Council's reason for refusal in respect of harm to road user safety.

Reasons

11. The description of development of the original planning permission refers, amongst other things to "car parking". In *Finney*, the Court of Appeal held that the description of development in an existing planning permission cannot be amended at all. Only the conditions can be varied.
12. If the condition in dispute were removed, and the development was carried out in accordance with the proposed site plan submitted with the Section 73

application, the development would not include any car parking. If I were minded to allow this appeal, the description of development (there is no distinction between use and built development) would remain intact, and there would be a conflict between what is detailed in the description and the new permission.

13. As part of a new permission, an approved plan would show vegetation in place of the originally approved vehicle parking, and there would no longer be a condition requiring the provision, and subsequent retention and use, of on-site parking in connection with the approved dwellings.
14. Given the principles established by *Finney*, the removal of condition 12 would result in conflict with the description of development, and would, in effect, fundamentally alter the nature of what was originally permitted. This would be unlawful and go beyond the powers available under Section 73 of the Act. In that context, a fresh planning application would therefore be required.

Conclusion

15. In the light of the *Finney* judgement, what is being sought goes beyond the powers available within the context of a Section 73 appeal, given that the description of development cannot be altered, and that the conditions should be consistent with it. For this reason, the appeal fails.
16. My findings on the procedural matter above are determinative, and therefore, it is not necessary for me to consider the merits of the appeal scheme in respect of highway safety, since this would not alter my overall decision.

S Leonard

INSPECTOR