



Appeal Decision

Site visit made on 8 March 2022

by Stewart Glassar BSc (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31st March 2022

Appeal Ref: APP/G5180/W/21/3275740

2 Crow Hill, Rookery Road, Downe, Orpington BR6 7JE

- 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 Mr & Mrs S Price against the decision of the Council of the London Borough of Bromley.
 - The application Ref DC/17/01523RECON, dated 5 June 2020, was refused by notice dated 30 November 2020.
 - The application sought planning permission for a: Change of use of the site from a cattery to residential use. Demolition of existing buildings and structures, and the construction of a one/two storey four bedroom dwelling, without complying with condition 9 attached to planning permission Ref DC/17/01523/FULL1, dated 26 June 2017.
 - The condition in dispute is No. 9 which states that:
"Prior to occupation of the dwelling hereby permitted, all development identified in red on the approved plan 4244-PD-09A shall be demolished, and all resulting debris removed from the site."
 - The reason given for the condition is:
"To prevent inappropriate development, and to protect the openness of the site in accordance with policy G1 of the UDP."
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. At the time of my site visit the dwelling was occupied. However, at the time the planning application was made in June 2020, the Officer Report (OR) noted that the dwelling had been constructed but not yet occupied. As at that point there was no breach of the condition, I must accordingly deal with this appeal under s73, as opposed to s73A, of the 1990 Act¹.
3. Although neither of the main parties referenced the '*Finney*' judgement² in their statements, their views were subsequently sought on the applicability of it to the current case.

Main Issue

4. Whether the variation of the condition would fundamentally conflict with the description and extent of the original planning permission.

¹ Town & Country Planning Act 1990 (as amended)

² John Leslie Finney v Welsh Ministers, Carmarthenshire County Council, Energiekontor (UK) Limited (2019)

Reasons

5. Planning permission was granted in June 2017 for the change of use of the site from a cattery to residential use. The description of development confirms that the proposal included the demolition of existing buildings and structures and the construction of a new four-bedroom house. Condition 9 of the permission further clarified, with reference to an approved plan, which buildings and structures were to be removed and that this should take place prior to the occupation of the dwelling. The OR confirms that this meant all buildings and structures.
6. It seems clear to me that both the description and extent of the permission enabled the erection of a single dwellinghouse on the site and a change of use of the land to residential only. Nowhere in the description of development does it mention retention of the cattery activities or buildings. On the contrary, my interpretation would be that the cattery use would cease. That condition 9 ensured that all the cattery buildings would be removed reinforces this view.
7. The current proposal seeks to retain two of the cattery buildings. They are wooden structures, enclosed by wire mesh, and appear to be purpose built to provide areas or pens for cats. Each building has 14 separate pens. The appellants note that by virtue of s75 of the 1990 Act, if no purpose is specified, a permission shall be construed as including permission to use the building for the purpose for which it is designed. Thus, the appellants contend that if this appeal were to be allowed, any subsequent use of the site as part residential use (Class C3³)/part Sui Generis use would be in accordance with this part of the Act.
8. Although this appeal would be separate to s75 of the Act, it seems to me that the natural consequence of what is being sought through this appeal would be to fundamentally change the development from what was put forward in the original application. What would in effect be permitted on the site would be a dwelling, cattery buildings and a cattery use and therefore by definition not just a dwelling within a site for only residential use. Accordingly, there would be a conflict with the original description of development.
9. Thus, the proposed change to the condition would fundamentally alter the permission itself and conflict with the description and extent of the original planning permission. Case law, which was most recently rehearsed in the '*Finney*' judgement, has established that such an outcome would go beyond the scope of what can be considered under s73 of the 1990 Act. Accordingly, I am unable to allow the appeal.

Other Matters

10. The appellants contend that the requested alteration only seeks relief from the condition insofar as it would allow the two buildings to be retained. Thus, it is suggested that allowing the appeal in the terms sought would not amend the description nor be in conflict with the '*Finney*' judgement. However, for the reasons I have given, the amended condition would create a discrepancy between what would occur on site and the description in the original permission. Therefore, I am unable to allow this appeal. However, it is open to

³ Town & Country Planning (Use Classes) Order 1987 (as amended)

the appellants to submit a fresh application to the Council to seek planning permission for the revised development.

11. Even if the amended condition could operate alongside the original description of development, it introduces elements which significantly alter the nature of the site and the activities which would take place. It is not clear to me that all interested parties would necessarily have been aware of this possibility when they were notified of the current proposal. As such there is a real risk that interested parties might have been prejudiced in commenting on the proposal. On this basis it would not be appropriate for me to allow the appeal.
12. The appellants have not suggested in their submissions that the cattery buildings could be considered incidental or ancillary to the dwelling. From my own observations of the size of the buildings to be retained, the potential number of cats which could be accommodated and the retention of a separate car parking area for the cattery operations, there is no substantive evidence before me to suggest otherwise.

Conclusion

13. For the reasons given above, I dismiss this appeal.

Stewart Glassar

INSPECTOR