



Appeal Decision

Site visit made on 18 May 2022

by G Roberts BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 June 2022

Appeal Ref: APP/P2114/W/21/3284506

48 High Street, Sandown, Isle of Wight, PO36 8AE

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Mr & Mrs M Paine against Isle of Wight Council.
 - The application Ref. 21/00529/FUL is dated 8 March 2021.
 - The development is proposed continued use as unrestricted residential apartment (ground floor level).
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Decision

1. The appeal is dismissed and planning permission for proposed continued use as unrestricted residential apartment (ground floor level) is refused.

Procedural Matters

2. In response to a query I raised with both parties the Council confirmed that the description of development was as per that on the application form, which now forms the basis of the appeal against non-determination. The application was registered as an application for full planning permission based on this description. This approach followed the receipt of recent appeal decisions relating to the variation of occupancy conditions, where the appeals had been dismissed (ref. APP/P2114/W/21/3268190 & 3274249) on the basis that both applications should have been for full planning permission rather than applications under Section 73 of the Town & Country Planning Act 1990 (as amended) (Planning Act).
3. Both appeal decisions referred to the ability under Section 73 of the Planning Act for such applications submitted to only consider the conditions subject to which a planning permission should be granted, i.e. the same development, but potentially different conditions. Furthermore, both decisions confirmed that the Court of Appeal had held, in the case of *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868, that an application under Section 73 may not be used to obtain permission that would require a variation of the terms of the 'operative' part of a planning permission, i.e. to the description of the development for which planning permission had originally been granted.
4. Both parties appear to agree that the ground floor apartment was constructed pursuant to planning permission ref. P/01401/11 granted on 24 November 2011 for "*Conversion of ground, first and second floors from hotel accommodation to form 3 self-contained holiday apartments*" (2011 Permission). Also, that condition 3 to that permission restricted the occupancy

of the 3 apartments to holiday accommodation, with the exception that the ground floor apartment could be used as managers accommodation limited to a person(s) solely or mainly employed in the businesses occupying the appeal site.

5. Given the above and to provide consistency with the approach adopted in the above appeal decisions, and as the 'operative' part of the 2011 Permission refers to "*3 self-contained holiday apartments*", I agree with the approach that has been adopted and have determined the appeal on the basis that full planning permission is sought for the proposed continued use of the ground floor as unrestricted residential apartment.

Main Issues

6. Whilst the appeal arises from the failure of the Council to give notice of its decision on the submitted application within the prescribed period, its Statement of Case (SOC) confirms that had the application been determined it would have been refused for the reasons set out paragraph 1.3 of the SOC. Based on this, the main issues are: (a) whether the proposed development would result in the harmful loss of tourist accommodation; and (b) the whether the unrestricted residential use would provide a suitable level of living accommodation for future occupiers.

Reasons

Loss of tourist accommodation

7. As I confirmed earlier, both parties appear to agree that the ground floor apartment was constructed pursuant to the 2011 Permission. There also appears to be agreement that the ground floor apartment has been occupied in accordance with condition 3 of the 2011 Permission, in that it has been used as residential accommodation by the owners of the holiday apartments (on the first and second floors) and the bar & restaurant (on the lower ground floor). There is no substantive evidence before me to indicate that the ground floor apartment has been occupied on any different basis to that permitted by the 2011 Permission.
8. The 2011 Permission states that the 'Reason' for condition 3 was to ensure that the development remained as holiday accommodation and that any permanent residential use of the ground floor apartment was associated with the management of the site in order to comply with the tourist policies of the development plan that were in operation at the time. The latter are now enshrined in policy SP4 ('Tourism') of the Isle of White Core Strategy and Development Management Development Plan Document (March 2012) (IWCS).
9. Policy SP4 states that whilst the target is to improve and maintain the quality of existing tourist destinations and accommodation on the Island, the loss of bed spaces through conversion to other uses will be permitted where it can be demonstrated that the use is no longer viable. The supporting text, paragraph 5.166, expands on this and lists the criteria that the Council will use in establishing the viability of tourist accommodation, which include: proof of marketing; evidence of attempts to save or reposition the business; evidence of business performance when set against local and regional benchmarks; and evidence of professional and competent management.

10. The Council contend that the grant of planning permission would effectively allow for a separate unrestricted residential use of the ground floor apartment. Whilst the Council acknowledge that policy SP4 allows such changes to occur, they contend that insufficient information has been provided to justify the proposal or to demonstrate that its proposed conversion would not harm the objective of improving and maintaining the quality of existing tourist accommodation within the Bay Key Tourism Area.
11. Based on the evidence before me, it would appear that the Appellant has occupied the ground floor apartment as their own accommodation for several years, a use permitted by condition 3 of the 2011 Permission on the basis that it is used as management accommodation to support the holiday letting and bar & restaurant businesses on the appeal site. I note that the Council's SOC questions whether there has been a breach of condition, but they do not explain in detail why this is the case. Even so, whether a breach of planning has occurred is not a matter that is before me and the Appellant's position is that there has been no such breach.
12. Whilst I accept that the ground floor apartment is not currently used as holiday accommodation, it has been used as residential accommodation by the owners and thus, I have assumed, as part of the management and running of the holiday lettings and bar & restaurant businesses. Its proposed conversion to provide a separate unit and potential sale as an unrestricted residential unit must, therefore, be assessed in terms of whether its loss would undermine or diminish the tourist facilities on the appeal site. Although policy SP4 refers to the loss of bed spaces, the ground floor apartment was approved as an integral part of the holiday accommodation and if used as residential accommodation limited to a person(s) solely or mainly employed in the management of the holiday businesses on site to ensure that the development remained for holiday purposes. Consequently, the conversion of the ground floor apartment to provide a separate unrestricted residential unit must, in my judgement, be considered against the aims, objectives and criteria to policy SP4.
13. Within the above context, I agree with the Council that insufficient evidence has been provided to demonstrate that the loss of the managers/owner's accommodation would not be harmful to the operation and continued viability of the existing tourist businesses on the appeal site. No substantive evidence has been submitted in support of the appeal proposal to allow any reasonable assessment to be made of the viability of the existing businesses or their future operation. Moreover, none of the criteria, listed 'a' to 'd' (inclusive) of paragraph 5.166 have been addressed.
14. Whilst the Appellant contends that the proposal would potentially allow the ground floor apartment to be sold to generate funds for the business, there is no detailed evidence to support that statement. I also concur with the Council that this does not in itself demonstrate, in line with policy SP4 and paragraph 5.166 of the IWCS, that the loss of the managers/owner's accommodation would be justified or whether this is necessary to support and secure the ongoing viability of the bar & restaurant and holiday lettings.
15. The Appellant has referred to the Lawful Development Certificate (LDC) granted by the Council in relation to the use of an existing flat as a residential dwelling at No. 46 High Street (ref. P/01210/17). However, that LDC established the lawfulness of a use on an application submitted under Section 191(2) of the

Planning Act. The appeal before me relates to an application for full planning permission for the proposed continued unrestricted residential use. Whether the proposed use would be lawful or not is not a matter for me to determine in the context of an appeal that has been submitted under Section 78 of the Planning Act. Moreover, my decision on this appeal would not prevent the Appellant from submitting an application under Section 191(2) to establish the lawfulness of the use of the ground floor apartment. Consequently, neither this LDC nor the existence of other residential apartments in the area affect the findings I have reached above.

16. Accordingly, I find that insufficient evidence has been provided justify the appeal proposal and as such the proposal would result in harm to the local tourist economy contrary to policy SP4 of the IWCS.

Future occupiers - living conditions

17. The Council's concern relates to the potential for greater conflict to exist between the unrestricted residential use of the ground floor apartment and the use of the lower ground floor bar & restaurant in the event that the proposed apartment was sold and occupied/owned separately to the bar & restaurant. This conflict would arise from the existing kitchen extractor to the bar & restaurant which the Council contend is very close to a window in the ground floor apartment.
18. As I observed on my site visit, the window in question currently serves a bedroom, which is reflected on the submitted plans. Whilst the kitchen to the restaurant & bar was not in use at the time of my visit, I am not convinced that the potential noise impact from the extractor would be so sufficient as to justify in itself the refusal of planning permission. Such relationships are not uncommon in high street locations and there is no evidence before me to suggest that the level of noise or other emissions from this extractor would result in significant harm to the living conditions of future occupiers. I am also satisfied that, were I minded to allow the appeal, further mitigation could be adequately secured by condition.
19. Accordingly, I find that the appeal proposal would, in this respect, not be at variance with the aims and objectives of policy DM2 of the IWCS.

Other matters

20. The Council's SOC contends that as the appeal proposal, due to its size, would not deliver affordable housing on site, that a financial contribution should be secured via a planning obligation in accord with policy DM4 of the IWCS and the Affordable Housing Contributions Supplementary Planning Document (March 2017) (Affordable SPD). In response, the Appellant argues that a contribution cannot be applied retrospectively and that this request is unreasonable.
21. I note that there is no mention of this issue in the Council's Delegated Report. I also note that paragraph 3.15 of the Affordable SPD sets out the exceptions where the requirement for a financial contribution would not apply and that this includes development that would result in a dwelling whose occupancy would be restricted by a condition, including holiday use. However, I could not find any references in the SPD to situations where, as in this case, the proposal involved a dwelling where the occupancy restriction would effectively be

removed to allow the unit to be converted to unrestricted residential use. Furthermore, I have not been provided with any examples of comparable cases where this approach has been adopted and accepted elsewhere.

22. There is therefore insufficient information before me to reach a finding on this issue and specifically, whether such an obligation would be justified having regard to the provisions of policy DM4 and the Affordable SPD, and whether it would also meet the three tests set out in paragraph 57 of the National Planning Policy Framework (July 2021) (and the statutory tests in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010). Had I been minded to allow this appeal, this is a matter on which I would, therefore, have invited the parties to make further submissions.

Conclusion

23. For the reasons given above and having taken all the matters raised into account, I conclude that the appeal should be dismissed.

G Roberts

INSPECTOR