



Appeal Decision

Site visit made on 13 February 2023

by L Wilson BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 March 2023

Appeal Ref: APP/R0660/W/22/3304413

Wheelock Heath Farm, Alsager Road, Winterley CW11 4RQ

- 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 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 Richard Lowe against Cheshire East Council.
 - The application Ref 21/4069N is dated 26 July 2021.
 - The application sought planning permission for the construction of new offices without complying with a condition attached to planning permission Ref 14/3035N, dated 16 July 2015.
 - The condition in dispute is No 3 which states that: The development hereby permitted shall be used only for purposes falling within Class B1 of the Town and Country Planning Use Classes Order 1987 as amended.
 - The reason given for the condition is: The application has been assessed on the basis it is for offices only and the Local Planning Authority wishes to retain control over alternative uses.
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Decision

1. The appeal is dismissed, and planning permission is refused.

Applications for costs

2. An application for costs was made by the appellant against the Council. This application is attached as a separate Decision.

Preliminary Matters

3. The appeal is against the non-determination of a planning application. The Council's submission sets out that they would have refused the application for reasons relating to noise impacts and the proposal cannot be considered under a Section 73 application.

Main Issues

4. The main issues are:
 - The effect of varying condition 3 on users of Winterley Grange, with particular reference to potential for noise and disturbance; and
 - Whether or not s73 of the Act allows the amendment of the condition as sought by the appellant.

Reasons

5. Planning permission was granted for the construction of new offices. Condition 3 restricts the use of the development to Class B1 only. Since the application was granted planning permission, the use classes order has been amended. Class B1 was revoked from September 2020 and has been replaced with Class E(g). The proposed variation in condition seeks to allow the development to include uses falling within E(g) and B2 (General industrial).

Winterley Grange

6. The appellant states that there are no residential properties within 200m of the appeal site. The appeal site is located within the open countryside and adjacent to Wheelock Heath Farm Business Court. This includes a number of uses including a vets, workshops, offices and St Luke's Hospice known as Winterley Grange. Highways and other consultees have not raised concerns in relation to the proposed variation of condition 3.
7. The Council states that Winterley Grange is a hospice for end of life treatment for those suffering from illnesses such as cancer and dementia. The appellant has drawn my attention to a planning application relating to St Luke's Hospice¹ and highlight that the building does not have approval for residential occupancy. However, that application includes ancillary treatment rooms for St Luke's Hospice. It is not clear from the information before me how frequently these treatment rooms are used and for what purpose, but it is likely they would be used by patients of the hospice. In my view, this could reasonably be described as a sensitive use and such a use would be particularly vulnerable to disturbance from noise and pollution.
8. The appellant asserts that many enquiries have required a small workshop or storage alongside office space. Furthermore, the Council has not previously requested a noise survey, there are no records of noise concerns relating to the existing adjacent employment area or considered that the appeal site is sensitive to noise. They state that the condition is unnecessarily restrictive and unjustified which impairs the development of the site and its viability to the detriment of the local economy by not reflecting the market for businesses seeking small unit accommodation. No substantive evidence has been submitted to support these claims or to show how the offices have been marketed.
9. The approved application granted consent for offices adjacent to Winterley Grange. I observed on my site visit that there was extremely little background noise in the local area, other than the occasional road noise from vehicles. However, I acknowledge that this was only a snapshot and there might be other times where there are higher levels of background noise. Having said that, there is no evidence before me that suggests the current uses at the business centre result in noise and disturbance.
10. Class B2 (General industrial) covers the use of industrial processes other than one falling within class E(g) (excluding incineration purposes, chemical treatment or landfill or hazardous waste). It covers a wide range of uses with the potential to generate noise. It is likely that a B2 use would generate more

¹ 13/1514N

noise and disturbance than the approved use, and other uses at the business centre.

11. Given the possible uses to which could be operated at the appeal site, should the condition be varied to allow Class B2 uses, and the appeal site's relationship with Winterley Grange, I am concerned that there would be the potential for future uses to cause noise nuisance for patients of Winterley Grange. The appellant has not provided any supporting information which demonstrates that a B2 use would not cause unacceptable noise and disturbance, or could be prevented through suitable mitigation measures. Thus, I do not consider that a B2 use could effectively integrate with Winterley Grange.
12. The appellant's submission suggests that there has been some interest for an office use and does not provide robust evidence to suggest that the approved use would be unviable or that the current condition is detrimental to the local economy. Given the proximity of Winterley Grange, I do not consider that condition 3 is unnecessarily restrictive or unjustified.
13. On the evidence before me, varying condition 3 would have a harmful effect on the users of Winterley Grange, with particular reference to potential for noise and disturbance. Consequently, it would conflict with Policy SD 1 of the Cheshire East Local Plan Strategy 2010 – 2030 (2017) and Policies ENV 15 and HOU 12 of the Site Allocations and Development Policies Document (2022). These seek, amongst other matters, to ensure new development must effectively integrate with existing uses and development proposals must not cause unacceptable harm to the amenities of adjoining or nearby occupiers of residential properties, sensitive uses, or future occupiers of the proposed development due to environmental disturbance or pollution.

S73

14. S73 applications 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*², the Court held that an application under s73 may not be used to obtain a permission that would require a variation to the terms of the 'operative' part of the planning permission i.e., the description of the development for which planning permission had originally been granted. *Finney* established that it is beyond the powers under s73 to amend a condition that would result in a conflict between it and the description of development.
15. I have also considered the other legal judgements highlighted by the Council³. The appellant considers that the proposal does not involve any fundamental change to the approved development, and it has taken the Council over 17 months to raise this issue.
16. The original application sought permission for the construction of new offices and a specific condition was imposed to ensure that the buildings could only be used for purposes falling within Class B1. This is because the application was assessed on the basis that the development was for offices only.

² *Finney v Welsh Ministers & Others* [2019] EWCA Civ 1868

³ *R. v Coventry City Council Ex p. Arrowcroft Group Plc* [2001] PLCR 7, *R (Vue Entertainment Limited) v City of York Council* [2017] and *R (Wet Finishing Works Ltd) v Taunton Deane BC* [2017] EWHC 1837 (Admin)

17. The operative part of the original permission is explicit in referring to the construction of new offices. Varying the condition to that sought by the appellant would allow the buildings to be occupied by an entirely different use. The effect of the appeal proposal would be to allow a fundamental change in the use of the buildings that would create a disaccord with the operative part of the original permission that refers to the buildings being an office.
18. Accordingly, varying the condition would result in a conflict with the original description of development. As such, I conclude that s73 of the Act does not legally permit the development granted under the original planning permission to be altered in this way because it would fundamentally change its 'operative' nature. Instead, it would be necessary for a fresh planning application to be made.
19. Even if I had found that varying the condition would be acceptable in this regard, it would not have altered the outcome of the appeal given the harm I have found above in relation to Winterley Grange.

Other Matters

20. The appellant highlights other matters including frustrations with the Council and that the Council's statement refers to irrelevant planning policies. The other matters highlighted do not change my findings on the main issues in this appeal, and do not outweigh the harm identified.

Conclusion

21. For the reasons given above, having considered the development plan as a whole, the approach in the Framework, and all other material considerations, the appeal does not succeed.

L Wilson

INSPECTOR