



Appeal Decision

Site visit made on 15 September 2023

by C Shearing BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th November 2023

Appeal Ref: APP/U1430/W/22/3307538

New Pond Farm, High Street, Wallcrouch TN5 7JN

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73A of the Town and Country Planning Act 1990 for the development of land carried out without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Mr Nayyar against the decision of Rother District Council.
 - The application Ref RR/2021/2335/P, dated 22 October 2020, was refused by notice dated 4 April 2022.
 - The application sought planning permission for 'demolition of existing Browsers Barn and replacement with building use for storage with retail trade counter, including parking and landscaping' without complying with a condition attached to planning permission Ref RR/2016/704/P, dated 6 May 2016.
 - The condition in dispute is no.8 which states:
The premises shall be used only for purposes within Class B1 and B8 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification), with ancillary trade counter use.
 - The reason given for the condition is:
To control the level of traffic movements associated with retail activity on the site in the interests of sustainable development, the availability of parking within the site and the amenities of the area. In accordance with Policies OSS4 (ii)(iii) and TR3 of the Rother Local Plan (2014)- Core Strategy.
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Decision

1. The appeal is dismissed.

Background and Preliminary Matters

2. Planning permission was granted on 6 May 2016 for development described as 'demolition of existing Browsers Barn and replacement with building use for storage with retail trade counter, including parking and landscaping'¹. This was subject to a number of conditions, including condition 8 stated in the banner heading above, restricting the use of the building.
3. The planning application sought to vary condition 8 and the application form states this is to enable the building to be used for storage and retail, in lieu of B1, B8 and a retail trade counter. The application documents describe the application as being retrospective, and that the proposed change has already occurred. The appellant describes that the use of the building allows stock to be stored on the site and customers to browse through the stock before purchase, where as previously the appellant had anticipated the stock would be brought to the customers on request.

¹ Planning permission ref RR/2016/704/P

Reasons

4. The appeal relates to a detached building on the southern side of the High Street, which comprises predominantly linear development within a wider rural setting. The appeal site has an extensive planning history as set out in the appeal documents, including elements of retail use. The application form, which makes reference to the proposal being 'in lieu' of other uses including the trade counter, appears to suggest this element would instead be replaced with a more typical retail use, with the Retail Impact Assessment setting out that there would be 525sqm of retail floorspace. The appellant's final comments describe this as a rebalancing of the uses of the building.
5. Planning Practice Guidance (PPG) states that an application under section 73 of the Act can be used to vary or remove conditions associated with a planning permission. It goes on to state that section 73 cannot be used to change the description of development. Irrespective of the provisions of condition 8, the original description of development here referred to use for storage with a retail trade counter.
6. Recent case law² has found 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 the original permission was granted. Consequently, the original description of development in an existing planning permission cannot be amended at all.
7. I have sought comments from the main parties on this issue. Having considered all the evidence before me, overall, I cannot be satisfied that, if the appeal were allowed, the resulting development would be consistent with the original planning permission. Consequently, the proposal would offend the principles established by case law and is beyond the powers available under section 73. It therefore follows that the appeal cannot succeed.

Other Matters

8. I note the appellant's concerns for the Council's treatment of the proposal, which was originally submitted as a full planning application. However, that submission nonetheless described the proposal as a variation to a condition. I also note the assertions that condition 8 was, in itself, not entirely consistent with the original description of development. In any event, for the reasons set out above, these matters do not provide justification to continue the assessment of the appeal scheme, given that it goes beyond the powers available here.

Conclusion

9. For the reasons given, the appeal is dismissed.

C Shearing

INSPECTOR

² John Leslie Finney v Welsh Ministers & Carmathenshire County Council, Energiekontor (UK) Limited