



Appeal Decision

Site visit made on 29 February 2024

by G Sylvester BSc (Hons) MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 02 April 2024

Appeal Ref: APP/V1505/W/23/3325514

Sirocoby Boarding Kennels, Newhouse Avenue, Wickford, Essex SS12 0JY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) 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 (as amended) for the development of land without complying with conditions subject to which a previous planning permission was granted.
- The appeal is made by Ms J Jolly against Basildon Borough Council.
- The application Ref is 23/00064/VAR.
- The application sought planning permission for the change of use of site from animal boarding business use to a mixed use comprising: Class E(a) retail, Class B8 (storage or distribution) and Class E(g)(iii) industrial processes use. Demolition of existing kennels, cattery buildings, storage building and greenhouse, change of use of existing office into shop/office, and the erection of 2no. detached buildings for Class B8 and/or Class E(g)(iii) purposes, without complying with conditions attached to planning permission Ref. 20/00225/FULL, dated 18 August 2022.
- The conditions in dispute are: Condition No 12 which states that *"No machinery shall be operated, processes carried out, deliveries taken or despatched to the premises or customers admitted except during the hours 08:00 to 19:00 Monday to Friday and 08:00 to 13:00 Saturdays"* and Condition No 26 which states that *"No open storage shall take place on the site"*.
- The reasons given for the conditions are: *"To prevent the use causing any undue disturbance to occupants of neighbouring properties at unreasonable hours and in accordance with Saved Policy BAS BE12 (iii)"* and *"To protect the appearance of the locality and in accordance with Saved Policy BAS BE12 (iv)."*

Decision

1. The appeal is dismissed and planning permission is refused for the change of use of site from animal boarding business use to a mixed use comprising: Class E(a) retail, Class B8 (storage or distribution) and Class E(g)(iii) industrial processes use. Demolition of existing kennels, cattery buildings, storage building and greenhouse, change of use of existing office into shop/office, and the erection of 2no. detached buildings for Class B8 and/or Class E(g)(iii) purposes, without complying with conditions attached to planning permission Ref. 20/00225/FULL, dated 18 August 2022.

Procedural Matters

2. The description in the banner heading above is taken from the application form. Although different to that used by the Council, it is the description used in the original planning permission and therefore the correct description for the purposes of my considerations under s73 of the Town and Country Planning Act 1990 as amended ("the Act").

3. The Council's jurisdiction to determine the application fell away when the appeal was lodged. Based on the evidence before me, including the Council's putative reason for refusal, it would have refused to vary condition number 26, which sought to provide the open storage facility shown on drawings ST MARYS/14A and ST MARYS/35.
4. Amending the design of the proposed storage facility or omitting it from the appeal proposal would constitute a fundamental change. This could lead to procedural injustice by unfairly depriving interested parties, including those whose views were sought during the consideration of the application, with an opportunity to make representations. The appeal procedural guidance¹ states that it is important that what is considered by the Inspector at appeal is essentially the same scheme that was before the Council and considered by interested parties at the application stage. For these reasons, I have determined the appeal on the information that was before the Council at the application stage.

Background and Main Issue

5. The approval of an application under s73 of the Act to remove or vary a planning condition would lead to the grant of a new planning permission. However, the Court of Appeal Judgement in *Finney*², established that such an application may not be used to obtain a new planning permission that would conflict with the 'operative' part of the original planning permission, that is, the description of development. This is confirmed in the Planning Practice Guidance³.
6. I have taken account of the responses received from the main parties on the implications of the *Finney* judgment in relation to this appeal. Therefore, the main parties would not be prejudiced by my determination of this appeal on the same basis.
7. The main issue in this appeal is whether or not the proposed amendments to the original planning permission can be determined through an application under s73 of the Act, with particular regard to the proposed outdoor storage facility.

Reasons

8. The proposed storage facility would cover an area of land on the appeal site measuring approximately 13 metres by 11 metres. It would comprise of a series of storage bays, bordered on 2 or 3 sides by concrete block walls with timber boarding above, erected to heights of between approximately 1.3 metres and 3 metres above ground level.
9. The proposed storage facility would therefore be a physical structure of substantial construction, scale and permanence. Having regard to s55(1), s55(1A) and s336(1) of the Act, which define a 'building' as including any structure or erection, I find that the proposed storage facility would constitute a building.

¹ Planning Inspectorate Procedural Guide: Planning appeals – England (Updated 5 October 2023)

² John Leslie Finney v Welsh Ministers & Carmarthenshire County Council, Energiekontor (UK) Limited [2019] EWCA Civ 1868

³ Paragraph: 014 Reference ID: 17a-014-20140306

10. Together with the 2 detached buildings permitted by the grant of the original planning permission, the proposed storage facility would constitute a third building. In having regard to *Finney*, the proposed third building would conflict with the original description of the development granted planning permission, irrespective of its proposed use. Whether or not the Council insisted upon an outdoor storage facility, including of the type proposed in this appeal, is of limited relevance and weight to my considerations, given the caselaw above, and does not alter my findings.
11. Consequently, on the evidence before me and having regard to the facts of the case and relevant caselaw, I conclude on this main issue that the proposed amendment to the original planning permission, as sought through the proposed variation of Condition number 26, is beyond the powers of s73 of the Act and therefore cannot be determined under its provisions.

Other Matters

12. Given my conclusion on the main issue, it is not necessary for me to consider the substantive planning matters that relate to the Green Belt or to the living conditions of nearby occupiers in respect of Condition number 12, as they would not alter the outcome of this appeal.

Conclusion

13. For the reasons given above the appeal should be dismissed and planning permission refused.

G Sylvester

INSPECTOR