



Appeal Decision

Site visit made on 17 October 2023

by M Clowes BA (Hons) MCD PG CERT (Arch Con) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 19 April 2024

Appeal Ref: APP/Y2003/W/22/3313325

TLC Handling, Sandtoft Road, Epworth DN9 1LB

- 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 Mikael Armstrong [Lexgreen Services Ltd] against North Lincolnshire Council.
- The application Ref PA/2022/1487 is dated 1 August 2022. The application sought planning permission to erect extensions to a warehouse without complying with a condition attached to planning permission Ref PA/2021/1854, dated 16 December 2021.
- The condition in dispute is No 1 which states that: The development hereby permitted shall be carried out in accordance with the following approved plans: Site Plan WREDE-LAY-03-B Rev B; Proposed Elevations WREDE-LAY-04-B Rev B.
- The reason given for the condition is: For the avoidance of doubt and in the interests of proper planning.

Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs is made by Mikael Armstrong [Lexgreen Services Ltd] against North Lincolnshire Council. This application is the subject of a separate decision.

Preliminary Matters

3. The Council received amended plans during the application process which it has confirmed it did not consult on. As the changes included the provision of a small link which the Council and interested parties have had opportunity to comment on during the appeal process, no injustice would endure by taking the amended plans into account. I have determined the appeal accordingly.
4. In December 2023, the Government published a revised National Planning Policy Framework (the Framework). Although some paragraph numbers have changed, the revisions do not relate to anything that is fundamental to the main issues in this appeal. Consequently, the main parties would not be prejudiced by reference to the revised Framework.

Background and Main Issues

5. The appeal is against the Council's failure to determine the planning application within the relevant statutory timeframe. The Council considers that the

proposal cannot be considered under a section 73¹ application, as it would change the nature of the development permitted. However, it has provided a statement advising that had it been in a position to determine the application, it considers that there would be no unacceptable adverse impacts from the proposed development subject to conditions.

6. Planning permission has been granted for the erection of extensions to an existing warehouse via planning application 2007/0563 and a subsequent application reference PA/2021/1854 to vary the original plans. This appeal seeks permission to carry out the development without complying with condition 1 of planning approval reference PA/2021/1854 which specifies the plans, in order to enable the provision of larger extensions.
7. The judgement in *Finney*² established that an application under section 73 of the Act 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.
8. It follows from *Finney* that where amending a condition would result in conflict between the new condition and the original description of development, that particular amendment is beyond the powers under section 73 and cannot be made, a fresh planning application being required instead. I have also considered the other legal judgements highlighted by the Council³. An amendment can only be made provided the new condition does not fundamentally conflict with the development originally granted permission, as described on the decision notice.
9. In this case, the operative part of the original planning permission is explicit in referring to the erection of extensions to a warehouse⁴. The Cambridge Dictionary defines extension as 'the act of adding to something in order to make it bigger or longer.'
10. The originally submitted plans indicated the erection of a new standalone building⁵. The proposal would not have amounted to an extension of the existing building, as understood by the ordinary definition. In this regard I concur with the Council. Instead, the proposal would have materially differed from the description of development on the original decision notice. It is not logical to suggest that because the description of development is silent on a matter i.e. does not include reference to a free-standing building, that such a structure would fall within the nature of the development proposed. This would be beyond the range of responses open to a reasonable decision maker, and a stand-alone building would not be encompassed by the original description of development.
11. However, during the course of the application, the appellant provided amended plans to include a small link between what are essentially 2 larger detached buildings. The link is small and the floorplans indicate that each 'section' of the building would have its own office and welfare facilities in connection to each of the workshop spaces, such that it would take very little to enable independent

¹ Of the Town and Country Planning Act 1990 (the Act).

² *John Leslie Finney vs Welsh Ministers & Others* [2019] EWCA Civ 1868.

³ *R. v Coventry City Council Ex p. Arrowcroft Group Plc* [2001] PLCR 7 and *R (Vue Entertainment Limited) v City of York Council* [2017] EWHC 588 (admin).

⁴ As set out on the decision notice for planning application reference 2007/0563.

⁵ 'Building B' as shown on drawing number WREDE-LAY-05-F.

occupation of each building 'section.' Nonetheless, the amended plans do result in a physically attached addition to the original building. It would therefore be difficult to suggest that the proposal does not amount to an extension.

12. Significantly larger than the original building, the proposal would result in development that would now be considered to be major in scale⁶. However, the Armstrong judgement⁷ advises that the scope of section 73 is not limited to minor material amendments. Furthermore, the Planning Practice Guide (PPG) advises that there is no statutory limit on the degree of change permissible to conditions under s73, so long as the changes only relate to conditions and not to the operative part of the permission⁸. Although the Fiske judgement discusses whether there is a fundamental alteration test in relation to S73 applications, the comments are made as 'orbiter dicta' i.e. as an expression of opinion and therefore are not legally binding as part of the judgement⁹.
13. Moreover, the original description of development did not seek to control the number or size of extensions permissible. There is therefore, no reason in this case to prevent larger extensions from coming forward, where this is consistent with the original description of development.
14. I am therefore satisfied that the proposal as amended would not affect the operative part of the original permission and the Council could have issued a decision. It follows therefore that the appeal is to be determined on its planning merits and it is to that which I now turn. Based on the Council's statement I consider that the main issues of the case are;
 - i) The effect of the proposed development upon the character and appearance of the area; and
 - ii) The adequacy of provisions for surface water drainage.

Reasons

Character and Appearance

15. The appeal site comprises an existing industrial unit and area of hardstanding within a wider compound contained by palisade fencing. The building appears to be vacant, although the evidence suggests it was last used for manufacturing purposes. The surrounding landscape is generally flat and established hedgerows and trees along Epworth Road provide a degree of screening, such that the appeal site is typically seen in relatively localised views where the pleasant rural character of the area predominates.
16. Despite the surrounding fields, the landscape backdrop to the appeal site, has a working rural character arising from other sporadic and large industrial buildings, for example those at E Parks and Sons and Wienerberger, as well as the Sandtoft Airfield.
17. The Council advises that the original building was circa 595sqm in floor area, whilst the proposal would result in a total of 1644sqm. This is a substantial increase over and above the size of the original building. I acknowledge that

⁶ Major development being defined as consisting of the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more insofar as is relevant to this appeal as set out in the Town and Country (Development Management Procedure) (England) Order 2015.

⁷ Armstrong v Secretary of State for Levelling-Up, Housing and Communities [2023] EWHC 176.

⁸ Paragraph: 013 Reference ID: 17a-013-20230726.

⁹ Fiske R (on the application of) v Test Valley BC [2023] EWHC 2221 (Admin).

several permissions have been granted over time enabling further extensions to the original building¹⁰. In particular, planning approval PA/2022/812 permitted extensions that would have a comparable floor area to that now proposed, with the exception of the small link. As the Council has confirmed that the original 2007/0563 permission has been implemented, the later varied permission of PA/2022/812, would be a fallback position with a realistic prospect of coming forward.

18. The design and materials of the proposed extension would replicate that of the existing building. Even with the absence of a landscape impact assessment, it is clear that the deeply recessed link would enable the mass and scale of the overall building to be lessened, despite a greater lateral spread of built form. This would result in a reduction in landscape impact, when compared to the fallback position consisting of one large building block¹¹. Whilst large it would still be substantially smaller than the E Parks and Sons development nearby, such that it would not appear particularly out of place.
19. Notwithstanding the above, I acknowledge that the proposal would still be a sizeable development within the countryside. Whilst there is a hedgerow to the front boundary with Epworth Road, the remaining boundaries including those to the adjacent access roads are relatively open in visual terms. To ensure that the development assimilates with the countryside location, a landscaping scheme could be secured via a planning condition as suggested by the Council. This would enable the planting of native species to enhance and soften the appearance of the proposed development, as advocated by Policy DS1 of the North Lincolnshire Local Plan (NLLP) 2003. However, I see no reason why a landscaping scheme would be required prior to the commencement of development in this instance, given that landscaping would be required to supplement rather than mitigate the visual impact of the proposed development. A planning condition with a later trigger for the provision of such a scheme would be reasonable.
20. For the above reasons, the proposal would not result in an adverse effect on the character and appearance of the area. The proposal would therefore accord with Policies DS1 and LC7 of the NLLP and Policy CS5 of The North Lincolnshire Local Development Framework; Core Strategy (CS) 2011. These policies seek amongst other things, to ensure that new development is well designed and appropriate to its context including conditions requiring the provision of landscaping to enhance new development.

Surface Water Drainage

21. Policy CS19 of the CS seeks to prevent development that would increase the risk of flooding elsewhere, as well as requiring development, wherever practicable to incorporate Sustainable Urban Drainage Systems (SUDS) to manage surface water drainage. Policy DS14 of the NLLP suggests that provisions for the disposal of foul and surface water would need to be agreed before permission is granted or by imposing conditions or planning obligations on such permissions.
22. As discussed above, the Council advises that the proposal would now result in a building that would be classed as major development. The Framework at

¹⁰ Planning application references 2007/0563, PA/2021/1854, PA/2022/114 and PA/2022/812.

¹¹ Planning approval PA/2022/812.

paragraph 175 is clear that major developments should incorporate sustainable drainage systems, unless there is clear evidence that this would be inappropriate.

23. The appeal site is relatively large and consists of an area of undeveloped land that may be able to accommodate SUDS. However, no drainage strategy has been presented, nor has any evidence that SUDS would be impractical or inappropriate in this location. The Lead Local Flood Authority also advises that it is unclear how surface water is drained from the existing site.
24. To make the development acceptable in planning terms, I consider that technical details are necessary to ensure that surface water arising from the proposal can be properly managed and drained, given the substantial increase in the size of the existing building, a view I note is shared by Epworth Parish Council. Recognising the presence of the existing building, and the wording of Policy DS14 of the NLLP, this matter could be dealt with by a suitably worded planning condition. It would however be required to be a prior to commencement condition, to ensure that the technical provisions could be met before construction takes place.
25. Section 100ZA(5) and (6) of the Act¹² provides that planning permission for the development of land can be granted subject to the imposition of conditions providing that they are necessary to make the development acceptable in planning terms, relevant to the development, precise and reasonable in all other respects. It is clear that permission may not be granted subject to a pre-commencement condition without the written agreement of the appellant.
26. The appellant has not agreed to the Council's suggested condition and disputes its necessity, pointing to the extant fallback permission which does not include such a condition. From the evidence before me, it is not clear why the Council failed to attach a similar drainage condition to that permission, when the same development plan policy appears to have applied.
27. I acknowledge that the fallback scheme is similar, but it is not exactly the same, given the separation of the extension away from the main building and inclusion of a link resulting in a greater floor, as well as roof area. In any case, it seems to me that the lack of a drainage condition on a previous permission does not provide justification to continue to grant permission for a scheme that does not comply with the development plan and the Framework. This does not therefore bind me in relation to the scheme that is before me.
28. The appellant could choose to implement the extant permission if he prefers, but the existence of that permission does not, in my view, represent a material consideration to justify a further grant of permission that would fail to make adequate drainage provision or contravene clear local and national planning policy.
29. I consider that a pre-commencement condition is necessary to make the development acceptable in planning terms and would otherwise meet the 6 tests of conditions¹³. In the absence of the appellant's agreement, I cannot attach such a condition. Without any evidence to the contrary, I cannot be satisfied that the proposal would make adequate provision for surface water drainage. The proposal would therefore fail to comply with Policies CS19 of the

¹² The Town & Country Planning Act 1990.

¹³ As set out at paragraph 56 of the Framework and Paragraph: 003 Reference ID: 21a-003-20190723 of the PPG.

CS and DS14 of the NLLP as set out above. Conflict is also found with paragraph 175 of the Framework which requires SUDS for major development.

Planning Balance and Conclusion

30. I am satisfied that the amended plans would not alter the operative part of the planning permission and that the development would not adversely affect the character and appearance of the area, subject to the provision of a landscaping scheme. However, in the absence of a drainage strategy I am not satisfied that surface water runoff would be adequately mitigated. Whilst this could have been resolved by a pre-commencement condition, without the appellant's agreement I am unable to proceed with this course of action. I therefore find it would be unacceptable to grant planning permission with the new condition due to the adverse effect with regard to surface water drainage.
31. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 requires that decisions be made in accordance with the development plan unless material considerations indicate otherwise. I am required to assess the proposal before me, in accordance with the development plan and I have found conflict for the reasons given. Planning permission PA/2022/812 is a different proposal that does not justify perpetuating development that does not comply with the development plan. Moreover, the Framework is clear that new development must not contribute to flooding elsewhere and that major development should provide for on-site SUDS.
32. For these reasons, the proposal conflicts with the development plan when considered as a whole and there are no material considerations, either individually or cumulatively that outweigh the identified harm. Accordingly, the appeal is dismissed.

M Clowes

INSPECTOR